

**Could s 17 of the *Animal Care and Protection Act 2001* (Qld)
represent a Derridean justice-based approach to animal
protections?**

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For Michael Mobley, the kindest being in my life.

For beautiful Renny.

For Rio, Freya, Pherrari, Khan, Lolly, Inspector Morse and Maya.

For all nonhuman animals that suffer at the hands of my species.

With deep gratitude for the vision and compassion of Jacques Derrida.

ABSTRACT

Section 17(1) of the *Animal Care and Protection Act 2001* (Qld) ('ACPA') provides that '[a] person in charge of an animal owes a duty of care to it'. Until the Northern Territory adopted that same expression in its *Animal Welfare Act*,¹ the ACPA was the only animal protection statute in Australia that suggested that a nonhuman animal is owed a duty. What is at stake in this thesis is the contrasting of that legal duty, posited to derive legal justice, with Derridean justice that demands that a duty *is* owed to other beings. This research addresses the question: *could s 17 of the Animal Care and Protection Act 2001 (Qld) represent a Derridean justice-based approach to animal protections?* To address this question, this thesis develops a legal and contextual analysis of ACPA s 17. It also applies Derrida's proposition of deconstructions² to ferret-out how rationality, embedded in the metaphysics of presence, gets-to-work in law. The purpose is to test if ACPA s 17 delivers what it promises. This research examines whether ACPA s 17 provides any undoing of the Western inheritance, which through rationality justifies using, mistreating, and slaughtering nonhuman animals for human animal ends.

Within this research, ACPA s 17 is examined in context to the Western cultural trace that Derrida described as a 'culture of sacrifice'. Derrida's lens offers a unique perspective since he provided a different accounting of beingness. That is one that breaks down human-animal difference. It enables contrasting of Western conceptions of duties and rights that continue to rely on rationality as bases for 'ethics'. The deconstructive approach highlights our Western modes of thinking and reasoning that reinstitute that violent culture of sacrifice. This research offers: a rich discussion of relevant Derridean propositions; a contrasting of Anglo-American and Continental perspectives of what is thought to be owed to nonhuman animals, a survey of neurosciences to ascertain if Derrida's propositions of beingness remain credible, and various approaches to legal contextualisation of ACPA s 17.

The new knowledge developed in the research includes a rich legal characterisation of ACPA s 17. The research finds that, in contrast to existing commentary, ACPA s 17 is not an implementation of 'negligence', and neither could it be properly described as implementing a 'guardianship' model. It is a regulatory type offence that is constrained by many layers of

¹ *Animal Welfare Act* (NT) s 8(1) which was introduced in 2013. The remaining clauses of the s 8 duty are not expressed in the same way or in the same structure as ACPA s 17. See Appendix 3, Table 6; Chapter 6, section 6.6.3.2. Other jurisdictions including Tasmania, ACT, New Zealand, and England and Wales, have similar provisions but they do not state that a person 'owes' a duty 'to' a nonhuman animal.

² I purposefully use the term deconstructions in the plural, since Derrida insisted that this mode of interrogation should not become subject to the metaphysics of presence and conceptualised as such.

anthropocentric law. Various problems that limit the effect of *ACPA* s 17 are highlighted. The research makes suggestions for law reform. The thesis finally brings together the traces gathered in the research, through a legal analysis, and a deconstructive reading, of a relevant appeal case. Unfortunately, *ACPA* s 17 does not institute a legal duty that is owed to nonhuman animals. Neither does it appear to be an opening toward Derridean justice.

STUDENT DECLARATION

I, Karina Elizabeth Heikkila, declare that the PhD thesis entitled *Could s 17 of the Animal Care and Protection Act 2001 (Qld) represent a Derridean justice-based approach to animal protections?* is no more than 100,000 words in length including quotes and exclusive of tables, figures, appendices, bibliography, references and footnotes. This thesis contains no material that has been submitted previously, in whole or in part, for the award of any other academic degree or diploma. Except where otherwise indicated, this thesis is my own work.

Signature



Date 12 September 2018

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I have also benefitted from, and have been inspired by, the community of animal law academics in Australia. Thank you for your work for nonhuman animals, your welcome and your encouragement. I hope my research is a valuable contribution.

Another source of valuable inspiration was the *Derrida Today* conference held in Montreal in May 2018. It was a tremendous experience to meet and hear so many distinguished Derrida scholars.

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PREFACE

Firstly, I would like to express my gratitude to the examiners who challenged and extended my thinking of Derrida's works in some respects. I hope that my responses and new additions as a result, make for a more robust interpretation. After all, interpretation of Derrida's propositions is a dangerous task.

In the main, this Preface highlights some of the aspects of the structure of this interdisciplinary thesis in law. This is necessary because this thesis may be read by persons who are not familiar with the structure of law theses, and who may assume that because the thesis employs the propositions of Derrida, that it is, or should be, written in a philosophical style.

Law theses generally require that the methods employed are stated up front before they are applied. It is also common for the research and the development of the new knowledge to be situated within the related, existing bodies of literature. In this thesis, Chapter 1 provides an introduction and an outline of the methods employed. As such, it is not meant to describe or provide a philosophical style or narrative accounting of the Derridean propositions mentioned there. Chapter 2 was developed as an impossible summary of the Derridean propositions that are relevant to this research. The scope of Chapter 2 appears vast. This could not be avoided because the topics are all interrelated. To show that I had undertaken the necessary research of Derrida's own difficult-to-read texts, and had developed an appropriate understanding of the possibilities of deconstructions (which I employ in Chapter 10), it was also necessary to develop Appendix 1. It is the basis upon which Chapter 2 is constructed. This is an unusual approach but it was necessary because of inter-relatedness of Derrida's propositions. In Chapter 1 I suggest that readers who are not familiar with Derrida's works should read Appendix 1 first. In hindsight and as a result of feedback from the examiners, I now suggest that all readers should read Appendix 1 first. That is for two reasons. First, because readers need to see that I have done the necessary work and interpretation. Second, because it is not unusual for readers of Derrida to articulate his propositions differently, or for commentary on Derrida's works to use terminology differently. Appendix 1 does this stage-setting, this 'writing', for subsequent reading of the body of the thesis.

Chapters 3 to 6 also provide context for the research through literature review. Those chapters address the contexts of: neuroscience; well-known analytical-philosophical, as well as some Continental and other perspectives on nonhuman animals and; an historical tracing of the development of omissions offences in Australian animal law. Chapters 1 to 6 are meant to be contextual and descriptive. I do not claim to have developed new knowledge within those chapters.

It is also worthwhile here highlighting the purpose of Chapter 3. That Chapter provides a literature review of opinions of respected neuroscientists to ascertain if Derrida's notions of trace and *différance*, and hence his notion of 'writing', are not incredible. In short, these notions propose how presence is experienced, that is, how beingness arises as a function(ing) of life and consciousness. That chapter finds that respected neuroscientists have also come to question the traditional notions of beingness and presence, and also assert that it is a result of biological functioning and not a metaphysical phenomenon. Further, I suggest that the descriptions of this process, as I can understand them in a lay person's interpretation, are not incompatible with trace, *différance* and 'writing' as was proposed by Derrida from the 1960's. The purpose of this chapter is not to prove that Derrida's propositions are scientifically accurate, or that they can be encapsulated as concepts, but that the possibility of the way in which Derrida proposes that consciousness is constituted, is not incredible. That adds credibility to deconstructions. That is because deconstructions, include in their purposes, the excavation of metaphysics of presence. They seek to unveil the workings of metaphysics and presence in the text, and hence in the writer and the reader. They suggest how trace, *différance* and 'writing' are at work. Deconstructions are not mere literary word play. They deconstruct the traditional notions of human autonomy and hence they also deconstruct human-animal differences. Given the subject matter of this thesis and the deconstruction provided in Chapter 10, it was important to test the credibility of these foundational propositions of Derrida's. I appreciate that this may be objectionable for some readers of Derrida who insist that *différance* for example, was never meant by Derrida to be properly explained or encapsulated as a metaphysical notion. I am not trying, or claiming, to do that. Rather, I am relying on his own claims that 'writing' in the broadest sense, as a function of life, (and, of which trace and *différance* are undoubtedly components that we should not conceptualise), is an actual biological function(ing). In that way, I do treat his propositions instrumentally, but to do otherwise, I feel, would undermine the power of deconstructions. That is because, they really do have the function and power of unveiling traditional applications and notions of presence(s) at work. Further, I am not the only Derrida commentator to either apply Derrida in an instrumental way, or to assume that 'writing' is a biological function. These propositions are further explained in Appendix 1, and Chapters 1 to 3. I feel that to relegate Derrida's propositions to mere philosophical abstractions, or worse, mere literary devices, would be an injustice to him and his work.

This Preface is also offered to highlight one particular and key aspect of my interpretation and employment of Derridean terminology. Some readers may have already questioned the way I use 'trace' in the previous paragraph. Throughout the thesis, when I use the word

'trace' in the Derridean sense, I use it to describe context. That is, that what we come to be, and to know, is dependent of what we already have come to be, to know and experience. Trace in my usage, is all of that. All of that which may be the result of experiences written in the body, written by the body, as gleaned intellectually, as absorbed through cultural inculcation and education etc. Trace includes memory. It is a being's memory of everything, conscious and unconscious. Everything that *différance* gets-to-work on, or in. As such, we each live in (the context of) our own trace(s). This definition of 'trace' differs from some other commentators' usage of that term where it may, more specifically, reference that which is left behind, perhaps as a result of an encounter with another. That is correct of course also, because Derrida himself used that word in different senses as well. Sometimes even in the same sentence. He had a point to doing that. That was to show the reader that *différance* was at work within them, at that very moment. It was a pedagogical strategy of his. As such, I also use the word 'trace' in plain English meanings of that term, in some places in this thesis. I have decided not to change that in some places, for the same reason.

An additional point of clarification required by one examiner was that it could not be assumed that Derrida's call for better treatment of nonhuman animals can be translated into a need to 'harshly' punish offenders under cruelty and duty of care laws. This thesis does not call for 'harsh' punishment, rather, I argue that general deterrence must be factored into sentencing as a means to include nonhuman animal interests in that process. This is taken up in section 2.9 in relation to Derrida's comments on the criminal law and his analysis of 'forgiveness'.

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LIST OF ABBREVIATIONS

ACPA	<i>Animal Care and Protection Act 2001 (Qld)</i>
AMP Act	<i>Agriculture (Miscellaneous Provisions) Act 1968 (England, Scotland and Wales)</i>
AWA	<i>Animal Welfare Act 2006 (England and Wales)</i>
AWLR	<i>The Welfare of Livestock (Amendment) Regulations 1998 (UK)</i>
<i>Brambell Report</i>	F W Rogers Brambell, <i>Report of the Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems</i> (Her Majesty's Stationery Office, 1965)
<i>Criminal Code (Qld)</i>	<i>Criminal Code Act 1899 (Qld) sch 1</i>
FAWC	Farm Animal Welfare Council
<i>First Act of 1850</i>	<i>Cruelty to Animals Act 1850 (NSW)</i>
<i>LCEW Report</i>	Law Commission, <i>Criminal Liability in Regulatory Contexts: A Consultation Paper</i> , Consultation Paper No 195 (2010)
<i>P&S Act</i>	<i>Penalties and Sentences Act 1992 (Qld)</i>
PAA	<i>Protection of Animals Act 1911 (UK)</i>
<i>Principled Regulation Report</i>	Australian Law Reform Commission, <i>Principled Regulation Report: Federal Civil & Administrative Penalties in Australia</i> , Report No 95 (2002)
<i>QLD 1901 Act</i>	<i>Animals Protection Act 1901 (Qld)</i>
<i>QLD 1925 Act</i>	<i>Animals Protection Act 1925 (Qld)</i>
RSPCA	Royal Society for the Protection of Cruelty to Animals
Schloss	<i>Department of Employment, Economic Development and Innovation v Schloss & Schloss</i> [2012] QDC 30 (delivered <i>ex tempore</i>)
WHS Qld	<i>Work Health and Safety Act 2011 (Qld)</i>

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PART 1: INTRODUCTION AND METHODS

CHAPTER 1: INTRODUCTION AND METHODS

Could s 17 of the Animal Care and Protection Act 2001 (Qld) represent a Derridean justice-based approach to animal protections?

1.1 Introduction

Section 17(1) of the *Animal Care and Protection Act 2001* (Qld) ('ACPA') provides that '[a] person in charge of an animal owes a duty of care to it'. Until the Northern Territory adopted that same expression in its *Animal Welfare Act*,¹ the ACPA was the only animal protection statute in Australia that suggested that a nonhuman animal is *owed* a duty. What is at stake in this thesis is the contrasting of that legal duty, posited to derive legal justice, with Derridean justice that demands that a duty *is* owed to other beings. This research addresses the question: *could s 17 of the Animal Care and Protection Act 2001 (Qld) represent a Derridean justice-based approach to animal protections?* To address this question, this thesis develops a legal and contextual analysis of ACPA s 17. It also applies Derrida's proposition of deconstructions² to ferret-out how rationality, embedded in the metaphysics of presence, gets-to-work in law. The purpose is to test if ACPA s 17 delivers what it promises. This research examines whether ACPA s 17 provides any undoing of the Western inheritance, which through rationality justifies using, mistreating, and slaughtering nonhuman animals for human animal ends.

Within this research, ACPA s 17 is examined in context to the Western cultural trace that Derrida described as a 'culture of sacrifice'. Derrida's lens offers a unique perspective since he provided a different accounting of beingness. That is one that breaks down human-animal difference. It enables contrasting of Western conceptions of duties and rights that continue to rely on rationality as bases for 'ethics'. The deconstructive approach highlights our Western modes of thinking and reasoning that reinstitute that violent culture of sacrifice. This research offers: a rich discussion of relevant Derridean propositions, a contrasting of Anglo-American and Continental perspectives of what is thought to be *owed* to nonhuman animals, a survey of neurosciences to ascertain if Derrida's propositions of beingness remain credible, and various approaches to legal contextualisation of ACPA s 17.

¹ *Animal Welfare Act* (NT) s 8(1) which was introduced in 2013. The remaining clauses of the s 8 duty are not expressed in the same way or in the same structure as ACPA s 17. See Appendix 3, Table 6; Chapter 6, subsection 6.6.3.2. Other jurisdictions including Tasmania, ACT, New Zealand, and England and Wales, have similar provisions but they do not state that a person 'owes' a duty 'to' a nonhuman animal.

² I purposefully use the term deconstructions in the plural, since Derrida insisted that this mode of interrogation should not become subject to the metaphysics of presence and conceptualised as such.

The new knowledge developed in the thesis includes a rich legal characterisation of *ACPA* s 17. The legal analysis proceeds by investigating: the historical development of the provision; its context in regard to Hohfeld's and Feinberg's definitions of legal duties; its context within the anthropocentric envelope of the Queensland legal regime; analysis of differences in the terminology of 'negligence' and 'strict liability' across jurisdictions that have been influential in describing animal protection omissions offences; and statistical analysis that compares numbers of prosecutions over time under *ACPA* s 17 and s 18, which is the cruelty offence. The legal analysis also applies the lenses of law reform commissions, and characterisations of legal responsibility offered by Lacey and by Ashworth.

The research finds that, in contrast to existing commentary, *ACPA* s 17 is not an implementation of 'negligence', and neither could it be properly described as implementing a 'guardianship' model. It is a regulatory type offence that is constrained by many layers of anthropocentric law. Various problems that limit the effect of *ACPA* s 17 are highlighted. The research makes suggestions for law reform. The thesis finally brings together the traces gathered in the research, through a legal analysis, and a deconstructive reading, of a relevant appeal case. Unfortunately, *ACPA* s 17 does not institute a legal duty that is *owed* to nonhuman animals. Neither does it appear to be an opening toward Derridean justice.

1.2 General comments on the format of this thesis

For ease of reading and referencing, this thesis restarts all footnotes at the beginning of each chapter. The referencing system employed is the Australian Guide to Legal Citation. I have followed the AGLC guide in the use of ellipses which may look unusual to readers not familiar with AGLC. The guide is available at: <https://law.unimelb.edu.au/mulr/aglc/about>

1.3 Overview of chapters and thesis sub-questions

The following topics and sub-questions have been addressed in the process of answering the main research question. The relevant methods are considered in greater detail in section 1.8 below.

Part 2: An Interpretation of Derridean Propositions

1) What are the key Derridean propositions relevant to this research?

Chapter 2 addresses this first thesis sub-question. Through a literature review, predominantly of Derrida's own texts, Part 2, Chapter 2, offers a brief summary of the key Derridean propositions most relevant to and applied in this research. The literature review and my understanding of Derrida's difficult-to-read texts are assisted by texts of recognised

and respected commentators on Derrida's works including Spivak,³ Lawlor,⁴ de Ville⁵ and Anderson.⁶ The key Derridean propositions include: logocentricity and the metaphysics of presence; writing, trace and *différance* in self-presence; otherness and responsibility; key elements of deconstructions; problems of responsibility and ethics; Derridean justice; and Derrida's perspective on the human–animal relationship. Furthermore, to balance the constraints of the thesis with the need to demonstrate that I have undertaken the deep research necessary to appreciate these Derridean propositions, more detailed expositions of them are provided in Appendix 1. Appendix 1 is optional reading for readers familiar with Derrida's works. It is recommended reading for readers who have little familiarity with his works.

Part 3: A Brief Survey of Animal Lives Contextualised in Western Sciences and Philosophies

The following sub-questions are addressed in Chapter 3.

- 2) Do Derrida's propositions of trace and *différance* remain credible in relation to findings in contemporary neurosciences?**
- 3) Is philosophically-posited human–animal difference being reconsidered in, and beyond, law?**
- 4) Does consideration of nonhuman animal 'sentience' in veterinary science remain limited, and what effect does it appear to have in law?**

Chapter 3, presented in the form of a literature review, briefly reviews neuroscience-related texts to ascertain if Derrida's propositions of trace and *différance* remain credible. This is necessary since trace and *différance* underpin his characterisations of beingness, of writing in its fullest sense, of justifications for responsibility and justice, and the worth and potential of deconstructions.

Chapter 3 also interrogates whether the trace of Cartesianism and other philosophically-thought human–animal differences, described by Derrida as constituting an 'abyss', are being rethought in studies of nonhuman animals. To address this question, I provide a very brief literature review of some areas of study that are repositioning thoughts about nonhuman animals. This leads to consideration of the progress of United States' litigation

³ Gayatri Chakravorty Spivak, 'Translator's Preface' in Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak trans, John Hopkins University Press, 1997) ix-lxxxvii ('*Spivak in OG*').

⁴ Leonard Lawlor, 'Translator's Introduction: The Germinal Structure of Derrida's Thought' in Jacques Derrida, *Voice and Phenomenon: Introduction to the Problem of the Sign in Husserl's Phenomenology* (Leonard Lawlor trans, Northwestern University Press, 2011) xi-xxviii ('*Lawlor in VP*').

⁵ Jacques de Ville, *Jacques Derrida: Law as Absolute Hospitality* (Routledge, 2011).

⁶ Nicole Anderson, *Derrida: Ethics Under Erasure* (Continuum, 2012) ('*Ethics*').

where a lack of human–animal difference is posited as a basis for limited ‘rights’ for some nonhuman animals. Litigation in Argentinian law is also considered as some nonhuman animals can be considered ‘sentient’ and worthy of protections under Argentina’s environment-focused law.

Chapter 3, sections 3.4 and 3.5 survey constructions of nonhuman animal ‘sentience’ as posited in veterinary sciences and law to determine if ‘sentience’ undermines Cartesian thinking of human–animal difference and moral worth. These sections apply a literature review, case analysis and reference to international and Australian legislative materials. Chapter 3, section 3.5 considers whether international recognition of ‘sentience’ in law appears to have made any significant difference to enhance nonhuman animal protections.

5) How do the perspectives of key Anglo-American theorists on the human–animal relationship differ from Derrida’s perspective?

This sub-question is addressed in Chapter 4. It employs a literature review. The purpose is to confirm key differences in perspective between well-known Anglo-American philosophical positions on the human–animal relationship and Derrida’s views. This chapter is not intended to be a comprehensive survey of all contemporary views of duties toward nonhuman animals; rather, its purpose is to set up key examples to explore how they differ from an impossible application of Derridean justice. This impossibility is described within. It provides a grounding against which rational forms ‘ethics’ may be compared.

6) What evidence is there toward new openings for rethinking nonhuman animal lives, that is more in concert with the Derridean perspective?

Chapter 5 addresses this sub-question by mentioning some key texts in Critical Animal Studies, posthumanism and other approaches that provide contrasts to the Anglo-American philosophical perspectives surveyed in Chapter 4. A literature review is also employed to address this question. I particularly consider the views of de Fontenay, a contemporary of Derrida, who considers the problems of the exclusion of nonhuman animals from legal justice.

Part 4: Tracing and Characterising the ‘Duty of Care’ said to be ‘Owed’ to Nonhuman Animals

7) How has the duty of care ‘owed’ to nonhuman animals developed?

Chapter 6 provides an historical analysis of how the duty of care law developed, as a result of the cruelty offence being applied to breaches caused by omissions, and as influenced by the laws of England and Wales.

8) Is a duty of care, in law, actually 'owed' to nonhuman animals?

Chapter 7 applies a literature review, particularly in relation to the propositions of Hohfeld and Feinberg, and historical and doctrinal analyses to determine if the 'duty' is actually 'owed to' nonhuman animals. The chapter highlights the anthropocentricity of law with its basis in duties derived from the social contract, and its demand for reciprocity of rights and duties. However, it also highlights that duties owed to the state need not demand corresponding rights.

9) What legal characterisation(s) can be developed for ACPA s 17 (prior to a broader jurisdictional analysis)?

Chapter 8 works toward developing a legal characterisation of ACPA s 17. Through a brief literature review, it starts with what other commentators have articulated about the offence. It then builds on the analyses in the previous chapters of this research. It applies comparative and doctrinal analysis of law, contrasting what appear to be influential definitions of 'negligence' and 'strict liability' in the law of England and Wales with Australian law. The chapter develops a frame of reference through a literature review based on the perspectives of English and Australian law reform commissions in their articulations of differences between criminal and regulatory offences. It then examines and applies the contexts provided by Lacey and by Ashworth on the shifting justifications of criminality.

10) What anthropocentric elements of the Queensland regime impact application of ACPA s 17?

11) What contextual and legal characterisation can be offered for ACPA s 17?

Chapter 9 addresses these two sub-questions. It surveys the Queensland legal regime more broadly, identifying the regime's relevant anthropocentric elements that impact interpretation of ACPA s 17. The chapter recounts the prior arguments in this research about the duty of care law and its context, and examines the relevant legislative materials, including the impact of the *Criminal Code Act 1899* (Qld) and the *Penalties and Sentences Act 1992* (Qld). A comparative analysis of the Australian harmonised work health and safety legislation is provided to offer three law reform suggestions to strengthen ACPA s 17. In addition, Chapter 9 applies straightforward empirical analysis to sentencing statistics to more clearly define ACPA s 17 as the predominant offence under the ACPA. This chapter concludes by offering

a contextualised and legal characterisation of *ACPA* s 17 along with the law reform suggestions.

Part 5: Case Study - Schloss

12) What does a legal analysis of *Schloss* reveal about that particular application of *ACPA* s 17?

13) What does a deconstructive reading of *Schloss* reveal about that particular application of *ACPA* s 17?

Chapter 10 addresses these two sub-questions. It provides an analysis of the case:

Department of Employment, Economic Development and Innovation v Schloss & Schloss.⁷ It is the only appeal case available that considers the legal issues of central relevance to this research, and that also includes sufficient text for a deconstructive reading. This chapter connects elements of the legal characterisation of *ACPA* s 17 developed in the previous chapters with what is revealed through this case. The deconstructive reading highlights how the judgment was constrained by, and within, the metaphysics of presence. The purpose of both readings is to highlight what the law and the judgment actually reinstitute for nonhuman animals.

Part 6: Conclusions - Could *ACPA* s 17 represent a Derridean justice-based approach to animal protections?

Chapter 11 answers the main research question. It brings together the key elements revealed in the previous chapters. It compares what has been found to constitute legal justice in the protection of nonhuman animals under *ACPA* s 17 with what Derridean justice would demand. This chapter reviews the new knowledge generated through this research and how it extends the existing literature in various areas. Suggestions for new and additional areas of research are provided.

1.4 Significance of this research

The significance of this research is that it provides a new and rich characterisation of *ACPA* s 17. This research addresses that gap in the literature. The characterisation offered in this research should improve general understanding of how the law should be accurately described and correctly applied. The research situates *ACPA* s 17 within the anthropocentricity of Queensland legal regime, highlighting particular deficiencies of the jurisdiction in its limitations to better protect nonhuman animals and particularly under *ACPA*

⁷ [2012] QDC 30 ('*Schloss*').

s 17. The deconstructive reading as part of the case study further highlights the anthropocentricity of the legal regime in its application of laws under the *ACPA*. Three law reform suggestions are offered to help strengthen the protective purpose of *ACPA* s 17.

1.5 New knowledge and extensions of the literature

As a result of the research, this thesis suggests three key areas of new knowledge and extensions of the literature as follows:

- 1) The duty of care law is clearly articulated in a legal definition and clarifies, that in contrast to some commentary, it does not employ concepts of negligence.

One important point of clarification offered in this research is appreciation of the difference between definitions of 'negligence' and 'strict liability' in Australian law, and the law of England and Wales. These differences should be appreciated in order to avoid misinterpretation of influential English animal law texts that otherwise appear to associate omissions offences with concepts of 'negligence'.

- 2) While *ACPA* s 17 provides that a 'duty' is 'owed' to a nonhuman animal, this research confirms that the duty is actually owed to the State. It is a regulatory-type offence and does not import any legal duty owed to any nonhuman animal. It does import a duty of diligence in relation to the minimum standards of care stipulated under the provision. I suggest that it is a mischaracterisation to associate *ACPA* s 17 with any implementation of nonhuman animal 'guardianship'.
- 3) As a result of the comparative analysis with the Australian harmonised work health and safety regime, I suggest that *ACPA* s 17 can be interpreted analogously with some aspects of that regime. That would demand clear enunciation of charges. I also suggest that the *ACPA* should be recognised as 'social legislation', and as such, a focus in sentencing should be general deterrence. Additionally, the comparative analysis results in a suggestion to enact a reckless conduct offence. That new offence would recognise more serious degrees of culpability and would institute greater general deterrence through a higher range of penalties.

A further outcome of the research is that I argue that the appeal case of *Schloss*⁸ included some erroneous analysis in ameliorating the culpability of the defendants in the assumption that it was 'a case of neglect rather than deliberate cruelty.'⁹ As a result, I suggest that the

⁸ Ibid.

⁹ Ibid 15.

case should be removed from its listing in the *Magistrates Court Criminal Law Benchbook*¹⁰ as an appropriate reference for interpretation of ACPA s 17.

1.6 Background

Some protections for some nonhuman animals in law were developed in England from the 1500s.¹¹ In the Australian colonies, the earliest statute for the protection of nonhuman animals was enacted in 1837.¹² Specific statutes for the protections against cruelty to animals were enacted in every Australian State by the 1920s. The statutes generally incorporated cruelty offences, and some included aggravated cruelty offences. From the 1850s in the law of England and Wales, and in Scotland, there were difficulties for the courts in interpreting whether the equivalent cruelty offences could be made out as a result of omission, that is, a failure to act, which was sometimes described as negligence.¹³ Another issue was whether any subjective test of the accused's state of mind was applicable.¹⁴ These issues were later mainly resolved with precedents in England such as *Ford v Wiley*¹⁵ for cases involving positive acts of cruelty, but remained problematic where the offence concerned omissions, as was demonstrated in the case of *Peterssen v RSPCA*.¹⁶

In the 1960s, attention was turned to the mistreatment of nonhuman animals in the context of factory farming. Ruth Harrison's book revealed what had become standard practice in the isolation, overcrowding and other forms of harms to nonhuman animals in industrial contexts in England.¹⁷ In 1965, the Government ordered an enquiry into the conditions under which nonhuman animals were treated in factory farms.¹⁸ The resulting *Report of the Technical Committee to Enquire into the Welfare of Animals Kept Under Intensive Livestock Husbandry Systems*, (the '*Brambell Report*'),¹⁹ made recommendations that included enactment of an offence for omissions to care for nonhuman animals. Despite the recommendations, the end result was, and is, that some industry practices only require

¹⁰ Supreme Court Library of Queensland, *Magistrates Court Criminal Law Benchbook: Animal Care and Protection Act 2001 Breach of duty of care prohibited – s 17 Animal Care and Protection Act 2001 (Qld)* <<https://www.sclqld.org.au/benchbooks/criminal-law-benchbook/#Animal%20Care%20and%20Protection%20Act%202001>> ('Benchbook').

¹¹ See Chapter 6, section 6.2.

¹² See Chapter 6, section 6.6.

¹³ See Chapter 6, section 6.3.

¹⁴ See Chapter 6, section 6.3.

¹⁵ (1889) 23 QBD 203.

¹⁶ (Unreported, Queens Bench, Evans LJ and Morland J, 23 March 1993) 853 reported in 1993 WL 963811 [1993] *Criminal Law Review* 852 Official Transcript. See Chapter 8, section 8.3.1.2.

¹⁷ Ruth Harrison, *Animal Machines* (Vincent Stuart, 1964). See Chapter 6, section 6.4.

¹⁸ See Chapter 6, section 6.4.

¹⁹ F W Rogers Brambell, *Report of the Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems* (Her Majesty's Stationery Office, 1965).

conformance with specific regulations which may permit what would otherwise be determined in law, as treatments that fail to meet particular minimum standards.²⁰ The minimum standards and the omissions offence that the *Brambell Report* did call for, were implemented as a form of a duty of care offence in 2006, in the law of England and Wales, but it does not apply for farmed animals.²¹

In Australia, there has been growing public concern about the mistreatment of nonhuman animals. Organisations such as the RSPCA, Voiceless, Animals Australia and Animal Liberation have highlighted mistreatment of animals in regard to live animal exports,²² greyhound racing,²³ puppy farms,²⁴ the dairy industry,²⁵ kangaroo culling,²⁶ jumps racing,²⁷ and various other areas of concern.

The first 'duty of care' law for the protection of nonhuman animals outside of the industrial context was enacted in Tasmania in 1993.²⁸ It was a response to public outcry regarding an instance of what was seen as inadequate penalties being applied for an accused who operated a puppy farm.²⁹ That law remains expressed as: '[a] person who has the care or charge of an animal has a duty to take all reasonable measures to ensure the welfare of the

²⁰ See Chapter 6, section 6.5.1.

²¹ *Animal Welfare Act 2006* s 9. See Chapter 6, section 6.4.6.

²² See, eg, Peter Lewis, 'Animal Cruelty', *ABC News* (online), 31 October 2013, <<http://www.abc.net.au/lateline/animal-cruelty/5062564>>; Lucy Barbour and Olivia Garnett, 'Red tape cuts in live animal export industry leaves RSPCA fuming', *ABC News* (online), 11 September 2014, <<http://www.abc.net.au/news/rural/2014-09-11/nrn-live-export-red-tape-cut-rspca/5737630>>; RSPCA, *Why is the RSPCA opposed to the live export trade?* (5 January 2017) <http://kb.rspca.org.au/Why-is-the-RSPCA-opposed-to-the-live-export-trade_517.html>; Voiceless The Animal Protection Institute, *Live Export* <<https://www.voiceless.org.au/hot-topics/live-export>>.

²³ See, eg, RSPCA, *Greyhound Racing Industry Issues* <<https://www.rspca.org.au/greyhound-industry>>.

²⁴ See, eg, RSPCA, *Puppy Farms* <<https://rspca.org.au/campaigns/puppy-farms>>; Animal Liberation, *Pet Shops, Puppy Farms & Pounds* <<https://www.animal-lib.org.au/new/pet-shops-puppy-farms-pounds/>>.

²⁵ See, eg, Voiceless The Animal Protection Institute, *Dairy Cows* <<https://www.voiceless.org.au/hot-topics/dairy-cows>>.

²⁶ See, eg, Voiceless The Animal Protection Institute, *Kangaroos* <<https://www.voiceless.org.au/hot-topics/kangaroos>>.

²⁷ See, eg, RSPCA, *Jumps Racing* <<https://www.rspca.org.au/campaigns/jumps-racing-australia>>; Animal Liberation, *Horse Racing* <<https://www.animal-lib.org.au/new/horse-racing/>>; Daniel Miles, 'Horse Jumping Racing Carnival an Economic Boom for Warrnambool, despite animal welfare concerns', *ABC News* (online) 2 May 2018, <<http://www.abc.net.au/news/2018-05-01/how-a-controversial-jumps-carnival-keeps-a-country-town-kicking/9713896>>.

²⁸ *Animal Welfare Act 1993* (Tas) s 6. See Appendix 3, Table 6.

²⁹ See Amanda Whitfort, 'Evaluating China's Draft Animal Protection Law' (2012) 34 *Sydney Law Review* 347, 361 citing Tasmania, *Parliamentary Debates*, House of Assembly, 19 May 1993, 40–95 (Robin Gray, Minister for Primary Industry and Fisheries).

animal’.³⁰ It is not expressed as the duty being ‘owed to’ the animal. The penalty is found in that same Act’s s 8 (the cruelty offence) where it is prohibited for a person to ‘omit to do any duty’.

In 2000, impetus grew in Queensland to implement a similar law. The Explanatory Memorandum explains that the duty of care offence was influenced by the ‘5 freedoms’ as minimum standards of care that were developed in the United Kingdom after the *Brambell Report*.³¹ The ‘duty of care’ was enacted as s 17 of the *Animal Care and Protection Act 2001* (Qld). Uniquely, at the time, the offence was expressed as a ‘[a] person in charge of an animal owes a duty of care to it’. In 2013, the Northern Territory followed suit and implemented a duty expressed in the same way.³²

This thesis traces the history of the development of the duty of care offence. Its focus remains on the Queensland jurisdiction. Queensland also provides a relevant judgment that was delivered *ex tempore* that is suitable for the case study. It addresses offending under *ACPA* s 17 where sufficient reasoning is captured that is suitable for the legal reading and the deconstructive reading in Chapter 10.

1.7 Rationale

1.7.1 Shaking up Enlightenment thinking

The practice of developing a thesis is a product of the Enlightenment. Underlying the justification for the thesis generally, is that it serves as a contribution to the public good. That is, a public that is constituted by human animals. Deligiorgi explains that ‘optimistic, progress-oriented’ enlightenment, in the ‘Age of Reason’ has been assumed to have the purpose of:

[securing] intellectual progress and human happiness ... by eradicating superstition and by setting the various branches of human knowledge on a sound scientific footing.³³

As Deligiorgi also explains, Rawls went so far to claim that the ‘will of the people’ was represented in law, where ‘the reason of the Supreme Court’ was the ‘exemplar of public

³⁰ *Animal Welfare Act 1993* (Tas) s 6.

³¹ Explanatory Memorandum, *Animal Care and Protection Bill 2001* (Qld) 4.

³² *Animal Welfare Act* (NT) s 8(1). The remaining clauses of the s 8 duty are not expressed in the same way or in the same structure as *ACPA* s 17. See Appendix 3, Table 6; Chapter 6, section 6.6.3.2.

³³ Katerina Deligiorgi, *Kant and the Culture of Enlightenment* (State University of New York Press, 2005) 13.

reason'.³⁴ This is not to say that there have been many theorists, including Kant that have criticised the suppositions of rationality and the role of the thesis, and have argued for the 'public use of one's reason', to criticise the status quo.³⁵ Deligiorgi describes that for Rousseau and Diderot, for example:

the philosopher is a Socratic gadfly who goads the city to wakefulness, identifying "wrong habits," or shattering complacent assumptions of progress and civilization.³⁶

Derrida was such a gadfly in his detonation of the metaphysics of presence and its underpinnings of Western languages, rationality, sciences and philosophies. He also used his public voice to argue that justice should not be the exclusive right of human animals.³⁷ As explained in the following paragraphs, this thesis in essence, in following Derrida, is critical of Enlightenment thinking.

Derrida was one of many theorists who challenged the predominant form of Western epistemology. As Gray describes it, that is the representationalist epistemology that accepts that language can be 'taken to [provide] accurate representations of the external world'.³⁸ Derrida also challenges traditional notions of human animal beingness, that is ontology as it has been constructed and carried in the forms suggested by Descartes, Kant and others, and that underpins the basis of Western knowledge generally. Within Gray's and Chia's taxonomies of epistemologies, the Derridean approach may at least partially fall into the 'constructivism' category where it is assumed that '[t]ruth and meaning do not exist in some external world, but are created by the subject's interactions with the world'.³⁹ In Derridean

³⁴ Ibid 8 citing John Rawls, *Political Liberalism* (Columbia University Press, 1993) 231.

³⁵ See, eg, Deligiorgi, above n 33, 5-16.

³⁶ Ibid 17.

³⁷ See, eg, Chapter 2, section 2.8; Jacques Derrida in "'Eating Well" or the Calculation of the Subject' in Elisabeth Weber (ed), *Points... Interviews, 1974-1994* (Peggy Kamuf et al trans, Stanford University Press, 1995) 255-87, 282-83 [trans of: *Points de suspension, Entretiens* (first published 1992)] ('*Eating Well*').

³⁸ David E Gray, *Doing Research in the Real World* (Sage, 2004) 17. See also Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak trans, John Hopkins University Press, 1997) [trans of: *De la Grammatologie* (first published 1967)] ('*Of Grammatology*') 36-50: Derrida discusses how representation is seen to work in the context of speech as it was privileged over writing, and how logocentrism masks the operation of language in its complicity with the metaphysics of presence and Western conceptions of ontology and therefore epistemology; Jacques Derrida, *Voice and Phenomenon: Introduction to the Problem of the Sign in Husserl's Phenomenology* (Leonard Lawlor trans, Northwestern University Press, 2011) [trans of: *La Voix et le phénomène: introduction au problème du signe dans la phénoménologie de Husserl* (first published 1967)] ('*Voice and Phenomenon*') 41-50: Derrida proposes how representation and repetition makes what we perceive as meaning, possible.

³⁹ Gray, above n 38, 17 citing R Chia, 'The Production of Management Knowledge: Philosophical Underpinnings of Research Design' in David Partington (ed), *Essential Skills for Management Research* (Sage, 2002).

terms, this occurs through the operation of trace and *différance* subject to cultural constructs.⁴⁰ Since Derrida's propositions question Western ontologies and the basis of the predominant forms of Western epistemology, his approach of deconstructions is appropriate to analyse law from a perspective that is *external* to law. That is, deconstructions enable non-legal analysis that questions Western notions of beingness and knowledge, and therefore, the basis of legal rules. I felt this was necessary in order to escape what appears to be the circular arguments about nonhuman animal 'rights' that face what seems to be the unassailable force of Kantian dogma in law that rights recipients must also be bearers of duties. In addition, nonhuman animal 'rights' theories do nothing to address the underlying and foundational issues of 'rights' that are a product of posited human–animal difference. Merely arguing for 'rights' does not force human animals to take a critical approach to Western conceptions of ontologies or epistemologies. In that sense, I follow Derrida in that rights arguments seem unlikely to be sufficient.⁴¹

1.7.2 A rationale of escaping rationality

This thesis walks the tightrope as presenting itself as a rational work, whilst adopting a perspective that is beyond rationality. This is what is necessary to contrast legal justice, implemented through the force of rationality and law, with absolute concern for, and a duty toward an individual other, and particularly where that other is a nonhuman animal. Deconstructions that expose Western cultural acceptance of the sacrifice of nonhuman animals, and that identify unstable logics, provide a means to escape remaining obsequious to the rationality that permits the utilisation of nonhuman animals' bodies for human animal ends.⁴²

It should be noted that Derrida's own works, of course, strode precariously close to the precipice of acceptability in the context of the rules of the thesis. He knew that his earliest works, given their nature, breadth and approach, could not conform to the accepted 'size and form then required for a thesis'.⁴³ For him '[t]he very idea of a thetic presentation, of

⁴⁰ See, eg, Derrida, *Of Grammatology*, above n 38, 51. See also Chapter 2, section 2.3.2 and Appendix 1, A3 where trace and *différance* are explained. These terms are non-concepts of Derrida's that describe how beingness is constituted.

⁴¹ See, eg, Jacques Derrida in Marie-Louise Mallet (ed), *The Animal That Therefore I Am* (David Wills trans, Fordham University Press, 2008) 26-27 [trans of: *L'animal que donc je suis* (first published 2006)] ('*The Animal That Therefore I Am*').

⁴² In regard to the Western culture of sacrifice, see Appendix 1, section D2.2.

⁴³ Jacques Derrida, 'The time of a thesis: punctuations' in Alan Montefiore (ed), *Philosophy in France Today* (Cambridge University Press, 1983) 34-50, 42 ('*Thesis*').

positional and oppositional logic, the idea of position ... that which he called 'the *epoch* of the thesis, was one of the essential parts that was under deconstructive questioning'.⁴⁴

A further contextualisation of the approach taken in this research, is possible by contrasting other approaches taken in applying 'Derrida'. That is, by adopting a method that takes on a subset of Derridean thinking. For example, Papadelos⁴⁵ described Derridean thought within the context of what she described as related to poststructuralism.⁴⁶ She described and argued for the value of deconstruction, but did not provide any deconstructions as part of her research.⁴⁷ Wex's more recent thesis⁴⁸ utilises Derrida's distinction between legal and Derridean justice, and talks about deconstruction, but does not actually apply it.⁴⁹ I believe that not taking on Derrida's propositions about beingness (and therefore trace and *différance*),⁵⁰ and not applying deconstruction, would be insufficient for this research. That is due to the subject matter of this research, since his perspective of the human–animal relationship is inseparable from his contentions about beingness. In addition, in my interpretation, to apply 'Derrida' means to perform deconstructive readings. Deconstructions work toward a different understanding of ontology, and therefore epistemology.

The other benefit of a deconstructive reading of *ACPA* s 17 in context to its histories, enactment and application, is that it provides opportunity for deep analysis that unveils contradictions, weaknesses, and reinstitutions of purported human–animal differences, even where law *appears* to posit the opposite. In that sense, deconstructions provide the means to undermine the purported stability of rational thought. Deconstructions show how logic is constructed and is deconstructible in texts. In that sense, as Derrida described, deconstructions catalyse an earthquake that should shake the foundations of human animal

⁴⁴ Derrida, *Thesis*, above n 43, 42.

⁴⁵ Pam Papadelos, *Derridean Deconstruction and Feminism: Exploring Aporias in Feminist Theory and Practice* (PhD Thesis, Adelaide University, 2006).

⁴⁶ Ibid 17: 'It is important to clarify ... the poststructuralist thinking presented in this thesis by examining where poststructuralism and deconstruction overlap with postmodernism, as well as where they differ from postmodernism.'

⁴⁷ Ibid 7: 'This thesis is not deconstructive in method. Rather it concludes by highlighting some aspects of deconstruction that might be useful to feminist theory ... [and] argues for a closer relationship between feminism and deconstruction.'

⁴⁸ Irene Lieselotte Wex, *Environmental Justice and the Ecofeminist Perspective: Bridging the Gap Between Law and Justice* (PhD Thesis, Macquarie University, 2013).

⁴⁹ Ibid 2-3:

Derrida's methodological approach to deconstruction is broadly applied in this thesis for the purpose of identifying and effectively dismantling the underlying historical, conceptual, and practical connections between the domination of women and of nature and of nonhuman animals. So by no means does this study involve a comprehensive or in-depth study of Derrida's theories and methodological approach ... The employment of Derrida's methodological approach further allows for a 'reflexive scrutiny' of the relationship between law and justice ...

⁵⁰ See also Chapter 2, section 2.3.2 and Appendix 1, A3 where trace and *différance* are explained.

beingness, and rationality, to their cores.⁵¹ This thesis seeks to inscribe a mild aftershock of Derrida's tremor.

1.8 Methods in detail

1.8.1 Overview of methods employed

This thesis employs a multi-disciplinary approach and takes advantage of both empirical and non-empirical knowledge. The empirical data is used to analyse historical trends in prosecutions under the *ACPA*. The research is both theoretical and reform oriented. As this thesis applies a deconstructive reading and traces the development, context, and application of law, it is a textual analysis of particular texts. As such this research does not extend to analysing what particular people think or do more broadly. As a result, there was no need to conduct interviews or gather other empirical data.

Overall, a mixed methods approach is applied including philosophical, historical, and doctrinal analyses. This is in line with The Council of Law Deans' Statement on the Nature of Legal Research ('*CALD Report*'),⁵² which recognises that legal research is 'multi-faceted'.⁵³ It may be inclusive of doctrinal analysis, theoretical research and it may be reform-oriented.⁵⁴ This research is also further categorised in terms of other forms of research recognised by the CALD Report in that it is: critical and reformist, historical, comparative and interdisciplinary.⁵⁵ Legal research is also recognised as having commonality with social sciences research in that it can consider social phenomena, philosophical and cultural implications.⁵⁶ All of those elements are employed in this research. The following subsections discuss the contextual and methodological aspects of this research.

1.8.2 Key considerations in applying Derrida's propositions

This section addresses key challenges and considerations in applying Derrida's propositions to this research.

⁵¹ See, eg, Derrida, *Of Grammatology*, above n 38, 24.

⁵² Council of Law Deans, Submission to *Department of Education, Science and Training Research Quality Framework Review Statement on the Nature of Legal Research*, May and October 2005, 1.

⁵³ *Ibid.*

⁵⁴ Dennis Pearce, Enid Campbell and Don Harding, 'Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission' (Commonwealth Tertiary Education Commission, 1987) [9.10]-[9.15] cited in *CALD Report*, above n 52, 1.

⁵⁵ *CALD Report*, above n 52, 2.

⁵⁶ Harry Arthurs, 'Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada' (The Consultative Group on Research and Education in Law, 1983) cited in *CALD Report*, above n 52, 1.

1.8.2.1 Derridean justice and the connection to deconstructions as a 'method'⁵⁷

This subsection clarifies that whilst a deconstructive reading with Derridean justice in view is employed as a method in this research, Derrida did not prescribe any application of any system of ethics.⁵⁸ Neither did he suggest that deconstructions can be formulaically described or applied. In approaching comprehension of Derridean justice, and the possibility of performing a deconstructive reading, I have performed deep and wide reading of his texts, sought guidance and confirmation of my understanding through the texts of respected Derrida commentators, have studied a number of Derrida's own deconstructions, and have brought together key relevant, possible features of deconstructions as a basis for my deconstructive reading. A summary of this work is provided in Chapter 2. Substantiation of the deeper research is found in Appendix 1.

Deconstructions were Derrida's means to uncover injustices wrought by the metaphysics of presence which is carried in the Western philosophical and cultural inheritance. That inheritance employs law as its instrument, and legitimises violence toward nonhuman animals. As it is applied in this thesis, the proposition of Derridean justice, *demands* the employment of deconstructive readings to identify how that violence gets-to-work in law. That is why a deconstructive reading, as a key 'method', is applied to the case study in Chapter 10. It exposes how 'rational' legal thinking in that judgment was constrained by the inheritances of the metaphysics of presence, and how anthropocentricity, and legitimated violence toward nonhuman animals, are carried and reinstituted in law.

Whilst Derrida's work might be thought as being concerned with what is 'ethical', because it is concerned about others and otherness, Derridean justice and deconstructions do not offer any *system* of 'ethics'. To do so would be to impose a particular rationality in decision making that takes away from the demand of consideration of every individual other. Anderson takes up Derrida's warning that reasoning through objectivity distances us 'temporally, psychologically and affectively' from our response to others and otherness.⁵⁹ Ethical decisions derived through ethical rule systems always involve a reduction in our

⁵⁷ The term 'method' is presented in quotations as deconstruction cannot be encapsulated as a systematised project. I address this within this section.

⁵⁸ Jacques Derrida, *The Gift of Death* (David Wills trans, University of Chicago Press, 1995) 60-68 [trans of: *Donner la mort in L'éthique du don, Jacques Derrida et la pensée du don* (first published 1992)] ('*Gift of Death*'); Anderson, *Ethics*, above n 6, 15. See also Chapter 2, section 2.6: Appendix 1, sections C3.2.4-C3.2.5.

⁵⁹ Anderson, *Ethics*, above n 6, 116. See also Chapter 2, section 2.6.

response, to a level of generality that may undermine our response-ability.⁶⁰ It involves sacrifice.⁶¹

However, the idea that deconstruction as an activity is an ethical undertaking is proposed by Critchley who claims that 'the textual practice of deconstructive reading can and, moreover should be understood as an ethical *demand*'.⁶² For Critchley, 'an ethical moment is essential to deconstructive reading and ... ethics is the goal, or horizon to which Derrida's work tends'.⁶³ In his use of the term 'ethics', Critchley takes on Levinas' definition which includes the notion that the 'face'⁶⁴ of the other calls me to account, where the alterity of the other is respected, and where there is a duty not to 'evade, comprehend, or kill and before whom I am called to justice, to justify myself'.⁶⁵ This notion of justice or absolute hospitality,⁶⁶ of putting the other before oneself, is carried in Derrida's proposition of justice that is a driving motivation for deconstructions.

1.8.2.2 Derrida's proposition of beingness through trace and différance

To understand Derrida and his perspective of the human–animal relationship, is to appreciate his non-concepts⁶⁷ relative to beingness, to which I primarily refer using the terms trace and différance.⁶⁸ Through trace and différance, he proposes, that many animals including human animals, individually construct meaning, and what is perceived as reality, and experience the passing of time.⁶⁹ The point is, that Derrida, particularly in his final animal-related works, was concerned with the commonalities rather than the differences between human animal and nonhuman animal beingness. He sought, through deconstructions of the Western inheritance, to undermine what he saw was the construction of the abyss of human–animal difference.⁷⁰ As such, he fought against the Cartesian and

⁶⁰ See, eg, Anderson, *Ethics*, above n 6, 16, 111-17. See also Derrida, *Gift of Death*, above n 58, 68-69; Chapter 2, section 2.6.

⁶¹ Anderson, *Ethics*, above n 6, 16. See also Derrida, *Gift of Death*, above n 58, 68-69; Chapter 2, section 2.6.

⁶² Simon Critchley, *The Ethics of Deconstruction: Derrida and Levinas* (2014, Edinburgh University Press) 1 (italics not in original).

⁶³ Ibid 2.

⁶⁴ See also Appendix 1, Part C, section C3.1.1; Appendix 1, Part A, section A4.1.

⁶⁵ Critchley, above n 62, 5.

⁶⁶ See also Jacques Derrida, *Of Hospitality: Anne Dufourmantelle Invites Jacques Derrida to Respond* (Rachel Bowlby trans, Stanford University Press, 2000) 25 [trans of: *De l'hospitalité: Anne Dufourmatelle invite Jacques Derrida à répondre* (first published 1997)] ('Of Hospitality'); Appendix 1, Part C, section C3.1.1; Chapter 2, section 2.7.

⁶⁷ Derrida did not want any of his propositions to become conceptualised. See Appendix 1, Part A, section A1.4.

⁶⁸ See also Appendix 1, Part A, section A1.4.

⁶⁹ Albeit it, potentially, differentially: see Appendix 1, Part A, section A3.

⁷⁰ See, eg, Derrida, *The Animal That Therefore I Am*, above n 41, 59-87; Appendix 1, Part D.

Kantian inscriptions that the human animal is essentially autonomous and possessed of a superior mode of being. These inscriptions are carried in law. This absolute difference in perspective justifies my selection of Derridean propositions, and the Derridean lens as a methodological basis of this thesis. It provides at least a partial escape from the cage of the Western inheritance, to examine law from an external perspective.

1.8.2.3 Inspired by de Ville's interpretations

This thesis is also inspired and influenced by de Ville's interpretation of Derridean propositions as they can be applied to law.⁷¹ I also relied on de Ville's interpretations, to an extent, to guide my understanding of Derrida's difficult texts. More significantly, I sought to live up to de Ville's call that philosophers of law should 'bring to the fore the aporia within every legal concept, to move law beyond what is simply possible ... to expose [what in legal texts] makes [those] texts possible in the first place'.⁷² That is, to deconstruct legal texts and conceptualisation, and to tempt 'a movement away from essence, consistency and truth towards the (dangerous) logic of the perhaps'.⁷³

1.8.2.4 Getting to grips with Derrida's propositions

Appendix 1 includes four Parts that explore what I deem is the relevant depth and breadth of Derrida's propositions for the purpose of this research. It is included to demonstrate that I have undertaken this necessary work to absorb its complexity to enable the performance of a deconstructive reading. This was necessary since Derrida's works and propositions have been misinterpreted or underestimated.⁷⁴ An impossible summary that includes reference to the most relevant of Derrida's propositions is included in Chapter 2. The parts in Appendix 1 can be described as follows.

Part A of Appendix 1: *Derridean Propositions: Presence(s), Cognition and Consciousness*, contextualises Derridean thought in relation to beingness. It explains relevant Derridean terminology. It briefly traces the acceptance of the metaphysics of presence and logocentrism and how they have affected Western epistemology. It provides an explanation of 'writing' in its fullest Derridean sense. It offers an interpretation of trace and différance, and it introduces Derridean perspectives on otherness, auto-affection, responsibility and ethics.

⁷¹ de Ville, above n 5. See also, Appendix 1, Part C, section C5.4.

⁷² de Ville, above n 5, 199.

⁷³ Ibid citing Jacques Derrida, *Politics of Friendship* (G Collins trans, Verso, 1997) 29 [trans of: *Politiques de l'amitié* (first published 1994)] ('*Politics of Friendship*').

⁷⁴ See section 1.8.2.7 of this chapter.

Part B of Appendix 1: *Elements of Deconstructions*, explicates some common elements of some of Derrida's deconstructions, collects together some of his comments about his deconstructive works, and explains how deconstructions are a working toward the impossibility of Derridean justice.

Part C of Appendix 1: *Derridean Justice*, further explains how deconstructions may be a working toward Derridean justice. It reviews Derrida's concerns with the aporias of, and the 'madness' and responsibility in, decision making. It makes reference to Anderson's explications of 'ethics' through the Derridean lens. It explicates Derridean justice as a call to human animal response-ability. It also recounts de Ville's interpretation that justice involves a non-violent reception of the other, and his call that lawyers of the future should work toward a future differentiated from the past.⁷⁵

Part D of Appendix 1: *Derrida's Animot*, attempts to briefly summarise Derrida's tracing of the Western inheritance in its conceptualisation, subjugation and rationalisation of the sacrifice of nonhuman animals for human animal ends. It explains how Derrida used his deconstructive device of l'animot⁷⁶ to suggest a more just signification of others that takes into account their individual beingness, and without absolutely dividing nonhuman from human animals. Part D also includes my own brief retracing of some of the Western inheritance in its construction of the human-animal relationship. Guided by Derrida, it surveys elements of what is carried in early Greek texts, Genesis, and the works of Descartes, Kant, Heidegger, Levinas and Lacan. It includes a summary of some of the assumed and devastating human-animal differences that Derrida claims constitutes the 'abyss' of human animal difference, that serves to define 'humanity' in opposition to 'animality'.

1.8.2.5 Applying 'Derrida': the deconstructive reading

Part 6 of this thesis provides a deconstruction of the only available and suitable court judgment (delivered *ex tempore*) that has applied *ACPA* s 17: *Schloss*.⁷⁷ It is the only suitable case for the deconstruction that includes sufficient reasoning to contextualise and demonstrate the context and interpretation of that law. Isolation of that case occurred as a result of searching www.austlii.edu.au and the LexisNexis database for all cases that have been reported and that apply *Animal Care and Protection Act 2001* (Qld) s 17. A table of all available cases and an explanation of why they were not suitable texts for deconstruction in this research is included in Appendix 2. That Appendix also includes notes on my survey of

⁷⁵ de Ville, above n 5, 199.

⁷⁶ See Appendix 1, Part D, section D2.3.

⁷⁷ [2012] QDC 30.

the Northern Territory reports to find that there were no relevant judgments in that jurisdiction that applies the equivalent law (that is also expressed that a person 'owes' a duty 'to' a nonhuman animal).

1.8.2.6 'Derrida' rejects classification(s)

What I have avoided in this thesis, is describing Derrida's propositions as postmodern, poststructuralist, or as falling within any other category. This is because Derrida himself rejected these labels as capturing what he proposed.⁷⁸ From the beginning, in *On Grammatology*, where he differentiated his thought from the traditional understandings of language and beingness, he argued that language was merely 'a species of writing'.⁷⁹ His proposition includes that 'writing' is a phenomenon of life itself,⁸⁰ and that all animals become written through experience and other forms of inscription. He suggests that we perform a writing of ourselves, or rather that writing writes us, as we make our way through the world. That we perceive the world based on what is already, and what becomes, written within us, within our individual traces. This phenomenon of writing, in human animal existence, had for 'nearly three millennia', succeeded in making us forget this function of writing, and had succeeded 'in wilfully misleading us' that language was something other than merely a species of writing.⁸¹ That it had merged with 'technics and logocentric metaphysics'.⁸² To describe Derrida's work as 'post' anything would be to miss this world-shattering contention that necessarily involves proposing a different ontology potentially for all animals and potentially other life forms including plants. According to Derrida, we are all written, and we are all writing, in different, but some shared modes.⁸³

The significance of Derrida's propositions, coupled with his desire to think beyond the metaphysics of presence, take his work beyond metaphysical definitions of 'post' any 'era' that is metaphysically constructed. He insisted that any such demarcation of an era, including 'postmodernism' and 'posthumanism', is an ordering of a 'linear succession' that imports a 'progressivist ideology' that seeks to 'limit the risks of reversibility or repetition,

⁷⁸ See, eg, Jacques Derrida, 'Some Statements and Truisms about Neologisms, Newisms, Postisms, Parasitisms, and Other Small Seismisms' in David Carroll (ed), *The States of "Theory"* (Columbia University Press, 1990) 63-94, 75-79, 83-89 ('Truisms'); de Ville, above n 5, 5 citing Jacques Derrida, 'Marx & Sons' in M Sprinker (ed), *Ghostly Demarcations: A Symposium on Jacques Derrida's Spectres of Marx* (Verso, 1999) 228-29, 263-64.

⁷⁹ Derrida, *Of Grammatology*, above n 38, 8.

⁸⁰ Ibid.

⁸¹ Ibid (italics in original).

⁸² Ibid.

⁸³ See, eg, ibid 9.

transformation or permutation'.⁸⁴ For Derrida, these are not merely risks, but are inherent in our constructions of reality. In attempting to escape these metaphysical habits, he insisted that deconstruction and his terminology should not be stabilised, conceptualised, objectified, normalised or systematised. By way of contrast, to describe Derrida as postmodern for example would be to risk pigeonholing his propositions to the popular definition of postmodernism as including merely a form of criticism that incorporates 'a general distrust of theories'.⁸⁵ To describe Derrida as post-structuralist⁸⁶ is to risk limiting his propositions as pertaining to the operation of language and criticism of it, rather than incorporating the impacts of his encompassing proposition of writing. All of these labels do not stretch to an understanding of the world and of ourselves and others that accepts language as a technology of writing, and that appreciates and counteracts the affects, (that is the performativity) of logocentrism and metaphysics, to arrive at a completely new appreciation of beingness and epistemology. In his words, deconstruction was to disrupt and to introduce 'an element of perturbation, disorder, or irreducible turmoil' as a 'principle of dislocation' into all the series of 'isms' that mark the classification of theories and discourse.⁸⁷ Derrida's thought and deconstructions provide a means to at least attempt an escape from the metaphysics of presence.⁸⁸ Additionally, appreciation of *différance* can mark both the necessary remainder of meaning constituted by the trace of the metaphysics of presence, and the difference that emerges from new (and never full) meaning that could be constructed beyond the metaphysics of presence.⁸⁹ I interpret Derrida's work as providing a portal toward a new mode of understanding, of reading, of being, and of writing in the fullest sense, that is

⁸⁴ Jacques Derrida, 'No (Point of) Madness – Maintaining Architecture' in Peggy Kamuf and Elizabeth Rottenberg (eds), *Psyche: Inventions of the Other Volume II* (Peggy Kamuf et al trans, Stanford University Press, 2007) 87-103, 87-88; See also, de Ville, above n 5, 6-12: de Ville argues against various categorisations of Derrida's propositions.

⁸⁵ Oxford University Press, *British & World English: postmodernism* <<https://en.oxforddictionaries.com/definition/postmodernism>>. But see the more sophisticated survey of the philosophical category in Gary Aylesworth, *Postmodernism* (Spring 2015) Stanford Encyclopedia of Philosophy <<https://plato.stanford.edu/entries/postmodernism/>>.

⁸⁶ See eg, Oxford University Press, *British & World English: post-structuralism* <<https://en.oxforddictionaries.com/definition/post-structuralism>>. See also Papadelos, above n 45, 15, 17, 21, at 21: '[p]oststructuralists like Derrida draw on the insights of structural linguistics ... recognize the irreducible excess of language as a multiple play of meanings ... question the appropriateness, or possibility of locating the truth ...'

⁸⁷ Derrida, *Truisms*, above n 78, 84.

⁸⁸ Derrida, *Voice and Phenomenon*, above n 38, 14: Derrida claimed that deconstructions of the metaphysical concept of the sign provides an opening beyond 'the closure' of the metaphysics of presence. See also Chapter 2, section 2.2.3; Appendix 1, section A2.7; Spivak, *Translators Preface*, above n 3, lxxvi: 'Deconstruction seems to offer a way out of the closure of knowledge'; Lawlor, *Lawlor in VP*, above n 4, xii:

Derrida's thought is structured by an existing movement, a line of flight to the outside. That the outside is a sort of utopian non-place, an "elsewhere" in which it is possible to think and live differently, indicates what motivates deconstruction.

⁸⁹ See, eg, Derrida, *Truisms*, above n 78, 23. See also Aylesworth, above n 85 [5].

at least partially freed from what I have been, thus far, written to understand. Derrida offers the possibility of a future that is significantly differentiated from the past.⁹⁰

1.8.2.7 Avoiding erroneous interpretations of Derridean propositions

Some commentators have mischaracterised or underestimated Derrida's propositions, or the purpose and results of deconstructions. I include this section for two reasons. Firstly, it is to justify my inclusion of Appendix 1 that seeks to demonstrate that I have taken on a sufficient reading of 'Derrida' to be able to offer a credible deconstructive reading particular to the subject matter of this research. Secondly, this section demonstrates that I am aware, and have hopefully considered and avoided, in adopting my approach, some of the common misconceptions and underestimations of Derrida's propositions that are possible, and that would undermine the robustness of my analysis.

1.8.2.7.1 Recounting de Ville's broad criticisms

De Ville provides a detailed account of some of the mischaracterisations and misunderstandings of Derrida's propositions.⁹¹ Relevant to Critical Legal Studies, de Ville describes a 'methodical reading' of Derrida's works that is primarily concerned with identifying preferences and applying reversals and describing *that* as deconstruction.⁹² De Ville also provides explanations of why interpretations of Derrida's propositions as postmodern,⁹³ 'ethical-liberal',⁹⁴ and interpretations of deconstruction as 'cosmopolitan or utopian'⁹⁵ are insufficient. Particularly, de Ville is concerned that these interpretations do not take into account the full implications of Derrida's propositions in the context of analysis of law.⁹⁶

1.8.2.7.2 Examples of misinterpretations and underestimations of Derrida's propositions

Francione

A very early interpretation of Derrida's exposition of the human–animal relationship was offered by Francione, who misunderstood Derrida's phrase 'constitutive of our culture' in

⁹⁰ de Ville, above n 5, 199; Lawlor, *Lawlor in VP*, above n 4, xii. See also section 1.8.2.3 above.

⁹¹ de Ville, above n 5, 2-12.

⁹² Ibid 3-5: de Ville cites Balkin's work as one such example. See, eg, J M Balkin, 'Deconstructive practice and legal theory' (1986-1987) 96 *Yale Law Journal* 743.

⁹³ de Ville, above n 5, 5-8.

⁹⁴ Ibid 8-10.

⁹⁵ Ibid 1-13.

⁹⁶ Ibid 2-13.

Force of Law.⁹⁷ He also suggested that Derrida was wrong in claiming that nonhuman animals are not subjects of law.⁹⁸ Derrida was describing carnophallogocentrism which proposes that animal sacrifice is essential to human subjectivity, is a basis of western culture and law, and encapsulates anthropocentric domination.⁹⁹ Francione assumed that 'constitutive of our culture' included discounting that 'most people regard "cruelty"', as criminal.¹⁰⁰ For Derrida, carnophallogocentrism is at the root of Western thought, and despite the fact that there are many people who oppose 'cruelty' (as they may deem that to mean), human subjectivity itself is constituted by human–animal difference, and nonhuman animal sacrifice (in its many forms) is part of that cultural construct. Derrida understood that cruelty laws only prohibit some limited forms of sacrifice, and that is, arguably, usually where it offends human animals. Additionally, and in any case, nonhuman animals cannot themselves, due to the language of law, be *subjects-to* the law. I believe it is in these senses that Derrida claimed that nonhuman animals are not subjects *of* law.

Calarco

More recently, Calarco has been highly critical of Derrida and read him as contradictory in insisting that recognition of human–animal distinctions should remain, whilst concurrently criticising distinctions that persist in the Western inheritance.¹⁰¹ I perceive that Calarco misunderstood Derrida's point that the undoing of *particular*, violent differences¹⁰² is necessary to combat rationalised justification for nonhuman animal utilisation, *and* that at core, those differences sustain the myth, rather than the facts, of what makes the human animal, 'human'.¹⁰³ I perceive that Derrida had no need to articulate the many non-violent,

⁹⁷ Gary L Francione, 'Carno-Phallogocentrism' (1991) 13 *Cardozo Law Review* 1317, 1320 citing Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' (1990) 11 *Cardozo Law Review* 919, 952, 951 ('*Force of Law*').

⁹⁸ Francione, above n 97, 1320.

⁹⁹ Derrida, *Force of Law*, above n 97, 951. See also Appendix 1, Part D, section D2.2.

¹⁰⁰ Francione, above n 97, 1320.

¹⁰¹ Matthew Calarco, *Zoographies: The Question of the Animal from Heidegger to Derrida* (Columbia University Press, 2008) 140-49.

¹⁰² See, eg, Derrida, *The Animal That Therefore I Am*, above n 1, 27-28, 32: A key purported and false difference, cemented by Descartes, that negates the need for human animals to register the suffering of nonhuman animals, is that nonhuman animals are assumed to merely react rather than respond. See also Appendix 1, Part D, section D3. Those inherited differences that persist in Western philosophy include beliefs that animals do not reason, that animals do not speak, that animals do not have an experience of their own deaths, and that animals cannot feign to feign.

¹⁰³ See Calarco, above n 101, 129-36, 140: Calarco did acknowledge Derrida's recognition of human–animal differences in constituting what is believed to be 'human', however, at 129-36: he discusses this in relation to an element of Derrida's thoughts in regard to ethics, but does not seem to relate it to the power of deconstructions; at 149 (*italics not in original*) equivocally:

human–animal differences that exist as a matter of common sense,¹⁰⁴ since Derridean justice and hospitality demands, simply, a duty to the other, for the fact that they are *an* other: human or nonhuman. Derrida's call was to exponentially register the differences so that there can be no one single limit that justifies the violence.¹⁰⁵ So that the limit 'can no longer be traced, objectified, or counted as single and indivisible'.¹⁰⁶ So that the differences 'do not leave room for any simple exteriority of one term with respect to another'. So then no one would ever 'have the right to take animals to be the species of a kind that would be named The Animal, or animal in general'.¹⁰⁷ It appears that Calarco missed that this reversal in logic, that this detonation of the *purported* and violence-making limit between human and nonhuman in Western philosophy, was a deconstructive move by Derrida. Derrida demonstrated how the traditional logic in Western philosophy is not *actually* representative of reality. He also proposed that one way to register the real, rather than the philosophically-constructed differences, and to focus on the individual, of any species, is to use his term *l'animot* rather than animal (that also serves to abyssally differentiate what is 'human').¹⁰⁸

Morton

In Morton's very recent philosophical book, *Humankind: Solidarity with Nonhuman People*,¹⁰⁹ he makes reference to Derrida's employment of spectrality in Derrida's *Spectres of Marx*.¹¹⁰ I suggest that perhaps Morton did not read more broadly Derrida's oeuvre, since he contrasts his own propositions with what he believed were a limitation of Derrida's to 'take spectrality as part of the actual world, not just something that haunts the idea of communism'.¹¹¹ However, Derrida *had* been concerned with spectrality, as a function of the human animals' *metaphysical* life more broadly as can be seen in texts such as *Force of Law*.¹¹² Spectrality is one element of metaphysical texts that Derrida repeatedly uncovered in his deconstructions. A fatal underestimation of Derrida's propositions by Morton is evident when he then claims that 'Derrida leaves the ontological just as it is ...'¹¹³ Derrida had been questioning and reimagining Western ontology from the beginning in *Of Grammatology*. In the *Animal That*

Even if one agrees with Derrida that the task for thought is to attend to differences that have been overlooked and hidden by philosophical discourse, this does not mean that every difference and distinction that guides common sense and philosophy should be maintained and refined.

¹⁰⁴ See, eg, Derrida, *The Animal That Therefore I Am*, above n 41, 30.

¹⁰⁵ Ibid 29-31.

¹⁰⁶ Ibid 31.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid 41, 47-48. See also Appendix 1, Part D, section D2.3.

¹⁰⁹ Timothy Morton, *Humankind: Solidarity with Nonhuman People* (Verso, 2017) 42.

¹¹⁰ Derrida, *Spectres of Marx*, above n 78..

¹¹¹ Morton, above n 109, 42.

¹¹² See Derrida, *Force of Law*, above n 97, 1005-07, 1027-31.

¹¹³ Morton, above n 109, 42.

Therefore I Am, Derrida very directly confirmed that from the beginning he had been concerned about the nature of life beyond the anthropocentric in that: '[m]ark, gramma, trace, and différance refer differentially to all living things, all the relations between living and nonliving'.¹¹⁴

1.8.2.8 Critiques of Derrida's propositions

This section provides further context for Derrida's propositions and works. There are many well-recognised sources of criticisms. The most public was the article published in the *New York Times* shortly after Derrida's death.¹¹⁵ Peters and Grierson described it as 'scurrilous'.¹¹⁶ According to Peters and Grierson, Kandell had argued that Derrida had '[undermined] many of the traditional standards of classical education'.¹¹⁷ They suggest that there was an uneducated fear of deconstruction as something that was nihilistic.¹¹⁸ Habermas had a similar fear, and according to Anderson, thought that deconstruction '[endorsed] an indeterminacy of meaning and thus demolishes in nihilistic fashion all values, truth and reason'.¹¹⁹ Habermas exclaimed: '[t]he labor of deconstruction lets the refuse heap of interpretations, which it wants to clear away in order to get at the buried foundations, mount even higher'.¹²⁰ Such a narrow conclusion is evidence of Habermas' relegation of deconstructions as predominantly consisting of textual game playing. Derrida responded by noting that Habermas's own text revealed that Habermas had not read his (Derrida's) work or that Habermas had not substantiated his arguments.¹²¹

Derrida's text *Limited Inc*¹²² documents the argument he had with Searle about Searle's misunderstanding of deconstruction. According to Anderson, Searle had argued that Derrida

¹¹⁴ Derrida, *The Animal That Therefore I Am*, above n 41, 104 (italics in original).

¹¹⁵ Jonathan Kandell, 'Jacques Derrida, Abstruse Theorist, Dies in Paris at 74', *New York Times* (New York), 10 October, 2004.

¹¹⁶ Michael A Peters and Elizabeth M Grierson, 'The Legacy of Jacques Derrida' (2005) 24 (1 & 2) *Critical Perspectives on Communication, Cultural & Policy Studies* 3, 3.

¹¹⁷ Ibid 4.

¹¹⁸ Ibid 5.

¹¹⁹ Anderson, *Ethics*, above n 6, 7 citing Jurgen Habermas, 'The Philosophical Discourse of Modernity: Twelve Lectures' (trans Frederick Lawrence, Polity Press, 1987) 96-97, 181 [trans of: *Der philosophische Diskurs der Moderne: Zwölf Vorlesungen* (first published 1985)], at 182: 'Derrida stands closer to the anarchist wish to explode the continuum of history than to the authoritarian admonition to bend before destiny'.

¹²⁰ Habermas, above n 119, 184.

¹²¹ Jacques Derrida in Gerald Graff (ed), *Limited Inc* (trans Samuel Weber, Northwestern University Press, 1988) 156-57 n 9 ('*Limited Inc*'): 'The most massive and most recent example of the confusion that consists in attributing confusions to me in places where quite simply I have not been read is furnished by Habermas'.

¹²² Derrida, *Limited Inc*, above n 121, 113.

had suggested that there was no authentic 'intention of meaning'.¹²³ For example, Derrida had to re-explain what he meant by his double reading of texts and their context, with an aim of deconstructions to '[signify] not the demolition of what is constructing itself, but rather what remains to be thought beyond the constructivist or destructionist scheme',¹²⁴ and how that was situated within broader texts, referents and trace(s).¹²⁵ Derrida also offered justification for deconstruction(s) in *Force of Law*¹²⁶ where his explanation included the claim that deconstruction 'hyperbolically raises the stakes of exacting justice', and 'calls for an increase in responsibility'.¹²⁷

Anderson also mentions Rorty's complaints about deconstruction and his inappropriate, reappropriation of it within his own conception of postmodernism.¹²⁸ That conception of Rorty's also perpetuated the false notion that deconstruction was 'unethical and nihilistic'.¹²⁹ All of the above misinterpretations were confirmed by Derrida himself, or by respected commentators of his works, as being a result of a lack of reading and comprehension of both Derrida's meaning and intentions.¹³⁰

1.8.3 Methods in developing a legal characterisation of ACPA s 17

In the development of the legal characterisation of ACPA s 17, this thesis employs historical, comparative, doctrinal and empirical analysis.

1.8.3.1 Literature reviews

Literature review is the research method employed in Part 3 which includes a brief survey of neurosciences to ascertain the credibility of Derrida's propositions of trace and différance. That was necessary in Chapter 3 because those propositions, according to Derrida, describe what constitutes beingness and consciousness as presence. Identifying evidence of those workings in texts is a target of deconstructions. I wanted to test the credibility of those propositions because they are implicated in the credibility of deconstructions (which I employ in Chapter 10). They are also key to Derrida's arguments about the lack of purported

¹²³ Anderson, *Ethics*, above n 6, 6-7.

¹²⁴ Derrida, *Limited Inc*, above n 121, 147.

¹²⁵ Ibid 148.

¹²⁶ Derrida, *Force of Law*, above n 97, 952.

¹²⁷ Ibid 955.

¹²⁸ Anderson, *Ethics*, above n 6, 2-7 citing multiple of Rorty's texts throughout, including Richard Rorty, 'Deconstruction and Circumvention' (1984) 11 *Critical Inquiry* 1.

¹²⁹ Anderson, *Ethics*, above n 6, 5.

¹³⁰ See, eg, Jacques Derrida and Christopher Norris, 'Jacques Derrida: In discussion with Christopher Norris' in Andreas Papadakis, Catherine Cooke and Andrew Benjamin (eds), *Deconstruction: Omnibus Volume* (Rizzoli Press, 1989) 74 cited in Anderson, *Ethics*, above n 6, 1; Anderson, *Ethics*, above n 6, 1; de Ville, above n 5, 2.

differences between human and nonhuman animals. In surveying the neuroscience-related literature I needed to take an approach that would reduce the risk of misinterpretation since I am not a scientist. I began with a lay description of contemporary findings relevant to consciousness¹³¹ that referred to works and opinions of eminent neuroscientists.¹³² I proceeded to survey individual works of those neuroscientists that also offered lay descriptions that were relevant to explicating consciousness for both human and nonhuman animals.

Chapter 3 also includes a very brief survey of a wide array of disciplines that are rethinking the question of the animal. In identifying those disciplines and some key texts I referred to sources mentioned in newsletters of the *Australasian Animal Studies Association*,¹³³ and I searched for key texts across various electronic databases and electronic library catalogues.

Chapter 3, section 3.5 explicates how ‘sentience’ relative to nonhuman animals, has become relevant to law in some jurisdictions. In explicating ‘sentience’ in sections 3.4 and 3.5, I refer to a number of neuroscience and veterinary science journal articles and books identified through various electronic databases and library resources.

Literature reviews were also necessary in the remainder Part 3: *A Brief Survey of Conceptions of Nonhuman Animal Lives in Western Sciences and Philosophies* (Chapters 4 and 5). They identify some of the key texts and commentary of the Western inheritance that positions the human–animal relationship. Beyond relying on Derrida’s accounting of that inheritance, I also relied on Steiner’s and other authors’ various historical accounts, referenced other encyclopaedias,¹³⁴ and made direct, brief reference to seminal texts including that of Rawls and Nietzsche. In surveying the positions of contemporary philosophical and ‘ethical’ views of the human–animal relationship, I undertook my own reviews of key commentators’ (including Singer’s, Regan’s and Nussbaum’s) own texts in order to contrast their positions with Derrida’s justice.

In Part Four: *Tracing and Characterising the ‘Duty of Care’ said to be ‘Owed’ to Nonhuman Animals*, Chapters 6 to 9 include literature reviews. In Chapter 6 I used the *Stanford Encyclopedia of Philosophy* to research and reference classical texts where authors had called for nonhuman animal protections. Jamieson’s thesis¹³⁵ is also a key reference. I also

¹³¹ I started with: Oliver Sacks, *The River of Consciousness* (Picador, 2017).

¹³² See Chapter 3, section 3.2.1.

¹³³ See, eg, Australasian Animal Studies Association, *Home* <<http://animalstudies.org.au/>>.

¹³⁴ These included: Tom L Beauchamp and R G Frey (eds), *The Oxford Handbook of Animal Ethics* (Oxford University Press, 2011); Stanford Encyclopedia of Philosophy <<https://plato.stanford.edu/>>.

¹³⁵ Philip M Jamieson, *Animals as Quasi-Legal Entities: A Legal Analysis from and Historical and Philosophical Perspective* (PhD Thesis, University of Queensland, 1990).

made direct reference to the commentaries of Bentham. Other key texts that were influential in the development of *ACPA* s 17 were identified through legislative materials that made reference to them. Some of those key texts include the *Brambell Report*¹³⁶ and the related reports of the *Farm Animal Welfare Council*¹³⁷ of England and Wales.

In Chapter 7, a literature review is employed in researching Kant's and other key theorists' explications of the social contract. I also employed the *Stanford Encyclopedia of Philosophy* as well as texts of other respected commentators including Steiner and Nussbaum. A literature review is also employed in the survey of Hohfeld's and Feinberg's own explications of rights and duties.

Chapter 8 includes a brief literature review of the existing commentary that offers some limited characterisations of *ACPA* s 17. Identifying this commentary involved examination of Australian animal law texts, Australian theses, and animal law journal articles. I searched for them using various electronic databases that include both Australian and international titles.

Chapter 9 provides a review of the Queensland criminal law regime with particular reference to the anthropocentric impacts in interpretation of relevant legislation and the *ACPA*. This review is assisted by a literature review of Australian commentary that has already recounted some of the anthropocentric elements of animal law and sentencing laws in Australia. Reference is made to Australasian animal law text books and related journal articles.

1.8.3.2 Empirical analysis

Chapter 9 applies straightforward empirical analysis to prosecution statistics of RSPCA Queensland. The data was collected from two sources. Firstly, from RSPCA national statistics that are published within RSPCA Australia's annual reports. Secondly, from RSPCA Queensland who provided me with a number of confidential spreadsheets via email that briefly detail historical prosecution records. The email that provides the permission for me to publish the data in the format that I have (in Chapter 9), is provided in Appendix 4. The reason for this approach is that these are the only available sources of broader information beyond seldom-published court reports. Most prosecutions under *ACPA* are taken in the Magistrates Courts in Queensland where judgments are rarely published. The method I used was to extract totals for the numbers of prosecutions under *ACPA* s 17 and s 18 into tables, and then I used Microsoft (MS) Excel to construct a bar chart and a pie chart to demonstrate the numerical relationship between the numbers of prosecutions for the different types of offending over time.

¹³⁶ *Brambell Report*, above n 19.

¹³⁷ See Chapter 6, section 6.4.

1.8.3.3 Historical, comparative and analysis of doctrinal law

In Chapter 3, section 3.3.2, I recall the arguments and key challenges facing the Nonhuman Rights Project in the United States in their litigation for limited 'rights' for some nonhuman animals. This very brief analysis is historical and doctrinal. It is relevant because it demonstrates the focus in law on the anthropocentric qualities of some nonhuman animals as a basis for improved protections in law for them. In identifying those cases I referred to the Nonhuman Rights Project website and I sourced the court materials directly from authoritative government websites. In Chapter 3, section 3.3.3, I recall the justifications for a successful case for improved protections for one nonhuman animal as it occurred in Argentina. This very brief analysis is also historical. I sourced the only English translation that I could locate of the Argentinian judgment from the Nonhuman Rights Project website. I confirmed the non-technical aspects of the findings articulated there, through various international press websites that published in English.

In Chapter 6, historical analysis is provided in relation to the development of cruelty and duty of care laws in England and Wales, and Australian jurisdictions. Direct reference to particular legislative materials and key cases is provided. Primary sources were located through various electronic databases. The earliest Australian legislation was located in the Supreme Court of Victoria library's archive volumes. The chapter includes elements of comparative and doctrinal analysis in that it traces how omissions offences developed across the jurisdictions. A further element of comparative analysis is also offered in that alternate models for nonhuman animal-related duties of care in other jurisdictions are also very briefly surveyed.

In Chapter 7, historical analysis and analysis of doctrinal law is provided in regard to key Australian cases that provided early explication of 'duties' and duty of care offences in relation to nonhuman animals. Chapter 7 also explicates the development of rights in ownership with very brief reference to Roman laws assisted by texts of Buckland and others. Early laws of England in relation to property ownership are recounted through the texts of Ingham, Cao and Radford. Direct reference is also made to English and Australian legislation and case law.

Chapter 8 traces the development of omissions offences in relation to cruelty to nonhuman animals and duties of care relevant to nonhuman animals in Australia. That required historical, comparative and doctrinal analysis of those laws as they developed in the jurisdiction of England and Wales that served as the basis for the Australian laws. Untangling the confusions that appear to have persisted around 'negligence' being relevant to the omissions-related offences required historical and doctrinal analysis of what is termed

‘negligence’, ‘strict liability’, and the various defences, across the jurisdictions. Analysis of key cases and legislative materials is also provided in relation to both jurisdictions. To assist with the doctrinal and comparative analyses, reference is made to relevant reports of The Law Commission of England and Wales, and the Australian Law Reform Commission. To further the development of the legal characterisation of *ACPA* s 17, in terms of doctrinal and historical analyses, in particular to justifications for criminal responsibility, texts and schemas of Lacey and of Ashworth are also employed.

Chapter 9 provides a systemic, historical analysis and analysis of doctrinal law within the Queensland criminal law regime including elements of procedural and sentencing law that are directly relevant to interpretation of *ACPA* s 17. The chapter makes direct reference to the relevant legislative materials and case law. Comparative and doctrinal analysis is also provided in the process of developing the law reform suggestions by way of analogy with the Australian harmonised work health and safety legislation.

1.8.4 Methods employed in the case study of the *Schloss* ‘judgment’

Chapter 10, Part One (sections 10.1-10.3), provides a legal analysis and criticism of the ‘judgment’: *Schloss*.¹³⁸ I refer to it as the ‘judgment’ since it was delivered *ex tempore*, delivered orally, and so it should not be confused with a judgment in the sense where usually more time is perhaps involved where a written judgment is developed and then delivered. The legal analysis includes examination of doctrinal law and the reasons given for amelioration of culpability through what was posited as ‘neglect’. The analysis refers to the relevant legislation, and relevant case law in Queensland, and other authoritative cases from other Australian jurisdictions. The analysis also refers to law reform commissions’ reports.

Chapter 10, Part Two (sections 10.4-10.7), offers a deconstructive reading of *Schloss*.¹³⁹ In addition to employment of various possible elements of deconstructions explicated in Chapter 2 and in Appendix 1, Part B, it is also assisted by Derrida’s exposition of the *pharmakon* as he described it *Plato’s Pharmacy*.¹⁴⁰ That text of Derrida’s is particularly relevant to this reading because it highlights workings of the metaphysics of presence in a manner that is relevant to this case, and it also helps to articulate the link between language, presence(s) and the violence of signification(s).

¹³⁸ [2012] QDC 30.

¹³⁹ *Ibid.*

¹⁴⁰ Jacques Derrida, ‘Plato’s Pharmacy’ in Jacques Derrida, *Dissemination* (Barbara Johnson trans, Bloomsbury, 2016) 65-181 [trans of: *La Dissémination* (first published 1972)].

PART 2: AN INTERPRETATION OF DERRIDEAN PROPOSITIONS

CHAPTER 2: AN INTERPRETATION OF DERRIDEAN PROPOSITIONS

We must take it as far as possible, beyond the place we find ourselves and beyond the already identifiable zones of morality, or politics or law ... [E]ach advance in politicization obliges one to reconsider, and so to reinterpret the very foundations of law such as they had previously been calculated or delimited. This was true for example in the Declaration of the Rights of Man, in the abolition of slavery, in all the emancipatory battles that remain and will have to remain in progress.¹

2.1 Introduction

The purpose of this chapter is to provide an interpretation of the Derridean propositions most relevant to this research. Readers not familiar with Derrida's work are encouraged to read the four Parts of Appendix 1 that provide a more detailed exploration of his propositions.

2.2 Logocentricity, the metaphysics of presence and their impacts

The Western philosophical tradition has carried an ontology that assumes that human animals usually experience a united self-presence and a capability of autonomous decision making. Derrida's texts and deconstructions continually question and undermine those notions. He offered a different proposition of beingness, and he did not insist that it was unique to human animals. As a starting point, in his early works, he explored the impact of languages and how logocentrism, and the metaphysics of presence constrict thought. According to Derrida, those constrictions apply to all Western languages at least, and therefore also to philosophies, sciences and law.²

2.2.1 Definitions

2.2.1.1 Ipseity, self-presence...

The terms essence, ipseity,³ consciousness, self-presence, auto-affection and beingness all refer to a sense of self-presence. According to Derrida, self-presence whilst appearing

¹ Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' (1990) 11 Cardozo Law Review 919, 971 ('Force of Law').

² Jacques Derrida, 'Of Grammatology as a Positive Science' in Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak trans, John Hopkins University Press, 1997) 74-100, 83 ('Positive Science') [trans of: *De la Grammatologie* (first published 1967)] ('Of Grammatology'); Jacques Derrida in 'Semiology and Grammatology: Interview with Julia Kristeva' in Alan Bass (ed), *Positions: Jacques Derrida* (Alan Bass trans, Athlone Press, 1981) 15-36, 35-36 ('Semiology and Grammatology') [trans of: *Positions* (first published 1972)] ('Positions'). See also Derrida, *Force of Law*, above n 1, 929-35.

³ Ipseity is defined as: 'individual identify: selfhood': Merriam-Webster, *ipseity*, Dictionary <<https://www.merriam-webster.com/dictionary/ipseity>>. There is no definition of ipseity listed in the online Oxford dictionary.

perpetual, is not constant during the course of life. For Derrida, beingness as presence is an affect of an internal otherness in the working of 'différance',⁴ which I describe more fully in section 2.3 below. Following Derrida, I use the terms hetero-affection, alterity, and multiplicity in reference to that internal otherness. It reflects the idea, in simple terms that I, can think of me.⁵

2.2.1.2 Economy

The use of the word economy reflects a return, usually to the self, of some benefit, of some meaning, or of presence, and usually it is a result of the workings of the metaphysics of presence (which is facilitated by the workings of différance).⁶ For clarity, it does not connote an economy in a monetary sense, and neither was it articulated by Derrida in terms of physics.

2.2.1.3 Metaphysics of presence

The metaphysics of presence denotes a preference for presences, rather than absences. Spivak suggests that 'Derrida [used] the word "metaphysics" very simply as shorthand for any science of presence'.⁷ Derrida demonstrated that presence is foundational to Western thought. He argued that Western ideas of human–animals' beingness has been perceived

⁴ See, eg, Jacques Derrida, *Voice and Phenomenon: Introduction to the Problem of the Sign in Husserl's Phenomenology* (Leonard Lawlor trans, Northwestern University Press, 2011) 71 [trans of: *La Voix et le phénomène: introduction au problème du signe dans la phénoménologie de Husserl* (first published 1967)] ('Voice and Phenomenon').

⁵ See, eg, Jacques Derrida in Michel Lisse, Marie-Louise Mallet and Ginette Michaud (eds), *The Beast & the Sovereign Volume I* (Geoffrey Bennington trans, University of Chicago Press, 2009) 181 ('The Beast & the Sovereign Vol I') [trans of: *Seminaire: La bete el le souverain Volume I (2001-2002)* (first published 2008)]: 'it suffices to admit that the living being is divisible and constituted by a multiplicity of agencies, forces and intensities that are sometimes in tension or even in contradiction ... what is at stake [is] this ego-logics of "I" and "Me".'

⁶ See, eg, Jacques Derrida in 'Implications: Interview with Henri Ronse' in Alan Bass (ed), *Positions: Jacques Derrida* (Alan Bass trans, Athlone Press, 1981) 1-14, 8 (italics in original) ('Implications'): Différance, as the process of differing, of meaning making, it 'is the economical concept, and since there is no economy without *différance*, it is the most general structure of economy'. A continual differing movement (or an economy) is at work, making our 'presence' in opposition to what we perceive is our own proper deaths: Jacques Derrida, 'To speculate – on "Freud"' in Jacques Derrida, *The Post Card: From Socrates to Freud and Beyond* (Alan Bass trans, University of Chicago Press, 1987) 257- 409, 359 ('On Freud') [trans of: *La Carte Postale: De Socrate à Freud et au-delà* (first published 1980)]. See also Jacques de Ville, *Jacques Derrida: Law as Absolute Hospitality* (Routledge, 2011) 32.

⁷ Gayatri Chakravorty Spivak, 'Translator's Preface' in Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak trans, John Hopkins University Press, 1997) ix-lxxxvii, xxi ('Spivak in OG'). The Oxford online definitions of metaphysics are: '[t]he branch of philosophy that deals with the first principles of things, including abstract concepts such as being, knowing, identity, time, and space' and '[a]bstract theory with no basis in reality': Oxford University Press, *British & World English: metaphysics*, English Oxford Living Dictionaries <<https://en.oxforddictionaries.com/definition/metaphysics>>.

merely as presence.⁸ He objected to this metaphysical presupposition as he claimed it masked what he proposed was the *actual* condition of beingness.⁹ For Derrida, beingness for human and nonhuman animals is not metaphysical at all, but rather a consequence of the fullest sense of writing, and of the workings of what he (sometimes) called trace and *différance*.¹⁰

The preference for presence seems to emanate from its assumed proximity to the notions of the Christian God, 'truth' and 'meaning'.¹¹ With the link of languages to the 'Word of God',¹² that is, the Logos,¹³ and therefore to 'truth' and 'meaning', Derrida argued (following Heidegger), that our mode of being is logocentric.¹⁴ For Derrida, metaphysics always had the function of assigning 'the origin of truth in general to the logos'.¹⁵

2.2.1.4 Logocentrism and idealism

Logocentrism is a both an extension of the metaphysics of presence and a mechanism that sustains it.¹⁶ Derrida explained that his definition of logocentrism encapsulated 'the matrix of [a wider] idealism'.¹⁷ That is, a broader idealism than is normally thought, and 'the most constantly dominant force'.¹⁸ His use of the term 'idealism' is in relation to ideality constructed through language, through signification and conceptualisation that affects mastery and power, and is enabled through writing (in his fullest sense).¹⁹ At a mechanistic

⁸ See, eg, Derrida, *Of Grammatology*, above n 2, 18, 23.

⁹ See, eg, *ibid* 23-24.

¹⁰ See, eg, *ibid*. Derrida's writing, trace and *différance* are approximated in section 2.3 below. See also Appendix 1, Part A, section A3.

¹¹ See, eg, Derrida, *Of Grammatology*, above n 2, 10-15.

¹² The Gospel of John declared: 'In the beginning was the Logos, and the Word was with God, and the Word was God': John 1:1.

¹³ Logos is both 'the Word of God, or principle of divine reason and creative order, identified in the Gospel of John with the second person of the Trinity incarnate in Jesus Christ', and the origin of Logos is stated as 'Greek, word, reason': Oxford University Press, *British & World English: Logos*, English Oxford Living Dictionaries <<https://en.oxforddictionaries.com/definition/logos>>. See also Marc S Cohen, Stanford Encyclopedia of Philosophy, *Aristotle's Metaphysics* (15 June 2016) <<http://plato.stanford.edu/entries/derrida/>>: [14]: Aristotle used the term in the sense of account, definition or formula. at [6] quoting *Topics* 102a3: Aristotle also linked essence to definition: 'a definition is an account (*logos*) that signifies essence'.

¹⁴ Derrida, *Of Grammatology*, above n 2, 12.

¹⁵ *Ibid* 3; see also at 10-11.

¹⁶ See, eg, *ibid* 12: 'Logocentrism would thus support the determination of the being of the entity as presence.'

¹⁷ Jacques Derrida in 'Positions: Interview with Jean-Louis Houdebine and Guy Scarpetta' in Alan Bass (ed), *Positions: Jacques Derrida* (Alan Bass trans, Athlone Press, 1981) 37-96, 51 ('*Positions Interview*'). See also Derrida, *Of Grammatology*, above n 2, 92-93.

¹⁸ Derrida, *Positions Interview*, above n 17, 51.

¹⁹ See especially Derrida, *Positive Science*, above n 2, 93. I describe Derrida's 'writing' in section 2.3.1 below.

or technological level, logocentrism includes the operation of linguistic and conceptual constructs which are recognised as hinging on binary oppositions such as good/evil and human/animal. Derrida's deconstructions demonstrated that each term in an opposition plays a role in inescapably defining the other²⁰ and is instrumental in cementing cultural values. Derrida explained that the resonating voice (or any form of signifier²¹ – that is, a sign's physical form, rather than its meaning), is a mechanism that brings forth *iterations* of past 'presences', as a 'supplement', that both recalls and produces the sensation of presence(s).²²

2.2.2 The ontotheological arché as signifying structure

In *Writing and Difference*, Derrida argued that the metaphysics of presence reflects our need to establish signifying structures.²³ He identified that we have a *desire* for presence, for certitude, for fixity and avoidance of anxiety.²⁴ We seek centres upon which we can articulate 'truths' and by which we can avoid the terror of the unknown, and of the future.²⁵ Arché-writing extends beyond mere appellation or signification in that sense, and affects mastery through ideology.²⁶ In Western cultures, this is manifest through logocentrism and its system of binary oppositions, influenced by ontotheology.²⁷ Ontotheology is the logocentric mode of being, with its link to the Logos – as Word of God.²⁸ Arché-writing then, fuels emergence of power and ascendance within, and of, societies through religions, common languages and therefore laws: legal and formal or informal,²⁹ in the forms of rules, customs or conventions. Derrida argued that in the West, our centre, our arché has been presence, whether of God, subject, essence, existence or consciousness.³⁰ It is theological,

²⁰ See, eg, Derrida, *Force of Law*, above n 1, 995-1003: Derrida highlighted the confounding of origins and repetitions, and the denial of cross contamination in what is accepted to be oppositional meanings in Benjamin's text *Critique of Violence*.

²¹ Derrida, *Of Grammatology*, above n 2, 65-70, at 60 (italics in original):

This arche-writing would be at work not only in the form and substance of graphic expression but also in those of nongraphic expression. It would constitute not only the pattern uniting form to all substance, graphic or otherwise, but the movement of the *sign-function* linking a content to an expression, whether it be graphic or not.

²² See, eg, Derrida, *Voice and Phenomenon*, above n 4, 88-89. 'Supplement' also has a richer meaning as a deconstructive non-concept for Derrida: see, eg, below nn 83-87 and accompanying text.

²³ Jacques Derrida, 'Structure, Sign and Play' in Jacques Derrida, *Writing and Difference* (Alan Bass trans, Routledge, 1978) 351-70, 352-55 ('*Structure, Sign and Play*').

²⁴ Ibid 352.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Derrida, *Positive Science*, above n 2, 92.

²⁸ See also Appendix 1, section A1.1 nn 62-68 and accompanying text.

²⁹ Derrida, *Positive Science*, above n 2, 92-93.

³⁰ Derrida, *Structure, Sign and Play*, above n 23, 353.

ontotheological and encapsulated in the logos.³¹ It is the structure and the condition of the 'epistēmē'.³²

2.2.3 The drive to conceptualisation as affirmation of presence and life

Derrida, following his influencers, including Plato, Kant, Husserl and Descartes,³³ highlighted connections between the drive to knowledge and life itself. The making of knowledge involves the development of concepts (ideals). Concepts are a means by which human animals, at least, seek to perfect knowledge. In a non-Derridean, metaphysical and Husserlian interpretation: knowledge is perceived as realised in idealisation, where a concept is made present in its fullness, to consciousness.³⁴ Any particular concept is also believed to be distinguishable from other concepts and is therefore appreciated as an identity in itself that is repeatable.³⁵

Traditionally, it was believed that meaning can be cognised, made present, and repeated, without recourse to any *process* of differentiation, and independently of the sign.³⁶ Language was perceived as merely *reflecting* 'meaning' rather than as ultimately entwined in the *making* of meaning.³⁷ Derrida found that the metaphysics of presence denies the workings of difference and *différance*.³⁸

For Derrida, space and time, are another way of describing presences, as repeatable idealities.³⁹ His definition of presence includes both the proximity of meaning and the 'proximity of the temporal present'.⁴⁰ What he describes as the 'form' of space and time, is presence, that enables repeatability of non-existent idealities/concepts.⁴¹ Derrida explained that what makes the presence in ideality work is the possibility of an ideal's repetition.⁴² In fact, ideality, or conceptuality itself, is *only* enlivened with the possibility of infinite repetition.⁴³

³¹ Jacques Derrida, 'Linguistics and Grammatology' in Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak trans, John Hopkins University Press, 1997) 27–73, 71–73 ('Linguistics').

³² Derrida, *Structure, Sign and Play*, above n 23, 351.

³³ See, eg, Appendix 1, sections A2.3–A2.8.

³⁴ See, eg, Derrida, *Voice and Phenomenon*, above n 4, 45, 65.

³⁵ *Ibid.*

³⁶ Derrida, *Semiology and Grammatology*, above n 2, 31.

³⁷ *Ibid* 31–32; Derrida, *Voice and Phenomenon*, above n 4, 26.

³⁸ Derrida, *Semiology and Grammatology*, above n 2, 32.

³⁹ Derrida, *Voice and Phenomenon*, above n 4, 8. See also Appendix 1, sections A2.2, A3.3.

⁴⁰ *Ibid.*

⁴¹ *Ibid* 5–8.

⁴² *Ibid* 8. See also, Derrida, *Positive Science*, above n 2, 91.

⁴³ Derrida, *Voice and Phenomenon*, above n 4, 45.

The fiction of concepts, the bringing into being of non-existents through signs and repetition in ideality, ensures presence(s),⁴⁴ and therefore, as Lawlor explains, in Derrida's words, institutes the 'closure of metaphysics.'⁴⁵ That is, not the end of metaphysics, but rather the closing of the system of the metaphysics of presence to alternative thought.⁴⁶ Lawlor explains that by instituting the perpetuation of presence(s) we can live in the sense of 'the security of the answer – the only answer given so far – to the question of the meaning of being: presence.'⁴⁷ According to Derrida, that is the telos of (at least) Western languages.⁴⁸ Derrida also sought to demonstrate that writing (in its fullest sense which I describe below), is *prior to* thought and that language is the 'medium' and 'machine' of presence(s) in ontotheology and its logocentrism.⁴⁹

Derrida continued to dispute the logocentric construction of 'truth' through signification and its infection of all disciplines of 'knowledge', which of course must include sciences⁵⁰ and law. As explained above, he argued that Western thought, and therefore epistemology, involves a continual seeking and reaffirmation of presences.⁵¹ It has a benefit to human animals at least, as the experience of presences is also the mechanism of auto-affectation. The perpetual tautological cycle, or economy, is the seeking of the concurrent presences of concepts and self-affirmation. As Derrida described it, 'language is really the medium of this play of presence and absence'.⁵² The issue for Derrida was that the metaphysics of presence can remain habitually blind to non-metaphysical constructions of thought, beingness and otherness.

⁴⁴ Ibid 44.

⁴⁵ Leonard Lawlor 'Translator's Introduction: The Germinal Structure of Derrida's Thought' in Jacques Derrida, *Voice and Phenomenon: Introduction to the Problem of the Sign in Husserl's Phenomenology* (Leonard Lawlor trans, Northwestern University Press, 2011) xi-xxviii, xv ('*Lawlor in VP*') quoting Derrida, *Voice and Phenomenon*, above n 4, 44.

⁴⁶ See, eg, Derrida, *Voice and Phenomenon*, above n 4, 88; Derrida, *Positive Science*, above n 2, 93; Derrida, *Of Grammatology*, above n 2, 4-5. See also Lawlor, *Lawlor in VP*, above n 45, xxvii-xxviii.

⁴⁷ Lawlor, *Lawlor in VP*, above n 43, xv.

⁴⁸ Derrida, *Voice and Phenomenon*, above n 4, 7-8; Derrida, *Of Grammatology*, above n 2, 8, 10 (italics in original): 'History and knowledge, *istoria* and *epistémè* have always been determined (and not only etymologically or philosophically) as dexterous *for the purpose of* the reappropriation of presence.'

⁴⁹ See, eg, Derrida, *Voice and Phenomenon*, above n 4, 14: Derrida claimed that deconstructions of the metaphysical concept of the sign provides an opening beyond 'the closure' of the metaphysics of presence.

⁵⁰ Derrida, *Positive Science*, above n 2, 83; Derrida, *Semiology and Grammatology*, above n 2, 35-36. See also Derrida, *Force of Law*, above n 1, 929-35; Derrida, *Implications*, above n 6, 13.

⁵¹ See, eg, Derrida, *Of Grammatology*, above n 2, 10.

⁵² Derrida, *Voice and Phenomenon*, above n 4, 9.

2.3 Undoing presence(s): writing, trace and *différance*

According to Derrida, the making and experience of presences occurs through *différance*, which constitutes 'desire' for presence as an automated, written, perpetual process until death.⁵³ Derrida uses his broader proposition of 'writing', and his non-concepts⁵⁴ of trace and *différance*, to identify this capability and possibility, as a force of life (for human and nonhuman animals – albeit, perhaps, to different degrees). For him, and here subjectivity refers to auto-affection: '[s]ubjectivity, like objectivity, is an effect of *différance*, an effect inscribed in a system of *différance*'.⁵⁵

In the following subsections, elements of Derrida's proposition of 'writing' (in its fullest sense), is discussed. Whilst the subsections are separated to explore different elements, it will become clear that trace, *différance*, and writing, are not separable in their proposed workings. I recommend that readers read Appendix 1, Part A on this topic prior to reading this section for the reasons explained in the Preface - that it is common that different commentators and Derrida himself, have used the same terms (such as trace) to indicate different meanings.

2.3.1 Writing in its fullest, Derridean sense

Derrida posited a broader proposition of 'writing', in its fullest sense, that is beyond what we normally think of as the written form of alphabetical languages.⁵⁶ In the 1960s, Derrida suggested that a reconstitution of the understanding of life and experience through 'writing' had already begun as the metaphysics of presence was being exposed in philosophy, science and literature, at least.⁵⁷ Derrida's suggestion, was that writing, including the laying down of 'knowledge' (and here we can read idealisation), is a function of any life form.⁵⁸ In my interpretation, reading across his texts, Derrida was suggesting that signification and

⁵³ Derrida, *On Freud*, above n 6, 359.

⁵⁴ See Chapter 1, section 1.8.2.2; Appendix 1, section A1.4.

⁵⁵ Derrida, *Semiology and Grammatology*, above n 2, 28 (italics in original). See also Chapter 2, section 2.3.1.

⁵⁶ See, eg, Derrida, *Of Grammatology*, above n 2, 8-10.

⁵⁷ Derrida, *Positive Science*, above n 2, 87; 82-84: He argued that writing, or the 'grammè', spans: the 'genetic inscriptions' and 'short programmatic chains' of amoeba; the functions of all our senses; the writing which has already been discovered within sciences such as genetics and biology; and that which is at work in technologies such as computing.

⁵⁸ Ibid 84. It is of interest that in *Plato's Pharmacy*, Derrida notes that Plato, in the *Sophist*, through his interlocutor Socrates, referred to the Logos as a living being. Plato himself seemed to consider the Logos, writing as 'living discourse', which is analogous to what Derrida described as a biological 'or rather zoological' organism: Jacques Derrida, 'Plato's Pharmacy' in *Dissemination* (Barbara Johnson trans, Bloomsbury, 2016) 65-181, 82 [trans of: *La Dissemination* (first published 1972)] ('*Plato's Pharmacy*') citing Plato, *Sophist*, 264b-c.

languages in their many forms, are not secondary instruments of the transcendental soul that supplement speech,⁵⁹ but that consciousness, rationality, objectivity and subjectivity are a *result* of expression and experience enabled by 'writing', that is, what is already, and what becomes, written within us.

2.3.2 Trace and *différance*

Derrida often used the word 'movement' to describe the process of meaning-making that connotes his non-concept *différance*. It is a not-conscious process, that is the automated and repetitive practice of differentiating between form(s) including signs, gestures, ideals or other forms of signification that are already written within us.⁶⁰ Derrida's use of the term 'form' here, includes the already written traces, including signified representations, and particular sensory experiences such as sounds (words, utterances), sights (such as optical recognition of letters, words or things) and scents that we have experienced, memorised, and bring to presence. Through the processing of differences in forms, we also experience the determination (the result of that processing) as presence: '[d]ifférance is therefore the formation of form ... [and] the being-imprinted of the imprint'.⁶¹ The newly experienced form/presence that is determined, is written into trace. It is the workings of trace and *différance* that enable repetition that make logocentrism, and any form of conceptuality possible.⁶² It is the making, and the marking, of all kinds of significations within our own individual traces. Language is only one technology that is facilitated by trace/*différance*. We should also consider how emotions, instincts and sensory perceptions get-to-work within all animal life.

As *différance* is the *process* of deriving meaning and since there is *no* direct relationship between the sign, signifier and what it is deemed to signify, Derrida suggests that *full* meaning is *always deferred*.⁶³ In addition, Derrida explains that it is impossible to recall, to '[reanimate] absolutely the manifest evidence of an originary presence',⁶⁴ that is to summons what we perceive is a full past present. It is always a modification, constructed through our

⁵⁹ See, eg, Derrida, *Linguistics*, above n 31, 30-35: Derrida discusses this assumption in relation to Plato's and Saussure's works.

⁶⁰ Ibid 60-65.

⁶¹ Ibid 63. See also Jacques Derrida, 'Différance' in *Margins of Philosophy* (Alan Bass trans, Harvester Wheatsheaf, 1982) 1-27, 22 (italics in original) ('*Différance*') [trans of: *Marges de la philosophie* (first published 1972)] ('*Margins*'): 'In a certain aspect of itself, *différance* is certainly but the historical and epochal *unfolding* of Being or of the ontological difference. The *a* of *différance* marks the *movement* of this unfolding.'

⁶² Derrida, *Linguistics*, above n 31, 63.

⁶³ See, eg, Derrida, *Linguistics*, above n 31, 62-66; Derrida, *Différance*, above n 61, 9-11.

⁶⁴ Derrida, *Linguistics*, above n 31, 66.

individual traces, and hence full meaning is impossible and always deferred.⁶⁵ Re-animation (as bringing to presence) is a function of the animal in writtenness.

2.4 Otherness, auto-affection and the intertwining in responsibility and ethics

2.4.1 Hetero-affection and response-ability in auto-affection

Derrida suggested that living beings are not strictly autonomous or self-contained in their cognition and consciousness, and that cognition and consciousness may be experienced to different degrees, and are inconstant.⁶⁶ For Derrida, selfhood is entirely dependent on otherness. There is no *différance* without difference.⁶⁷ Derrida exposed what he suggested is our inherent openness to otherness – in that *différance* at work in all of us is the opening to otherness. He suggested that before the application of conscious thought, when confronted with others and otherness, we automatically respond, are called to ourselves, and to thinking itself, in *différance*. That is, even *before* we appreciate or signify, conceptualise or idealise that other or otherness.⁶⁸ As such, subjectivity is an affect of *différance* at work. Subjectivity is a continual movement between presence and absence. It means that presence is always contaminated and punctuated by absence,⁶⁹ (that Derrida described as ‘dead time’ or ‘spacing’).⁷⁰ Otherness, as absence within ourselves, is inherent: it is constitutive of what we experience as presence. As Anderson clarifies, otherness *cannot* be thought of something that is ‘outside’ or in opposition to presence.⁷¹

2.4.2 The space in *différance* as opening to Derridean ‘ethics’

Derrida’s proposition that we are dependent on otherness, follows Levinas to an extent.⁷² I understand that an element of what Derrida proposes was that in the moment of the possibility of that presentment of absolute otherness, that is not yet cognised, *différance* produces an empty place, a not-yet-fully-differentiated other, a space for a future presence

⁶⁵ Ibid 66-67.

⁶⁶ This follows as a result of the workings of *différance* that includes ‘dead time’/spacing as described in Appendix 1, Part A, section A3.5. See also section 2.4.2 below.

⁶⁷ It is also true to say that ‘there is no [perception of] difference without *différance*’.

⁶⁸ See, eg, Jacques Derrida in “‘Eating Well’ or the Calculation of the Subject’ in Elisabeth Weber (ed), *Points... Interviews, 1974-1994* (Peggy Kamuf et al trans, Stanford University Press, 1995) 255-87, 275-76 [trans of: *Points de suspension, Entretiens* (first published 1992)] (Punctuation is as it appears in the text) (‘*Eating Well*):

The origin of the call that comes from nowhere, an origin in any case that is not yet a divine or human “subject,” institutes a responsibility that is to be found at the root of all ulterior responsibilities (moral, juridical, political), and of every categorical imperative.

⁶⁹ Derrida, *Linguistics*, above n 31, 69.

⁷⁰ Ibid 68-69. See also Derrida, *Différance*, above n 61, 13.

⁷¹ Nicole Anderson, *Derrida: Ethics Under Erasure* (Continuum, 2012) (‘*Ethics*’) 101-02.

⁷² See Appendix 1, Part A, section A4.1.

that is unknowable or even impossible. In that process and in that moment, that otherness is unconditionally welcomed.⁷³ As part of that, Derrida suggested that all decision making and responsibility may always be 'of the other'.⁷⁴ For Derrida, that signalled a rupture of the Western idea of human autonomy and the assumption of our absolute powers to respond rather than react.⁷⁵

2.4.3 Summary so far

This chapter overall, is necessary because the research examines whether s 17 of *Animal Care and Protection Act 2001* (Qld) could represent a Derridean justice-based approach to animal protections. To pave the way for the analysis, this chapter, so far, has provided a brief recounting of Derrida's base, and interconnected propositions that are relevant for this research. I stop here to pause, to recollect what has been discussed to this point because these base contentions are critical to the remaining discussion of deconstructive elements, 'ethics', Derridean justice, and how Derrida addressed the human-animal question.

Key elements reverberating in this chapter so far include: that there was, and perhaps still is, a dogma of human self-presence and autonomy; that there may be life forces at work through writing, trace and *différance*; that there is an element of desire, a drive to consume, to become sovereign over 'knowledge'; that there is a belief in origins and *archés*; that there is a discounting of the value of sensory perceptions in objectivity; that meaning, subjectivity, rationality and objectivity are constructed through a commitment to logocentric oppositions; that there is a logocentric habit of selectively raising some characteristics or possibilities regarding non-material things to the metaphysical status of existence; that meaning is an approximation based on oppositions; that repetitions of, and the making presences of signs and concepts are constructive of 'knowledge'; that significations and meaning can incorporate ambiguity and are potentially unique to each individual's trace; that 'truth' is

⁷³ See, eg, Jacques Derrida, *Spectres of Marx: The state of the debt, the work of mourning, and the new international* (Peggy Kamuf trans, Routledge, 2006) 65 [trans of: *Spectres de Marx* (first published 1993)] ('*Spectres of Marx*'): Derrida describes our ability and metaphysical predisposition to leaving openings, in hope, for impossible ideals (such as actual democracy) to arrive. In *Of Hospitality*, Derrida examines the aporias of hospitality, and notes that unconditional hospitality requires a welcoming of the other, prior to any economy of return, prior to conformance to any duties, and that involves leaving space for the other, to welcome them even before questioning the other (where questioning of course results in signification of the other): Jacques Derrida, *Of Hospitality: Anne Dufourmantelle Invites Jacques Derrida to Respond* (Rachel Bowlby trans, Stanford University Press, 2000) 25-29, 83 ('*Of Hospitality*') [trans of: *De l'hospitalité: Anne Dufourmatelle invite Jacques Derrida à répondre* (first published 1997)]. See also Anderson, *Ethics*, above n 67, 120.

⁷⁴ Jacques Derrida in Werner Hamacher and David E Wellbery (eds), *Adieu: To Emmanuel Levinas*, (Pascale-Anne Brault and Michael Naas trans, Meridian, 1999) 23 [trans of: *Adieu à Emmanuel Levinas* (first published 1997)] ('*Derrida's Adieu to Levinas*').

⁷⁵ Ibid 23-24.

potentially unknowable in its otherness; that some conceptual notions such as justice could be boundless and ungraspable; and that despite our faith in philosophical and scientific thoughts and methods, denial or repression of otherness could be habitual. Critically, in relation to response-ability and the possibility of ethics, Derrida suggests that we inherently carry a potential for openness, welcoming and hospitality.

2.5 Key elements of deconstructions for this research

Without repeating the more comprehensive exploration in Appendix A, Part B: *Elements of Deconstructions*, here, I briefly mention some of the key and possible elements of deconstructions that are most relevant for this research.

Deconstructions generally, have in their sights: the repressions of logocentrism – that is, what logocentrism represses, the positing of transcendental notions of self-presence, and how the text satisfies the desire for mastery through conceptualisations. In *Truisms* Derrida reiterated that deconstructive thinking must address the effects of history, that is, our conceptualisations, what we perceive as world views, empiricisms and objectivity.⁷⁶ It must then consider how those conceptions are carried in the text(s) being analysed.⁷⁷ Those influences need to be examined as part of any deconstruction. Deconstructions cannot be reduced to simple literary or textual analyses.⁷⁸

Derrida's deconstructive approach calls for vigilance in regard to the performative force of significations, including those effects as they are manifest in law.⁷⁹ It seeks to accept, or rather not reduce, the fullness of otherness,⁸⁰ including the otherness of nonhuman animals.⁸¹ As such, deconstructions are not nihilistic, but rather, offer an affirmation of a differentiated beingness that provide a means of agitation within, and that points toward an

⁷⁶ Jacques Derrida, 'Some Statements and Truisms about Neologisms, Newisms, Postisms, Parasitisms, and Other Small Seismisms' in David Carroll (ed), *The States of "Theory"* (Columbia University Press, 1990) 63-94, 91-92 ('*Truisms*').

⁷⁷ See, eg, *ibid* 92:

deconstruction in general – also dislocates the borders, the framing of texts, everything which should preserve their immanence and make possible an internal reading, or merely reading in the classical sense of the term.

⁷⁸ See, eg, *ibid* 79, 86.

⁷⁹ See, eg, Derrida, *Force of Law*, above n 1, 929-41.

⁸⁰ See, eg, Jacques Derrida and John D Caputo, 'The Villanova Roundtable: A Conversation with Jacques Derrida' in *Deconstruction in a Nutshell* (Fordham University Press, 1994) 3-28, 17-18 ('*Villanova Interview*').

⁸¹ See, eg, Jacques Derrida in Marie-Louise Mallet (ed), *The Animal That Therefore I Am* (David Wills trans, Fordham University Press, 2008) 107 [trans of: *L'animal que donc je suis* (first published 2006)] ('*The Animal That Therefore I Am*'); Derrida, *Force of Law*, above n 1, 973; Derrida, *Eating Well*, above n 68, 279.

exit of, the closure of the metaphysics of presence.⁸² The driving forces are responsibility and justice.⁸³

Deconstruction brings with it the possibility of making new 'knowledge' through the unveiling of what is repressed within particular texts. In exposing the logocentricity of texts, Derrida's deconstructive logic demonstrates that the superior term of an opposition shares, or is infected by, traits of the subordinated term.⁸⁴ Derrida was able to highlight that the structure of those opposites is not as it seems. Rather, that they include cross-dependency and aporia.⁸⁵ Derrida's contention was that the identification of oscillations, contaminations or aporias point toward the transcendental workings of language in a more general sense. It demonstrated, in his view, the workings of writing (in the fullest sense), trace and *différance*. He found those workings in texts, in the authors' not-conscious thinking, and in non-deconstructive reading. Non-deconstructive reading is also of course, logocentric reaffirmation in its re-writing of the reader, as a perpetuation of logocentric thinking without interruption.⁸⁶ Therefore, he found writing, trace and *différance* at work *in* life, or rather, that *that* working is *of* life itself.⁸⁷ The goal was not to establish the intended meaning of the target texts, but rather identify its 'engagement and the appurtenance that encompass existence and writing in the same *tissue*, the same *text*'.⁸⁸

The Derridean non-concepts,⁸⁹ including *différance*, iterability, supplementarity and economy, and other robust deconstructive elements yet to be revealed within texts, are means by which we can leave open the possibility of a different future.⁹⁰ These are examples of what may be exposed in deconstructions. In *Supplement*, Derrida noted Rousseau's oscillating meaning of his use of the term 'supplement', in that it 'cumulates and

⁸² See, eg, Derrida, *Of Grammatology*, above n 2, 4-5; Derrida, *Voice and Phenomenon*, above n 4, 14: Derrida claimed that deconstructions of the metaphysical concept of the sign provides an opening beyond 'the closure' of the metaphysics of presence; Spivak, *Translators Preface*, above n 7, lxxvi: 'Deconstruction seems to offer a way out of the closure of knowledge'; Lawlor, *Lawlor in VP*, above n 45, xii:

Derrida's thought is structured by an existing movement, a line of flight to the outside. That the outside is a sort of utopian non-place, an "elsewhere" in which it is possible to think and live differently, indicates what motivates deconstruction..

See also Chapter 2, section 2.2.3; Appendix 1, section A2.7

⁸³ See, eg, Derrida, *Force of Law*, above n 1, 955.

⁸⁴ Lawlor, *Lawlor in VP*, above n 45, xii.

⁸⁵ See also Appendix 1, sections A2.2, B2.1.2.

⁸⁶ See also Chapter 2, section 2.3.1; Appendix 1, sections A3.2-A3.3.

⁸⁷ See, eg, Jacques Derrida, '... That Dangerous Supplement...' in Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak trans, John Hopkins University Press, 1997) 141-64, 158 ('*Supplement*').

⁸⁸ Derrida, *Supplement*, above n 87, 150 (italics in original).

⁸⁹ See Appendix 1, Part A, section A1.4.

⁹⁰ See, eg, de Ville, above n 6, 194.

accumulates presence'.⁹¹ It adds as a surplus to form the '*fullest measure* of presence'⁹² and it *also* 'adds to replace'.⁹³ In that case, that text overturned its own meanings. In *Force of Law*, Derrida analysed our dependence on, and enforcement of, performative speech acts, where words themselves are perceived to be endowed with law making power to institute new eras and new beginnings.⁹⁴ That was an example of iterability at work.⁹⁵ Derrida also evidenced Benjamin's resorting to spectrality and religion where Benjamin found that meaning or logic was ungraspable.⁹⁶ *Cogito and the History of Madness*⁹⁷ includes examination of madness in context to the assumption of human self-presence, philosophy, rationality, history and logocentrism. Derrida determined that our concept of history, and history as it is written, is only a history of rationality and 'meaning'.⁹⁸ Derrida also extended the problem of madness and undecidability in *Force of Law*. His propositions highlight the possibility that signifying forces deny and suppress the reality that not everything is resolvable or calculable within what we deem as rationality.⁹⁹ At times, and often, rationality runs out. Decisions are made that require a step beyond the calculable.¹⁰⁰ By definition, decisions, whether made with or without consideration of Derrida's justice, should be seen as a type of madness.¹⁰¹ Justice and truth are hijacked by each other under the logos, where 'truth' presupposes non-Derridean justice.¹⁰² Derrida also explored the relationship between law as means to ends, that is, law as a legitimised force to meet legal ends, rather than 'just' ends.¹⁰³ In his retracing of this possibility, Derrida found that Pascal had more devastatingly criticised law: '[t]here are, no doubt, natural laws; but this fine thing called reason has corrupted everything'.¹⁰⁴ It appears that for Derrida, that force, that 'corruption' comes to be through the performativity of what we call 'reason' and language.¹⁰⁵

⁹¹ Derrida, *Supplement*, above n 87, 144. See also Chapter 2, section B2.1.2.

⁹² Ibid 144 (*italics in original*).

⁹³ Ibid 145.

⁹⁴ Derrida, *Force of Law*, above n 1, 999.

⁹⁵ See also Appendix 1, sections A2.6 and B2.1.2.

⁹⁶ Ibid 1005-07, 1027-31.

⁹⁷ Jacques Derrida, 'Cogito and the History of Madness' in Jacques Derrida, *Writing and Difference* (Alan Bass trans, Routledge, 1978) 36-76 ('*Cogito*').

⁹⁸ Ibid 43, 50.

⁹⁹ Derrida, *Force of Law*, above n 1, 963-65, at 65: By deconstructing presences we can recognise the undecidability of every decision, and the impossibility of the truth or justice of every decision; Derrida, *Cogito*, above n 97, 36-76. See also Appendix 1, sections B3.1-B3.3.2.

¹⁰⁰ Ibid 963.

¹⁰¹ Derrida, *Force of Law*, above n 1, 965-67. Derrida's justice is explained in section 2.7 below.

¹⁰² Ibid 969.

¹⁰³ Ibid 983.

¹⁰⁴ Ibid 941 quoting (and translating) Pascal, Section IV, *pensée* 294.

¹⁰⁵ Derrida, *Force of Law*, above n 1, 941-45, 969.

One of the apparent relations in the analysis in *Force of Law* is that since justice and responsibility in the Levinasian and Derridean senses requires consideration of the singular other, law, which espouses rules in the general sense, cannot, without more, deliver *that* form of justice. A judge must, to deliver Derridean justice, consider the case in its singularity and that includes to 'approve' and 'confirm' the value of the rule *for this case*, every time.¹⁰⁶ A judge must have the freedom to consider that singularity.¹⁰⁷ Derrida's point is that we should remain aware of the paradox that following laws cannot be just in the singular, Derridean sense, and at the same time, justice cannot be wrought without rules.¹⁰⁸ Laws deliver merely legal justice, and always in the context of a repetition of its founding violence.¹⁰⁹

2.6 Problems of rationality and ethics

In this section I briefly recount some of the criticisms of rationality and ethical frameworks that purportedly deliver ethical decisions. That is in contrast to Derrida's contention that such frameworks do not fully address otherness and unknowns. This is also explored in further detail in Appendix 1, Part C.

In contrast to the Western philosophical inheritance, Anderson recounts Derrida's proposition, that presumptions about human animal beingness should be questioned.¹¹⁰ Anderson suggests that both utilitarian and deontological codes of ethics rely on: the principle of a united self-presence of actors; the belief that reason and rationality is reducible to decision making based on what is seen to be objective, external evidence; what we deem as knowledge; and, the belief that decision making limited to prescriptive ethical frameworks is sufficient.¹¹¹ According to Anderson: '[t]hinking ... is limited to deductive and logical reasoning associated with argumentative-theoretical evidence',¹¹² and hence ignores what could be the limits of our inherited principles of reason. Anderson explains that our process of reasoning based on what we deem as objectivity, supports our conceptions of our own autonomy and distances us 'temporally, psychologically and affectively' from our response to others and otherness.¹¹³ What are ignored are other(ed) elements that contribute to experience, decision making, and the construction of knowledge.¹¹⁴ We do not take into

¹⁰⁶ Ibid 961.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid 961-63.

¹⁰⁹ Ibid 963.

¹¹⁰ See eg, Anderson, *Ethics*, above n 71, 94-96, 116-17.

¹¹¹ Ibid 112-17.

¹¹² Ibid 116.

¹¹³ Ibid.

¹¹⁴ Ibid.

account our writtenness. As I summarise, it, that is, how we 'know', and deeper consideration of our own inheritances. It includes our situatedness within our own particular traces (as I use that term, as explained in the Preface).

For de Ville, to follow Derrida, would be to at least exercise responsibility cognisant of the limits of predetermined rules and rationality:

It is from this non-localisable abyss, beyond space and time, and therefore without meaning, without property, without law, without right and without reason, that responsibility in decision making, a responsibility necessarily without limit and before memory must be thought.¹¹⁵

To deconstruct the violence of ethical systems, Derrida demands a working toward his notion of justice,¹¹⁶ which I explore in section 2.7 below.

Derrida, de Ville, and Anderson, at least, point to the problems of ethical frameworks that include reinstitution of the belief in the autonomous decision maker, and failure to incorporate concentrated concern for alterity and the unknown.¹¹⁷ Therefore, ethical frameworks do not fully engage our response-ability or responsibility toward others and alterity.

2.6.1 Hosts and hostages

Following Levinas, Derrida draws relationships between responsibility and ethics, and hospitality. Levinas proposed that the call to responsibility and to which we respond 'ethically', also makes the receiving subject a hostage of sorts.¹¹⁸ According to Derrida, the responsibility toward the other makes the subject beholden to the other, to perhaps have an ethical duty toward the other, and is therefore both the host and the hostage.¹¹⁹ Derrida indicates there is an inescapable tension between the welcoming, and its violent subjection.¹²⁰ Naas clarifies that unconditional hospitality simultaneously includes an appeal

¹¹⁵ de Ville, above n 6, 139 citing Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' in Gil Anidjar (ed), *Acts of Religion* (Gil Anidjar trans, Routledge, 2002) 228-98, 247-48 (*Force of Law in Acts of Religion*); Jacques Derrida, *Glas* (John P Leavey Jnr and Richard Rand trans, University of Nebraska Press, 1986) 49a-53a.

¹¹⁶ See, eg, Derrida, *Force of Law*, above n 1, 965.

¹¹⁷ See, eg, Anderson, *Ethics*, above n 71, 116-17.

¹¹⁸ Emmanuel Levinas, *Otherwise Than Being: Or Beyond Essence* (Alphonso Lingis trans, Duquesne University Press, 1998) 112, 127 [trans of: *Autrement qu'être* (first published 1974)] ('*Otherwise Than Being*').

Derrida, *The Beast & the Sovereign Vol I*, above n 5 ; Derrida, *The Animal That Therefore I Am*, above n 81, 106; Derrida, *Of Hospitality*, above n 73, 125.

¹²⁰ Derrida, *Of Hospitality*, above n 73, 27, 29.

to, or desire for, Derrida's notion of justice.¹²¹ That is where the host and the guest desire the welcoming and sharing not hampered by economic return (in its non-monetary sense), and without experiencing 'the worst' of the other as a result of the unconstrained welcome.¹²² Conditional hospitality heeds that call to unlimited justice. Yet its laws take account of it *and* simultaneously destroy it.¹²³

2.6.2 The aporias of responsibility in ethical decision making

Derrida highlighted a number of aporias that are repressed in decision making. When these are considered in light of decisions made that purport to be ethical in a general sense, it appears that, for Derrida, decisions that are made within the rules of ethical frameworks are always deconstructible and do not guarantee any truly ethical outcome. As described below, 'ethical' decisions in favour of one, always compromise our ethical duties to others. Responsibility to an other, constitutes irresponsibility to other(s).¹²⁴ It involves sacrifice and an economy of violence.¹²⁵ Additionally, ethical decisions on the basis of one particular ethical rule or idea are always in conflict with other ethical rules and ideas, and in all cases, ethical decisions always involve a reduction in our response, and perhaps responsibility, to a level of generality that may undermine our response-ability. The institution of ethical codes and rules masks and deprioritises what, and *who*, is sacrificed.¹²⁶

2.6.3 Responsibility incites 'irresponsibility'

Through the lenses of Derrida and Kierkegaard,¹²⁷ responsibility as we normally conceive it, is a reducing, generalising concept.¹²⁸ From this perspective, decision making and justifications for it, are conceptualised and generalised. In the process, unreduced and

¹²¹ Michael Naas, 'Alors, qui êtes-vous?: Jacques Derrida and the Question of Hospitality' in Michael Naas, *Derrida From Now On* (Fordham University Press, 2008) 18-36, 24-25 ('*Derrida's Hospitality*').

¹²² Ibid. See also Anderson, *Ethics*, above n 71, 52 citing Derrida, *Derrida's Adieu to Levinas*, above n 74, 111-12. See also Appendix 1, Part C.

¹²³ Derrida, *Of Hospitality*, above n 73, 25.

¹²⁴ Ibid 61-62, 68-69. See also, Anderson, *Ethics*, above n 71, 13, 16.

¹²⁵ Jacques Derrida, *The Gift of Death* (David Wills trans, University of Chicago Press, 1995) 68-69 [trans of: *Donner la mort in L'éthique du don, Jacques Derrida et la pensée du don* (first published 1992)] ('*Gift of Death*').

¹²⁶ Ibid 120, 68. See also, Anderson, *Ethics*, above n 71, 16 (italics in original): Anderson clarifies that sacrifice in this sense for Derrida 'is *the condition* of every decision or choice'.

¹²⁷ In *Gift of Death*, Derrida also made reference to Kierkegaard's exploration of sacrifice in the generalisation that occurs through language, decision making and speaking: Derrida, *Gift of Death*, above n 127, 56-65 citing Søren Kierkegaard, 'Fear and Trembling by Johannes de Silentio' in Howard V Hong and Edna V Hong (eds), *Fear and Trembling/Repetition: Kierkegaard's Writings Volume 6* (Howard V Hong and Edna V Hong trans, Princeton University Press, 1983) [trans of: *FGrygt og bø ven and of Gjentagelsen*].

¹²⁸ Derrida, *Gift of Death*, above n 127, 56-65 citing Kierkegaard, above n 129, 115.

absolute responsibility that does not reduce the otherness within myself or the otherness of others, is subsumed. General responsibility and its ethical constructions are therefore described by Derrida as 'irresponsibilization'.¹²⁹ The same aporias, paradox and scandal inhabit notions of duties that function by way of these same sacrifices.¹³⁰ Derrida suggested that recognition of these aporias (as unresolvable conundrums) is metaphysical conceptual thinking pushed to its limits.¹³¹

2.7 Derrida's justice

Derrida's justice demands giving beyond any expectation of return. It is beyond rules and beyond the application of rationality. The decision to give cannot be derived simply from the following of rules. As Derrida described it in *Force of Law*:

This "idea of justice" seems to me to be irreducible in its affirmative character, in its demand of gift without exchange, without circulation, without recognition or gratitude, without economic circularity, without calculation and without rules, without reason and without rationality.¹³²

Whilst Derrida did not dispute that some calculation was necessary, he also demanded that

there is no responsibility, no ethico-political decision, that must not pass through the proofs of the incalculable or the undecidable. Otherwise everything would be reducible to calculation, program, causality.¹³³

What is required, in de Ville's interpretation, whilst impossible, is an openness to the other where 'decisions' are made not through calculable rules, and not through belief in the autonomy of the decision maker, but rather a 'passive and unconscious' response in hospitality that allows the other to come,¹³⁴ and to come without our signification.¹³⁵ Derrida suggests, and de Ville highlights, that a working toward Derridean justice must involve 'a

¹²⁹ Derrida, *Gift of Death*, above n 127, 61. See also Anderson, *Ethics*, above n 71, 15.

¹³⁰ Derrida, *Gift of Death*, above n 127, 68.

¹³¹ Ibid.

¹³² Derrida, *Force of Law*, above n 1, 965.

¹³³ Derrida, *Eating Well*, above n 68, 272-73.

¹³⁴ de Ville, above n 6, 151 citing Jacques Derrida, *Politics of Friendship* (G Collins trans, Verso, 1997) 68-69 [trans of: *Politiques de l'amitié* (first published 1994)] ('*Politics of Friendship*').

¹³⁵ de Ville, above n 6, 152 quoting Derrida, *Derrida's Adieu to Levinas*, above n 74, 111.

différential relation between (undecidable) justice and (decidable) law.¹³⁶ A relation which needs to be 'negotiated' in singular instances'.¹³⁷

In another approach, in *Spectres of Marx*, Derrida spoke of his proposition of justice as something that cannot be 'gathered up' and cast into the future as a concept, as a graspable presence.¹³⁸ That it should not, and cannot, be gathered up where there is recognition of the disjunction in time, space and Being.¹³⁹ This proposition follows the logic that historically, Western law has instituted justice on the basis of reparation,¹⁴⁰ of righting past wrongs in the present through punishment.¹⁴¹ That thinking, of course, involves a tying of the past to the present, of making the past and the future a part of the present. De Ville explains that recognition of the disjuncture 'opens the possibility of a notion of justice which exceeds the circularity of economic exchange'.¹⁴² As such, Derrida's notion of justice requires 'giving beyond the due, the debt, the crime or the fault'.¹⁴³ Derrida's justice therefore opens a new future, an unknown future, because his justice is *not* tied to the past, to any debt that is due.¹⁴⁴ Properly thought, any form of justice cannot be something that is a presence, that can be given by one who does not possess it, to another.¹⁴⁵ Derridean justice is beyond (and before) economic exchange.¹⁴⁶ As I understand it, that includes giving without the expectation of reward, including the reward of any bringing to presence.

2.8 Derrida and nonhuman animals

In his final animal-related works, that is, *The Animal That Therefore I Am* and both volumes of *The Beast & The Sovereign*, Derrida continued retracing the human–animal relationship as it had been portrayed in ancient, biblical, philosophical and other literary texts. He concluded that conceptually, 'humanity' is constructed in opposition, and in preference, to 'animality'.¹⁴⁷ He also suggested that philosophy, the 'philosopheme itself' is constituted by that posited difference.¹⁴⁸ He found that many of the worst characteristics and possibilities of

¹³⁶ de Ville, above n 6, citing Derrida, *Force of Law in Acts of Religion*, above n 116, 257.

¹³⁷ de Ville, above n 6, citing Derrida, *Force of Law in Acts of Religion*, above n 116, 257. See also Anderson, *Ethics*, above n 71, 17.

¹³⁸ Derrida, *Spectres of Marx*, above n 73, 27.

¹³⁹ Ibid.

¹⁴⁰ Ibid 25, 27-28.

¹⁴¹ See also de Ville, above n 6, 190.

¹⁴² Ibid 191.

¹⁴³ Ibid 190 citing Derrida, *Spectres of Marx*, above n 73, 24-29.

¹⁴⁴ Ibid 26-27.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ See, eg, Derrida, *The Animal That Therefore I Am*, above n 81, 31-34.

¹⁴⁸ Ibid 40.

human behaviour are cast as 'animal', and that an 'abyss' of difference has been constructed to ensure animality is quarantined from what we have coveted for ourselves. Those things are posited to include self-presence, autonomy, rationality and dignity. Derrida suggested that the abyss of difference is captured within the signification 'animal',¹⁴⁹ and that what nonhuman animals are dogmatically presumed to lack¹⁵⁰ justifies their sacrifice to human consumption (in the many meanings of that term). He concluded that nonhuman animals are perceived as, and are utilised as, means to human ends. They are fuel for our drive to, and desire for, sovereignty.

Throughout Derrida's animal-related works, he examined the Judeo-Christian 'sacrificialist current'¹⁵¹ in the constructions of human ipseity reflected in the legacies of Descartes, Kant, Heidegger, Lacan and Levinas. For example, Heidegger argued that the 'Western doctrine of the human' was affirmed through the Greek encapsulation: '*zōon logon echon, animal rationale*',¹⁵² as 'rational living thing'.¹⁵³ Heidegger insisted that this 'doctrine' is not just pervasive to ontology but to 'all psychology, ethics, epistemology, and anthropology'.¹⁵⁴ A point of interest for Derrida was that Greek philosophies had retained the signification of animal within definitions of what is human, despite the distinction of 'rationality'.¹⁵⁵ That element of 'animality' was then severed within the works of Descartes and Heidegger at least.¹⁵⁶

Derrida found that the violent ordination of things and beings through the consuming gaze of the human animal works toward sealing the fate of those others.¹⁵⁷ That is, that signification has a relationship to their perceived utility. Derrida recalled that Heidegger indicated that

¹⁴⁹ Ibid 31.

¹⁵⁰ See, eg, Jacques Derrida in Michel Lisse, Marie-Louise Mallet and Ginette Michaud (eds), *The Beast & the Sovereign Volume II* (Geoffrey Bennington trans, University of Chicago Press, 2011) 243 [trans of: *Seminaire: La bete et le souverain Volume II (2002-2003)* (first published 2010)] ('*The Beast & the Sovereign Vol II*'): '... the difference between animal and human has always been defined according to the criterion of "power" or "faculty"'.
¹⁵¹ See, eg, Derrida, *The Animal That Therefore I Am*, above n 81, 91.

¹⁵² Martin Heidegger, *Introduction to Metaphysics* (Gregory Fried and Richard Polt (eds), Yale University Press, 2nd ed, 2014) 157-58 ('*Metaphysics*'). Derrida claimed that the expression was Aristotle's: Derrida, *The Beast & the Sovereign Vol I*, above n 5, 314.

¹⁵³ Heidegger, *Metaphysics*, above n 154, 158.

¹⁵⁴ Ibid.

¹⁵⁵ Derrida, *The Animal That Therefore I Am*, above n 81, 71.

¹⁵⁶ See ibid citing René Descartes, 'Meditations on First Philosophy' (John Cottingham trans) in *The Philosophical Writings of Descartes Volume II* (John Cottingham, Robert Stoothoff and Dugald Murdoch trans, Cambridge University Press, 1984) 1-62, 17; Heidegger, *Metaphysics*, above n 154, 157-58. I have only mentioned these philosophers as they are those that I discuss in Appendix 1 on this topic.

¹⁵⁷ Derrida, *The Beast & The Sovereign Vol II*, above n 152, 278-83, 287-89. See also Appendix 1, section D2.2.

man is gripped by violence.¹⁵⁸ Yet man denies or forgets *that* element of humanity.¹⁵⁹ That element that should be properly described as an unjustness proper to *humanity*, but as revealed throughout both volumes of *The Beast & The Sovereign*, it is often referenced elsewhere as a base animality. The culture of sacrifice is a result of humanity's violence, a culture that is masked and enshrined in language and in law.¹⁶⁰ It comprises the predominant form of the Western human animals' idealism of its own sense of beingness, which is aptly described by Derrida as a result of the 'superarmament' of Western idealism.¹⁶¹

In absolute opposition to what is carried in law, Derrida's propositions of responsibility and justice are beyond ideas of 'rights' as we currently conceive them.¹⁶² Derrida declared:

So long as there is recognizability and fellow, ethics is dormant. It is sleeping a dogmatic slumber. So long as it remains human, among men, ethics remains dogmatic, narcissistic, and not yet thinking. Not even thinking the human that it talks so much about.

The "unrecognizable" is the awakening. It is what awakens, the very experience of being awake.¹⁶³

Derrida argued that whilst we might *feel* a greater responsibility toward beings most like us, that should never be the basis for rights, ethics or politics.¹⁶⁴ Our compassion and duty should not be limited to recognition of ourselves. It indicates decision making based on a return to ourselves. Recognition of beingness and respect for the other, for what they are, or who they are, *is* [what should be] ethics.¹⁶⁵ As it is, others that are completely other, are at risk of not being considered Beings, and consequently not subjects of responsibility and ethical treatment. That ontology already incorporates closure. That closure, is already manifest in law. It raises the possibility of the impossibility of any 'letting be', and particularly

¹⁵⁸ Ibid 288 citing Martin Heidegger, *Einführung in die Metaphysik* (Niemeyer, 1976) 119-20 ('*Metaphysik*').

¹⁵⁹ Derrida, *The Beast & The Sovereign Vol II*, above n 152, 288 citing Heidegger, *Metaphysik*, above n 160, 119-20.

¹⁶⁰ Derrida, *The Beast & The Sovereign Vol II*, above n 152, 288-90 citing Heidegger, *Metaphysik*, above n 160, 119-20.

¹⁶¹ Derrida, *The Beast & The Sovereign Vol II*, above n 152, 290.

¹⁶² Derrida, *The Beast & The Sovereign Vol I*, above n 5, 108. See also de Ville, above n 6, 162-64.

¹⁶³ Derrida, *The Beast & The Sovereign Vol I*, above n 5, 108.

¹⁶⁴ Ibid 109.

¹⁶⁵ Jacques Derrida, 'Violence and Metaphysics: An essay on the thought of Emmanuel Levinas' in Jacques Derrida, *Writing and Difference* (Alan Bass trans, Routledge, 1978) 97-192, 172 ('*Violence and Metaphysics*').

within any humanism including Cartesianism.¹⁶⁶ Yet, recognition of beingness and respect for the other, for what they are, or who they are, is [what should be] ethics.¹⁶⁷

Following Derrida in *Eating Well*,¹⁶⁸ and Lawlor's interpretation of Derrida's message more generally, we should limit the harm that we inflict on nonhuman animals, to 'receive the animals', in 'the least violent response', 'the most amiable response'.¹⁶⁹ In that way, it can be said that Derrida was calling for us to attempt to render hospitality for all others, including nonhuman animals. That requires an approach that is beyond the inheritances of Descartes, Kant, Heidegger and so many others.

2.9 Derrida's 'forgiveness' is not a rejection of law or general deterrence in law

2.9.1 Introduction

This section has been added to the thesis as a result of feedback of one of the examiners. They suggested that the thesis needs to address the following point: Derrida's 'call for better treatment (justice) towards [nonhuman] animals, cannot be directly translated into a need to harshly punish offenders'. This needed to be addressed with reference to Derrida's discussions of the criminal law in his two volumes of *The Death Penalty*¹⁷⁰ and his non-concept of 'forgiveness'.

Firstly, as a matter of clarification, and as highlighted in the Preface, this thesis does not call for 'harsh' penalty of perpetrators of harms to nonhuman animals. It does call for penalties that *are* deterrent, and that general deterrence be factored into sentencing considerations. That is suggested as necessary to include nonhuman animals' interests, into what *are* the various anthropocentric economies of interests that *are* alive in the sentencing scheme.¹⁷¹ General deterrence needs to be effective so that nonhuman animals are protected at least to a degree, so that there is *sufficient* disincentive to harm them over and above what is otherwise permitted by the statute.

In further addressing the examiner's comments, here I undertake further and brief discussions of Derrida's deconstruction of forgiveness as we normally employ that concept.

¹⁶⁶ See, eg, *ibid* 172-79. See also Appendix 1, Part D, section D3.5; Appendix 1, Part C, section C4.2.

¹⁶⁷ Derrida, *Violence and Metaphysics*, above n 167, 172.

¹⁶⁸ Derrida, *Eating Well*, above n 68, 282-83. See Appendix 1, Part C, section C4.1

¹⁶⁹ Leonard Lawlor, *This is Not Sufficient: An Essay on Animality and Human Nature in Derrida* (Columbia University Press, 2007) 73.

¹⁷⁰ Jacques Derrida in Geoffrey Bennington, Marc Crépon and Thomas Dutoit (eds) *The Death Penalty Volume I* (Peggy Kamuf trans, Chicago University Press, 2014) ('*Death Penalty Vol I*') [trans of: *Séminaire: La peine de mort, vol. 1 (1999-2000)* (first published 2012)]; Jacques Derrida in Geoffrey Bennington, Marc Crépon and Thomas Dutoit (eds) *The Death Penalty Volume II* (Peggy Kamuf trans, Chicago University Press, 2017) ('*Death Penalty Vol II*') [trans of: *Séminaire: La peine de mort, vol. 1 (1999-2000)* (first published 2012)].

¹⁷¹ See, eg, Chapters 9 and 10.

What is relevant here is: that it does involve economic returns (in the non-monetary sense), and is embedded in the metaphysics of presence; that Derrida did not denounce penalties other than the death penalty in law; that he did acknowledge that there was no true equivalence between any crime and any punishment despite the fact that our metaphysical conceptions lead us to believe that particular punishments can exact an appropriate price for particular crimes; that Derrida also acknowledged Nietzsche's contention that there may be pleasure derived from exacting cruelty; and that Derrida acknowledged that a 'utopian' ideal may include a world where punishment was not exacted, but that could only be where the sovereign power of states had been extinguished. I conclude that Derrida was not against criminal law in general and neither did he object more specifically to deterrence as a function of the criminal law. No doubt, since he did object to the death penalty, I agree that he would have objected to unjust and harsh penalties in any case, but as I describe above, that is not what this thesis suggests is necessary.

2.9.2 Derrida's 'forgiveness' confirming law within the metaphysics of presence

To set the scene, what is clear is that Derrida, in his final works, which were the works about the human-animal relationship, did include nonhuman animals as subjects worthy of his justice. That has been recounted in this thesis.¹⁷² He objected to the Western culture of sacrifice of nonhuman animals.¹⁷³ Additionally, that was a restatement of what he had already indicated in *Force of Law*¹⁷⁴ and in *Eating Well*.¹⁷⁵

Derrida's *Death Penalty* lectures, captured in the two volumes, were delivered prior to his final nonhuman animal-related works. The focus in the *Death Penalty* lectures includes the relations between religious conceptions of guilt and punishment, how that influences Western constructions of rationality, and how all of that works within human animal beingness – within the economic workings of beingness as *différance*.¹⁷⁶ Forgiveness as a concept, as we normally accept it, is also discussed.¹⁷⁷ The fuller deconstruction of 'forgiveness' had been undertaken by Derrida previously in other texts.¹⁷⁸ That element in

¹⁷² See Chapter 2, section 2.8; Appendix 1, Part D.

¹⁷³ See, eg, Derrida, *The Animal That Therefore I Am*, above n 81, 113. See also Appendix 1, section D1.

¹⁷⁴ Derrida, *Force of Law*, above n 1, 949-51.

¹⁷⁵ Derrida, *Eating Well*, above n 68, 282-83.

¹⁷⁶ See also Michel Naas, *Philosophy and the Death Penalty* Derrida Seminars Translation Project <<https://derridaseminars.org/pdfs/2011/2011%20Presentation%20Naas.pdf>>.

¹⁷⁷ Derrida, *Death Penalty Vol I*, above n 170, 170-75: It was discussed briefly there in context to the views of Reik.

¹⁷⁸ Derrida had undertaken the deconstruction earlier in Jacques Derrida, 'On Forgiveness' in *On Cosmopolitanism and Forgiveness* (Routledge, 2001) 27-60 ('*On Forgiveness*'). See also Jacques Derrida, 'The "World" of the Enlightenment to Come (Exception, Calculation, Sovereignty)' (2003) 33 *Research in Phenomenology* 9-52, 40.

Derrida's work has been discussed by a multitude of authors.¹⁷⁹ None of the authors that I could locate, take up a presumption that Derrida meant that forgiveness for him, would actually include a suspension of law and punishment generally, other than that he was opposed to the death penalty. Brenner highlighted Derrida's comments in context to absolute hospitality, and confirmed that unconditional forgiveness similarly, does not actually call for a suspension of law or punishment in that 'in as much as a just and unconditional hospitality remains impractical and unrealizable, "one cannot inscribe it in rules or in legislation" ... 'if one were to translate it immediately into a politics, it may risk "having perverse effects"'.¹⁸⁰

Derrida's deconstruction of the notion of forgiveness, exposes the impossibility of true forgiveness, in that it would only be possible to forgive the unforgivable, otherwise, forgiveness is meaningless.¹⁸¹ He exposes that forgiveness as we usually conceive of it, still works within the economics of returns – that in forgiving, we do so for *some* return.¹⁸² That may be, for example, in exchange for the remorse, rehabilitation, or promise of the offender not to reoffend.¹⁸³ In that way, forgiveness comes with a price. As with Derrida's own notion of justice, his deconstructed non-concept of forgiveness, which he also claims is impossible, must be awarded *without* the expectation of returns.¹⁸⁴ He goes so far to say that if that is the case, then it may be that it can only be achieved in the not-conscious, or the unconscious state.¹⁸⁵ In this way, Derrida's forgiveness, beyond the reaches of economy and *différance* could not be something that is given as a function of the criminal law, since the purposes of the criminal law *is* retribution, deterrence, rehabilitation and so on. All of those elements or purposes are economic elements in the sense that they are either a price to be paid for the crime committed, or they are a disincentive for a crime to be committed in the future. This situates the criminal law within the metaphysics of presence. The actual payment also provides for a new beginning, a new start, a cleansing of the crime or the guilt.¹⁸⁶ The function of the judgment is to pass judgment, to award the price, to allow the

¹⁷⁹ David A Brenner, "'Torn' Between Justice and Forgiveness: Derrida on the Death Penalty and 'Lawful Forgiveness'" (2005) 37 *Crime and Punishment: Perspectives from the Humanities Studies in Law, Politics and Society* 109-22; Giovanna Borradori, 'Living with the Irreparable. A Critique of Derrida's Theory of Forgiveness' (2011) 17(1) *Parallax* 78-88; Elizabeth Rottenberg, 'The "Question" of the Death Penalty' (2013) 35(2) *Oxford Literary Review* 189-204; Peter Banki, 'Seeking Forgiveness (Jacques Derrida)' (2011) 52(2-3) *Culture, Theory and Critique* 285-302; Steven Gormley, 'The Impossible Demand of Forgiveness' (2014) 22(1) *International Journal of Philosophical Studies* 27-48; Peggy Kamuf, 'At the Heart of the Death Penalty' (2013) 35(2) *Oxford Literary Review* 241-51.

¹⁸⁰ Brenner, above n 179, 119 quoting Jacques Derrida, 'On Forgiveness: A Roundtable Discussion Moderated by Richard Kearney' in J D Caputo, M Dooley and M J Scanlon (eds), *Questioning God* (Indiana University Press, 2001) 53-72, 58.

¹⁸¹ See, eg, Derrida, *Death Penalty Vol I*, above n 170, 171. See also Derrida, *On Forgiveness*, above n 180, 32, 39, 45.

¹⁸² Derrida, *Death Penalty Vol I*, above n 170, 171; Derrida, *On Forgiveness*, above n 178, 34.

¹⁸³ Derrida, *Death Penalty Vol I*, above n 170, 171; Derrida, *On Forgiveness*, above n 178, 34.

¹⁸⁴ Derrida, *Death Penalty Vol I*, above n 170, 172. In regard to justice, see also *Force of Law*, above n 1, 965; Chapter 2, section 2.7.

¹⁸⁵ Derrida, *Death Penalty Vol I*, above n 170, 172; Derrida, *On Forgiveness*, above n 178, 49.

¹⁸⁶ Derrida, *On Forgiveness*, above n 178, 39.

price to be paid, and hence to form or force the new beginning, or to issue a cut in time, where the guilty party is relieved of their guilt in law and may start again.¹⁸⁷ The law, by exacting the price, provides for payment and ‘forgiveness’ but only with a price having been paid.

2.9.3 Derrida affirms the necessity of law and as a site of economic returns

In relation to the function of law more narrowly, it is clear in the *Death Penalty* volumes that Derrida was opposed to the death penalty. However, he did not object to the law exacting other penalties. In fact, Derrida did explain that law was necessary, that it was an affirmation, that for law to be just, it must have force.

As Kant rightly says, there is no justice in the strict sense, in the legal sense, in the judicial sense, as long as there is no binding force, as long as commitments are not duties to which the subjects of the law are held on pain of punishment ... precisely, on pain of being punished by the law if they should infringe it. One must be able to apply the law by force, one must be able to “enforce” it as one says so well in English, in order for it to be a law, in the full sense.¹⁸⁸

Derrida had also confirmed the need for force in law in *Force of Law*:

Justice without force is contradictory, as there are always the wicked; force without justice is accused of wrong. And so it is necessary to put justice and force together, and for this, to make sure that what is just be strong, or what is strong be just.¹⁸⁹

In that way, Derrida’s justice is not *against* law.

In the *Death Penalty Vol I*, Derrida traced Nietzsche’s questioning of the aporia of the equivalence between the injury committed as a result of a wrong inflicted on another, and the pain then exacted as penalty through law.¹⁹⁰ That there is no *actual* equivalence. Derrida recounted Nietzsche’s tracing of the equivalences assumed as possible in commercial law:

The origin of the legal subject, and notably of the penal law, is commercial law; it is the law of commerce, debt, the market, the exchange between things, bodies, and monetary signs, with their general equivalent and their surplus value, their interest. This would mean, in sum, that what *makes us believe*, credulous as we are, what makes us believe in an equivalence, that is, in penal law, the origin of the law, the origin of the credit we grant it or that in truth we believe we must grant it, is belief itself.¹⁹¹

¹⁸⁷ See, eg, Ibid.

¹⁸⁸ Derrida, *Death Penalty Vol I*, above n 170, 80.

¹⁸⁹ Derrida, *Force of Law*, above n 1, 937: here, he was following Pascal. See also Appendix 1, section B3.3.2.

¹⁹⁰ Derrida, *Death Penalty Vol I*, above n 170, 91 (Kant’s view is also discussed here).

¹⁹¹ Ibid 152

Derrida did then agree that there could not be an equivalence between ‘some common value, some equivalence, for example, between murder and the death penalty’.¹⁹² He agreed with Nietzsche that we do not really believe that this market or economy of crime and punishment *actually* deals in equivalences, and that actual lack of belief, despite how we operate, also applies in relation to the workings of language, the social contract and law as a system itself.¹⁹³ What is at work is a ‘simulacrum’ of belief – in that we believe without actually believing.¹⁹⁴ Further, that this is relevant to:

the whole origin of religion, like that of society, culture, the contract in general, has to do with this non-belief at the heart of believing ... the market, exchange, the social contract, the promise, the whole system of supposed equivalences that ground money, language, law as well as penal law; all of this presupposes this trafficking in the act of faith ... one might say [it is] spectral, quasi-hallucinatory, or unconscious.¹⁹⁵

Derrida continued with his analysis on Nietzsche and Kant on this subject of the economics of crime and punishment. He found that Nietzsche had raised the stakes even further to find that in regard to the death penalty at least, in its (religious) conception, it may involve or be motivated by a not-conscious ‘counter-pleasure in cruelty’.¹⁹⁶ That cruelty gave a primitive form of pleasure, and Nietzsche also found that the history of punishment was intertwined with its origin in the counter-pleasure of cruelty.¹⁹⁷

I cannot isolate within *Death Penalty Vol I*, any objection, by Derrida, to the law as a whole, as a system that is necessary for there to be justice (legal or otherwise). He objects to the death penalty, on various fronts, but he does not discuss the connection between law and its necessary deterrent function more generally. Neither does he elaborate much further on the ‘counter-pleasure’ of cruelty or that it would be a reason *not* to afford any being protections *from* cruelty, hence legal or Derridean justice.

2.9.4 Deterrence as a necessary function in the economy of law

In *Death Penalty Vol II*, Derrida does recount Kant’s views of law and punishment and what is relevant here, is that Kant rejected the notion that a *human* animal could be used as a means to an end.¹⁹⁸ That included discussion of the function of punishment. It appears that Kant would have objected to a person’s punishment being exacted for the purpose of

¹⁹² Ibid.

¹⁹³ Ibid 153.

¹⁹⁴ Ibid 154.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid 163.

¹⁹⁷ Ibid 147-65.

¹⁹⁸ Derrida, *Death Penalty Vol II*, above n 170, 39-43, 180.

general deterrence, being used as an example for others.¹⁹⁹ That would be a breach of their dignity.²⁰⁰ Derrida also provides analysis of Reik's psychoanalytic perspective on law which included that punishment based on talionic law (the religious law of reciprocity²⁰¹ that works as a 'calculating machine'),²⁰² involves implementation of 'retribution, retaliation, reparative punishment and reprisal'.²⁰³ Reik also saw law as having the purpose of 'prevention or deterrence',²⁰⁴ and that the function of it is only *assumed* to work, to a degree in the unconscious mind.²⁰⁵ Reik disputed that this was the case, that deterrence could work on the unconscious which he presumed drives our lack of caution.²⁰⁶ Derrida recounted Reik's logic that in the future there may be an 'extinction of legal punishment',²⁰⁷ that confession and self-punishment could become the norm.²⁰⁸ Derrida found this possibility to be 'utopian'²⁰⁹ but did not confirm that this was a possible or likely future reality. However, he did say that we 'must believe in and hope for the worldwide-ization of psychoanalysis',²¹⁰ which was a reference to Reik's ideal. This, it seems would be so far into the future that it was almost unimaginable, since Derrida also stated that '[i]n the future, the transition to the disappearance of punishment (... is as good as the disappearance of the state)'.²¹¹ This utopia then is not something that has potential for the foreseeable future. De Ville had also noted this requirement of statelessness if Derridean justice were to take hold. He said that, for there to be Derridean justice, 'or a hyper-politics or hyper-ethics of the impossible' then that would be 'where the subject or the state will no longer be in control'.²¹² De Ville's discussion was in context to the death drive. He also confirmed that Derrida had '[pointed] out that justice needs law and that there are different (better or worse) ways of calculating law'.²¹³

As a result, I do not garner from either volume of the *Death Penalty*, or Derrida's comments in *Force of Law*, or as interpreted by any of the commentators I mention in this section,²¹⁴

¹⁹⁹ Ibid 39-43, 89-90.

²⁰⁰ Ibid 91.

²⁰¹ Ibid 108.

²⁰² Ibid 143-44.

²⁰³ Ibid 127.

²⁰⁴ Ibid 128.

²⁰⁵ Ibid 128-29.

²⁰⁶ Ibid 129.

²⁰⁷ Ibid 130.

²⁰⁸ Ibid 131-32.

²⁰⁹ Ibid 131-32.

²¹⁰ Ibid 134.

²¹¹ Ibid 131.

²¹² Jacques de Ville, 'Desire and Language in Derrida's Force of Law' (2009) 95(4) *Archiv fuer Rechts-und Sozialphilosophie* 449-73, 470.

²¹³ Ibid 471.

²¹⁴ I also researched other papers to see if other authors had made connections between Derrida's discussion of animals, law and forgiveness. I could not locate any such discussions. See, eg, Nicole Anderson, 'A proper death: penalties, animals, and the law' in K Oliver and S M Straub (eds), *Deconstructing the Death Penalty: Derrida's Seminars and the New Abolitionism* (Fordham University Press, 2018) 159-74; Michael Naas, 'Derrida's Flair (For the Animals to Follow ...)' in Michael Naas, *The End of the World and Other Teachable Moments*:

that Derrida intended for his readers to accept that punishment or its function of deterrence was redundant in exacting either legal justice, or as a working toward Derridean justice where nonhuman animals, were in his view, also worthy recipients. If Derridean justice does call for an end to the Western culture of sacrifice of nonhuman animals, and I believe it does, then the legitimate force of law plays a role in their protection. I suggest that it must, because if we are not-consciously driven by economies of interests as a function of *différance*, then there must be in place, a mechanism for ameliorating our drive to utilize nonhuman animals as means to our own ends. Whether we are, or are not, consciously in control of our drives, or are only in control to certain degrees, then the protection of nonhuman animals and vulnerable *human* animals must continue to be applied through law. That is the function of general deterrence in law. I suggest it is necessary in life as we experience it today, and it is also necessary in working toward Derridean justice for all vulnerable beings.

2.10 Summary

As Derrida suggested, his proposition of justice is impossible. It is however enlightening. For example, it seems unlikely that pure hospitality or pure altruism (as examples) are possible in the sense that they always include some form of economic return, and they always leave one vulnerable to the worst of the other. Hence, responsibility is infected by irresponsibility, duty envelops failure of duty, justice in its narrow rule-following sense is blinded to injustice. Conditional hospitality, and unconditional or absolute hospitality, are infected by each other. Absolute hospitality would either be temporary or impossible.²¹⁵ Altruism is constituted by self-interest, and the ethical is contaminated by the non-ethical.²¹⁶ However, decisions must still be made. Every true decision will involve sacrifice(s). Yet, what Derrida calls for is an awakening to the violence of decision making, of acting, that has become subsumed, veiled and ignored through the application of calculable rules. That includes, rules of ethics, and rules in law.

For Derrida, if we can intellectually evolve beyond what might be humanity's 'Darwinian trauma'²¹⁷ to accept our own material workings, it should lead to a detonation of the traditional positing of so many potentially false distinctions, including that between reaction and response. Derrida contended that a true responsibility or ethics should always take this

Jacques Derrida's Final Seminar (Fordham University Press, 2015) ch 1; Leonard Lawlor, 'A More Sufficient Response?' in Leonard Lawlor, *This is Not Sufficient: An Essay on Animality and Human Nature in Derrida* (Columbia University Press, 2007) 71-114.

²¹⁵ Derrida, *Of Hospitality*, above n 73, 75, 77, 79. See also, Naas, *Derrida's Hospitality*, above n 122, 20-24.

²¹⁶ See, eg, Anderson, *Ethics*, above n 71, 52.

²¹⁷ See, eg, Derrida, *The Animal That Therefore I Am*, above n 81, 136.

lack of difference between reaction and response into account.²¹⁸ That lack was a target of his deconstructions. That exposure through deconstructions is a working toward a responsibility that has Derridean justice as its ends, that requires the recognition and rethinking of all tracing beings, as individuals, as animot.²¹⁹ Derrida determined that if we *were* to recognise the workings of trace and *différance* within life, that would allow us to derive ‘another “logic” of decision, of the response and of the event’.²²⁰ He implored that we should take into account the relationship ‘of the living to their ipseity ... [to their] reactional automaticity, to death, to technics, or to the mechanical [*machinique*’].²²¹ Recognition of l’animot is a movement and a deconstruction toward Derridean justice, and toward futures that are absolutely different from our pasts. It would enable re-writing of our traces and reconstructions of our languages, logos and epistemologies.

The following Part 3 of this research considers and contrasts how nonhuman animal lives have been conceptualised in Western thought, particularly within sciences and Anglo-American propositions of ‘ethics’. Chapter 3 investigates whether Derrida’s propositions of trace and *différance* remain credible in context to contemporary thought in neurosciences. Chapter 4 contrasts the demand for Derridean justice with the predominant Anglo-American propositions of ethics regarding nonhuman animals. Chapter 5 briefly surveys other schools of thought that attempt a break from traditional Western rationality and that appear awakened to the suffering of nonhuman animals at the hands of humans.

²¹⁸ See, eg, *ibid*; Derrida, *The Beast & The Sovereign Vol I*, above n 5, 120.

²¹⁹ See Appendix 1, section D2.3: Derrida’s non-concept ‘animot’ rejects conceptualisation of all beings that are not human as ‘animal’ and it seeks to undo human-animal difference.

²²⁰ Derrida, *The Animal That Therefore I Am*, above n 81, 126.

²²¹ *Ibid* (*italics in original*).

**PART 3: A BRIEF SURVEY OF CONCEPTIONS OF NONHUMAN ANIMAL LIVES
IN WESTERN SCIENCES AND PHILOSOPHIES**

CHAPTER 3: TRACE, DIFFÉRANCE AND 'SENTIENCE' IN THE SCIENCES

3.1 Introduction¹

This chapter addresses three sub-questions of this thesis. The first sub-question is whether Derrida's propositions of trace and différance remain credible in relation to findings in contemporary neurosciences. This is necessary since trace and différance underpin his suggestions about the workings of life for many species of animals, writing in its fullest sense and Western epistemologies. They also underpin his justifications for responsibility and justice. As such, they justify the worth and potential of deconstructions. Since I am not a scientist, the approach I have taken is to start with non-technical introductions, and then I follow the commentary of respected scientists as they convey their views in lay terms.

The second sub-question is whether philosophically-posed human-animal differences are being reconsidered in, and beyond, law. The task requires interrogation of whether the trace of Cartesianism and other philosophically-thought human-animal differences, that Derrida described as constituting an 'abyss', are being rethought in studies of nonhuman animals. To address this question I mention some related areas of study.

The third sub-question considers whether conceptualisation of nonhuman animal 'sentience' in veterinary science appears to remain limited, and whether that influences law. To address this question, this chapter surveys the conceptualisation of 'sentience'. This is important because 'sentience' underpins common *reasoning* for why harms to nonhuman animals should be ameliorated. I review 'sentience' through the lenses of neuroscience, veterinary science, and law, to determine if that concept remains limited and infected by Cartesianism.

3.2 Consciousness in neuroscience

3.2.1 An introduction through Oliver Sacks and Nobel Prize winners

As a neurologist, the late Oliver Sacks explained that the study of consciousness is a 'central concern' in neuroscientific study, and that it is not limited to the perceptual mechanisms of human animals.² Related areas of study include those related to 'the higher reaches of

¹ This chapter is offered with some personal anxiety and regret in that I acknowledge some of the research mentioned in this chapter may have depended on scientific testing on nonhuman animals.

² Oliver Sacks, *The River of Consciousness* (Picador, 2017) 173.

memory, imagery, and self-reflective consciousness'.³ Leading research listed by Sacks includes that of Edelman,⁴ Kandel,⁵ Crick⁶ and Koch.⁷

In what appears to be not incompatible with Derrida's notion of *différance*, as a process at work, is what Sacks describes as William James' early proposition that 'consciousness [is] not a "thing" but a "process"'.⁸ In 1909, in *The Meaning of Truth*, James described that appreciation of 'reality' is:

an experience that "represents" it, in the sense of being substitutable for it in our thinking because it leads to the same associates, or in the sense of pointing to it through a chain of other experiences that either intervene or may intervene.⁹

³ Ibid.

⁴ Nobel Media, *Gerald M Edelman – Biographical* (1 April 2018) Nobelprize.org <https://www.nobelprize.org/nobel_prizes/medicine/laureates/1972/edelman-bio.html>: Gerald M Edelman is a professor at Rockefeller University, he holds various other positions, and:

His early studies on the structure and diversity of antibodies led to the Nobel Prize for Physiology or Medicine in 1972 ... His book published with Giulio Tononi, entitled *A Universe of Consciousness: How Matter Becomes Imagination*, presents exciting new data on the neural correlates of conscious experience. In his latest book... entitled *Wider than the Sky: The Phenomenal Gift of Consciousness*, Dr. Edelman offers a model of the biology of consciousness.

⁵ Eric R Kandel is professor of neuroscience at Columbia University, and in 2000 was awarded a Nobel Prize, along with Arvid Carlsson and Paul Greengard 'for their discoveries concerning signal transduction in the nervous system', and he had earlier found that 'short-term and long-term memories are formed by different [chemical] signals', and that '[t]his is true in all animals that learn, from molluscs to man': Nobel Media, *Eric R Kandel – Facts* (1 April 2018) Nobelprize.org <https://www.nobelprize.org/nobel_prizes/medicine/laureates/2000/kandel-facts.html>.

⁶ Francis Crick, received a Nobel prize in 1962, in conjunction with James Watson and Maurice Wilkins 'for their discoveries concerning the molecular structure of nucleic acids and its significance for information transfer in living material': Nobel Media, *The Nobel Prize in Physiology or Medicine 1962* (1 April 2018) Nobelprize.org <https://www.nobelprize.org/nobel_prizes/medicine/laureates/1962/>. Later in his career Crick was the J.W. Kieckhefer Distinguished Research Professor at the Salk Institute for Biological Studies in La Jolla, California and he was concerned with consciousness. With Christof Koch, they published *Towards a Neurobiological Theory of Consciousness* in 1990, that suggested that: 'the origin of consciousness can be found at the neural level and appears to have an intimate connection with other two brain properties: short-term memory and serial attention': Andrea Eugenio Cavanna and Andrea Nani, 'Francis Crick and Christof Koch: A Neurobiological Framework for the Study of Consciousness' in Andrea Eugenio Cavanna and Andrea Nani, *Consciousness: Theories in Neuroscience and Philosophy of Mind* (Springer, 2014) 99-103, 99 ('Crick and Koch').

⁷ Christof Koch, *Christof Koch's Home Page* <<https://christofkoch.com/>>:

I am the Chief Scientific Officer of the Allen Institute for Brain Science in Seattle ... I was a Professor of Biology and Engineering at the California Institute of Technology in Pasadena in Southern California. I think a lot about the universe and how it came to be, about the brain, how it produces consciousness and how the sentient mind emerges from the physical brain.

⁸ Sacks, above n 2, 176. Sacks does not provide a reference for this particular quote, however his bibliography does include three texts relevant to James, all published in the late 1890s.

⁹ William James, 'The Essence of Humanism' in *The Meaning of Truth: A Sequel to "Pragmatism"* (1909) ch V [III]. The original includes significant capitalisation of the text which I have omitted.

This not only, in Derridean terms speaks of representation, conceptuality and construction through trace and *différance*, but also of supplementarity, that what is brought to presence is a substitute, that does not add to, but actually replaces, in thought, what we *perceive* is reality. It also makes an early link between the fact that scientists studying consciousness have little choice but to engage with philosophy and issues of epistemology.¹⁰

In contemporary thought, consciousness is still perceived as a process and '[involves] integration of the activities of multiple brain regions'.¹¹ Edelman suggests that a moment of consciousness, which he refers to as a 'scene' appears to be united 'at least in healthy individuals'.¹² Yet, the multiplicity of experience within just one scene is not reducible to one thing, is changeable and subject to stimuli.¹³

The scene is not just wider than the sky, it can contain many disparate elements – sensations, perceptions, images, memories, thoughts, emotions, aches, pains, vague feelings, and so on. Looked at from the inside, consciousness seems continually to change, yet at each moment it is all of piece – what I have called “the remembered present” – reflecting the fact that all my past experience is engaged in forming my integrated awareness of this single moment.¹⁴

According to Sacks, in the study of visual continuity, Crick and Koch found that it 'is perceived or constructed, and, by extension, the seeming continuity of consciousness itself'.¹⁵ They found that 'conscious awareness is a series of static snapshots, with motion “painted” on them ... that perception occurs in discrete epochs'.¹⁶ They explain that it is possible that consciousness involves a series of 'snapshots' as a result of neurons firing, that at a particular threshold of around one hundred milliseconds maintains consciousness to produce a 'perceptual moment'.¹⁷ According to Sacks, those authors further explain that

¹⁰ See also Christof Koch, *Consciousness: Confessions of a Romantic Reductionist* (MIT Press, 2012) ch 1 ('Confessions').

¹¹ Gerald M Edelman, *Wider Than the Sky: The Phenomenal Gift of Consciousness* (Basic Books, 2004) 31.

¹² *Ibid* 7.

¹³ *Ibid*.

¹⁴ *Ibid*.

¹⁵ Sacks, above n 2, 177.

¹⁶ Francis Crick and Christof Koch, 'A Framework for Consciousness' (2003) 6(2) *Nature Neuroscience* 119, 122 citing J Zihl, D Von Cramon and N Mai, 'Selective disturbance of movement vision after bilateral brain damage' (1983) 106 *Brain* 313. See also RH Hess, C L Baker and J Zihl, 'The 'motion-blind' patient: low-level spatial and temporal filters' (1989) 9 *Journal of Neuroscience* 1628.

¹⁷ Crick and Koch, above n 16, 120.

consciousness is the result of 'a continual overlapping of successive perceptual moments'.¹⁸ This sounds like Derrida's proposition of *différance*.

As Sacks describes:

[i]f a dynamic, flowing consciousness allows, at the lowest level, a continuous active scanning or looking, at a higher level it allows the interaction of perception and memory, of present and past. And such a "primary" consciousness, as Edelman calls it, is highly efficacious, highly adaptive, in the struggle for life.¹⁹

Edelman's consideration of these functions is not limited to human animals.²⁰ He explains that a nonhuman animal may have primary consciousness, even where they '[lack] semantic or linguistic capabilities [where their] brain organization is nevertheless similar to ours'.²¹ That is, having 'the state of being mentally aware of things in the world, of having mental images in the [remembered] present'.²² For animals with primary consciousness, '[c]onsciousness allowed integration of the present scene with the animal's past experience, and that integration has survival value whether a tiger [as predator] is present or not'.²³ Sacks extends these suggested nonhuman animal experiences to human consciousness by explaining that:

[f]rom such a relatively simple primary consciousness, we leap to human consciousness, with the advent of language and self-consciousness and an explicit sense of the past and the future ... For consciousness is always active and selective – charged with feelings and meanings uniquely our own, informing our choices and interfusing our perceptions.²⁴

Following from Freud's understanding of consciousness and no doubt many other traces and influences, Edelman, according to Sacks, suggests that 'every perception is a creation and every memory a re-recreation or recategorisation'.²⁵ This accords with Derrida's proposition

¹⁸ Sacks, above n 2, 180. See Crick and Koch, above n 16, 122.

¹⁹ Sacks, above n 2, 181.

²⁰ Edelman, above n 11, 9. Koch also surmises that 'many animals, mammals especially, possess some of the features of consciousness ... they all experience something', and that 'it is not only physical pain that we share with animals but suffering as well... the structure of the nervous system is comparable across mammals ... and there are a myriad of quantitative differences at the hardware level': Koch, *Confessions*, above n 10, 32.

²¹ Edelman, above n 11, 9.

²² *Ibid.*

²³ *Ibid* 11; see also Sacks, above n 2, 182. Edelman goes on to contrast higher-order consciousness which I describe in section 3.2.4 below.

²⁴ Sacks, above n 2, 182-83.

²⁵ *Ibid* 99. Sacks does not cite any particular text of Edelman here. See also Todd E Feinberg and Jon M Mallatt, *The Ancient Origins of Consciousness: How the Brain Created Experience* (MIT Press, 2016) 114 citing G M Edelman, *The Remembered Present: A Biological Theory of Consciousness*

that what we perceive of reality and thinking is actually a recreation and re-collection from within our individual (accumulation of) traces, reconstituted from what is already written within us. Of course, this recollection, as if echoed from the past, is in itself a demonstration of the proposition.

In terms of decision making, and Derrida's reference to an 'economy' at work, it appears that contemporary neuroscience also employs a similar conceptual reference. In Gifford's view:

[w]e acquire information about the expected costs and benefits of possible actions through interaction with the world; our brains then use simulations that incorporate the discounted expected costs and benefits of the actions when generating new plans of action. After an action the expected costs and benefits are subject to revision based on the outcome of the action, making choice an iterative, on-going learning process ... Importantly for our purposes, these systems operate below the level of consciousness²⁶

Frith and Rees agree that 'consciousness is not necessary for rational thought', in that decisions can be made through not-conscious 'mental processes'.²⁷ Further, they suggest that there are different forms of consciousness at different stages of life, and across species.²⁸ Koch suggests that '[i]t is possible that consciousness [of different types] is common to *all* multicellular animals'.²⁹ Feinberg and Mallatt note that there is dispute about different elements of consciousness and that many researchers believe that 'only mammals and birds are conscious'.³⁰ Feinberg and Mallatt argue that all vertebrates (including fish) are

(Basic Books, 1989); G M Edelman, *Bright Air, Brilliant Fire: On the Matter of the Mind* (Basic Books, 1992); G M Edelman, J A Gally, and B J Baars, 'Biology of Consciousness' (2011) 2 *Frontiers in Psychology* <<https://www.frontiersin.org/article/10.3389/fpsyg.2011.00004>>:

... memory plays an important role in sensory consciousness. In conscious perception, images are continually called up from memory, then modified by the new, incoming sensory information into an updated image of the world as it is being experienced. Thus, there is no need to build completely new mental images from instant to instant, just a need to adjust and update the existing image. And even more basically, almost nothing sensed can be recognized without prior learning and training, and that depends on memory.

²⁶ Adam Gifford Jr, 'Rationality and intertemporal choice' (2009) 11 *Journal of Bioeconomics* 223, 229 citing K Doya, 'Modulators of decision making' (2008) 11 *Nature Neuroscience* 410. Gifford's paper makes reference to many neuroscience papers including those of Edelman, Koch and Crick. See also David McFarland, 'The Biological Basis of Economic Behaviour' in David McFarland, *The Biological Basis of Economic Behaviour: A Concise Introduction* (Palgrave Macmillan, 2016) 72-89.

²⁷ Chris D Frith and Geraint Rees, 'A Brief History of the Scientific Approach to the Study of Consciousness' in Susan Schneider and Max Velmans, *The Blackwell Companion to Consciousness* (Hoboken, 2017) 3-16, 12.

²⁸ Frith and Rees, above n 27, 13. For an analysis on how consciousness may have developed across animals such as fish, birds and mammals, see: Feinberg and Mallatt, above n 25, ch 6.

²⁹ Koch, *Confessions*, above n 10, 33.

³⁰ Feinberg and Mallatt, above n 25, 118. They list these researchers as including Bernard Baars, David Edelman and Anil Seth.

conscious,³¹ and that different forms of consciousness evolved as different senses and memory developed³² from five hundred and twenty million years ago.³³ The evolutionary history of consciousness is still unknown, given the biological differences of different types of animals.³⁴

3.2.2 Writing and cognition

Freud, according to Sacks, had also postulated that there is not a 'centre' for writing in the brain.³⁵ Rather, Freud believed that the brain has, '*systems* for achieving cognitive goals'.³⁶ Since 'literacy was not innate', Sacks recalls that Freud suggested it is something that is developed as a result of adaption of that cognitive potential by each human individual.³⁷ That seems to be in concert with Derrida's suggestion that human languages are a technology of the broader concept of writing (as explained in Chapter 2 and Appendix 1, Part A), and that there could be many forms of animal writing technologies that are not alphabetical. For example, the function of marking and sensing more generally, through scent and olfactory functions, are also technologies of writing. Hence Derrida's use of the word 'trace', since we, as just one form of organism, follow others, write in the world, and leave our own autobiographical marks. We are also marked or written by ourselves and others, other things, experiences and sensory perceptions. Our beingness, what we think, what we come to 'know', is a result of *différance*, which is a movement through trace.

Further (also apparently in concert with Derrida's propositions as I suggest above), Edelman suggests that the link between symbols and meaning is biologically different in different human individuals:

there is no single circuit activity or code that corresponds to a given conscious "representation".³⁸

the conscious process embeds representation in a degenerate ... context-dependent web: there are many ways in which individual neural circuits, synaptic populations, varying environmental signals, and previous history can lead to the same meaning.³⁹

³¹ Ibid.

³² Ibid 114-26.

³³ Ibid 128.

³⁴ Ibid 126-27.

³⁵ Sacks, above n 2, 88.

³⁶ Ibid (italics in original).

³⁷ Ibid.

³⁸ Edelman, above n 11, 104.

³⁹ Ibid 105.

As further support for Derrida's propositions, I suggest, are Kandel's discoveries. Kandel found that memory and reactions in different kinds of animals, including humans, are a result of different forms of writings, that may utilise not only neurological but also chemical triggers.⁴⁰ In a recent text Kandel explains how the human brain processes imagery.⁴¹ It has been found that there are different pathways in the brain that share information,⁴² that determine *where* a sighted object is in the world, and *what* the object is.⁴³ The *what* pathway leads to the hippocampus which 'is concerned with the explicit memory of people, places, and objects [and it is] recruited by the beholder's brain for top-down processing'.⁴⁴ That 'top-down processing' is where 'the brain uses cognitive processes such as attention, learning, and memory – everything we have seen and understood before – to interpret the information'.⁴⁵ Kandel also cites Triesman's finding that a 'preattentive process' is employed to detect a sighted object and involves scanning for features and focussing on 'distinctions between figure and ground by encoding all of the useful elementary properties ... its colour, size, and orientation'.⁴⁶ A binding process is also employed to bring together the features and location.⁴⁷ When the top down processing is applied:

it disregards details that are perceived as behaviourally irrelevant in a given context; it searches for constancy; it attempts to abstract the essential, constant features of objects, people, and landscapes; and, particularly important, it compares the present image to images encountered in the past. These biological findings confirm Kris and Gombrich's inference that visual perception is not a simple window on the world, but truly a creation of the brain.⁴⁸

It appears to me, that this sounds like trace and différance at work, within each of us.

⁴⁰ Nobel Media, *Eric R Kandel – Facts* (1 April 2018) Nobelprize.org <https://www.nobelprize.org/nobel_prizes/medicine/laureates/2000/kandel-facts.html> citing Eric R Kandel, *In Search of Memory: The Emergence of a New Science of Mind* (WW Norton, 2007). See also Sacks, above n 2, 74-77.

⁴¹ Eric R Kandel, *Reductionism in Art and Brain Science* (Columbia University Press, 2016) 25-29 ('*Reductionism*').

⁴² Ibid 28.

⁴³ Ibid 26-29.

⁴⁴ Ibid 28.

⁴⁵ Ibid.

⁴⁶ Ibid 29 citing Anne Triesman, 'Features and Objects in Visual Processing' (1986) 255(5) *Scientific American* 114.

⁴⁷ Kandel, *Reductionism*, above n 41, 29 citing Triesman, above n 46, R H Wurtz and E R Kandel, 'Perception of Motion, Depth and Form' in Eric R Kandel, James H Schwartz and Thomas M Jessell (eds), *Principles of Neural Science IV* (McGraw-Hill, 4th ed, 2000) 548-71.

⁴⁸ Kandel, *Reductionism*, above n 41, 30.

3.2.3 Neuroscientists as activists?

On 7 July 2012, at the Francis Crick Memorial Conference on Consciousness in Human and Nonhuman Animals, at University of Cambridge, the Cambridge Declaration on Consciousness was 'publicly proclaimed' by neuroscientists Philip Low, David B Edelman and Christof Koch.⁴⁹ The Declaration was signed by the conference participants, consisting of a 'prominent international group of cognitive neuroscientists, neuropharmacologists, neurophysiologists, neuroanatomists and computational neuroscientists', in the presence of Stephen Hawking. It was declared that:

The absence of a neocortex does not appear to preclude an organism from experiencing affective states. Convergent evidence indicates that nonhuman animals have the neuroanatomical, neurochemical, and neurophysiological substrates of conscious states along with the capacity to exhibit intentional behaviors. Consequently, the weight of evidence indicates that humans are not unique in possessing the neurological substrates that generate consciousness. Nonhuman animals, including all mammals and birds, and many other creatures, including octopuses, also possess these neurological substrates.⁵⁰

3.2.4 The purported language-consciousness connection

This brief survey of neuroscience highlights that different animals may experience different forms of consciousness, and modes of building and utilising knowledge. Koch eloquently describes:

I furthermore assume that many animals, mammals especially, possess some of the features of consciousness: They see, hear, smell, and otherwise experience the world. Of course, each species has its own unique sensorium, matched to its ecological niche.⁵¹

One of the common-sense differences between human and nonhuman animals is the human animal's ability to develop and utilise alphabetic languages. That language capability is what enables us to develop knowledge, technologies, reason, ethics and perhaps our whole worlds as we perceive them. In terms of neuroscience, it is acknowledged that there is still much to learn about how language works in the human brain.⁵² It seems there would be

⁴⁹ See Francis Crick Memorial Conference, *Consciousness in Human and Nonhuman Animals* <<http://fcmconference.org/>>.

⁵⁰ Phillip Low, *The Cambridge Declaration on Consciousness* (7 July 2012) Francis Crick Memorial Conference <<http://fcmconference.org/img/CambridgeDeclarationOnConsciousness.pdf>> 2.

⁵¹ Koch, *Confessions*, above n 10, 32.

⁵² See, eg, Mirko Grimaldi, 'Toward a neural theory of language: Old issues and new perspectives' (2012) 25 *Journal of Neurolinguistics* 304, 304, 322.

even more to learn about how different forms of marking and tracing work, differently, in nonhuman animals. There are a number of approaches to the issue with each area producing a multitude of texts and research. These areas of study include linguistics,⁵³ biology,⁵⁴ cognitive neuroscience,⁵⁵ neurolinguistics⁵⁶ and philosophies.⁵⁷ While it is not possible to cover these areas in any detail in this research, I offer some of the relevant commentary from the field of neuroscience as an introduction.

Edelman suggests a connection between ‘higher-order consciousness’ and linguistic ability:

Primary consciousness is the state of being mentally aware of things in the world, of having mental images in the present. It is possessed not only by humans but also by animals lacking semantic or linguistic capabilities whose brain organization is nevertheless similar to ours. Primary consciousness is not accompanied by any sense of a socially defined self with a concept of a past or a future. It exists primarily in the remembered present. In contrast, higher-order consciousness involves the ability to be conscious of being conscious, and it allows the recognition by a thinking subject of his or her own acts and affections. It is accompanied by the ability in the waking state explicitly to recreate past episodes and to create future intentions. As a minimal level, it requires semantic ability, that is, the assignment of meaning to a symbol. In its most developed form, it requires linguistic ability, that is, the mastery of a whole system of symbols and grammar. Higher primates, to some minimal degree, are assumed to have it, and in its most developed form it is distinctive of humans. Both cases require an internal ability to deal with tokens and symbols.⁵⁸

⁵³ See, eg, John R Taylor, *The Mental Corpus* (Oxford University Press, 2015); Julie Tetel Andresen, *Linguistics and Evolution: A Developmental Approach* (Cambridge University Press, 2014).

⁵⁴ See, eg, Janine M Benyus, *The Secret Language of Animals: A Guide to Remarkable Behaviour* (Black Dog & Leventhal, 2014); Philip Lieberman, *Toward an Evolutionary Biology of Language* (Harvard University Press, 2006); Peter B Denes and Elliot N Pinson, *The Speech Chain: The Physics and Biology of Spoken Language* (Waveland Press, 2nd ed, 2015).

⁵⁵ See, eg, David Kemmerer, *Cognitive Neuroscience of Language* (Taylor & Francis, 2015); MIT Press, *Journal of Cognitive Neuroscience* <<http://cognet.mit.edu/content/journal-of-cognitive-neuroscience>>.

⁵⁶ See, eg, Elsevier, *Journal of Neurolinguistics* <<https://www.journals.elsevier.com/journal-of-neurolinguistics>>; John C L Ingram, *Neurolinguistics: An Introduction to Spoken Language, Processing and its Disorders* (Cambridge University Press, 2012).

⁵⁷ See, eg, Michael P Wolf, *Philosophy of Language* Internet Encyclopedia of Philosophy <<https://www.iep.utm.edu/lang-phi/>>; Fiona Cowie, *Innateness and Language* (Fall 2017) Stanford Encyclopedia of Philosophy <<https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=innateness-language>>.

⁵⁸ Edelman, above n 11, 9.

This short extract makes assumptions about primary consciousness in some subjects. I feel we cannot be sure whether this view is tainted by Cartesianism.⁵⁹ Koch also points out that *human* animals do not remain in a self-conscious state, and do not experience complete immersion in the here and now in particular circumstances where '[t]he passage of time slows down, and the sense of self disappears'.⁶⁰ It can be a result of deep concentration, enjoyment, meditation or the effects of excitement.⁶¹ However, it appears obvious, and a matter of common-sense that nonhuman animals do not write in alphabetic form, and that semantic ability in human animals does contribute to our constructions of the world, our abilities to create and communicate ideas, to develop technologies and so on. Edelman clarifies that in his view:

Lacking these functions [of primary consciousness] does not mean that they lack a self, that they lack imagery in the remembered present, or that they do not have long-term memory. Within the attentive focus of consciousness in the remembered present, they can even carry out plans and react in terms of their past value-category memory.⁶²

Edelman suggest that what they lack as a result, is the ability 'to use symbols as tokens to lend meaning to acts and events and to reason about events not unfolding in the present moment'.⁶³ Although I doubt this is strictly true when a nonhuman animal is tracking another being where memories and differentiation of scents (of a multitude that we cannot even begin to imagine) are perhaps employed to construct and reconstruct conceptualisations of past presences. Edelman reasons that even without language, it appears that some primates can recognise themselves and 'can reason about the consequences of the actions' of others, and so they may have 'a form of higher-order consciousness'.⁶⁴ Another element related to the human language function is the capability for speech which developed as a result of the 'bipedal posture'.⁶⁵ Capability for conceptualisation is another factor.⁶⁶ Although this conceptualisation capability also seems questionable as uniquely human, in context to nonhuman animals' capacity for tracking, tracing and identifying other species and individuals. As an example, Slobodchikoff, Perla and Verdolin found that within studies of

⁵⁹ Edelman notes it is known that some nonhuman animals, including rodents employ hippocampal function to determine and remember 'a sense of place': *ibid* 23. At 59 Edelman suggests that human animal testing of consciousness is assisted by semantic ability since human animals can report their conscious states whereas nonhuman animals cannot.

⁶⁰ Koch, *Confessions*, above n 10, 34.

⁶¹ *Ibid*.

⁶² Edelman, above n 11, 97-98.

⁶³ *Ibid* 98.

⁶⁴ *Ibid*.

⁶⁵ *Ibid* 102.

⁶⁶ *Ibid* 103.

prairie dogs, it was clear that a language was used to communicate impending dangers.⁶⁷ They found that not only were different sounds used to communicate specific things, but also that where new dangers were introduced, the prairie dogs introduced new sounds that appeared to communicate those additional factors within a semantic structure.⁶⁸ Overall they found that prairie dogs' alarm calls in particular include 'acoustical, visual and olfactory signals' and that this knowledge of 'non-human communication systems ... has further narrowed the gap between human animals and other life forms'.⁶⁹

A more detailed account of the evolution of languages in context to human biological adaptations, grammar, gestures and cultures, is provided in the recent text of the American linguist Daniel Everett.⁷⁰ Stephen R Anderson also advances arguments as to why language skills are particular to human animals.⁷¹

In regard to the potential for Cartesian framings of investigations, Everett warns that:

One of the most problematic issues in the lengthy conversation in science about whether animals have cognitive abilities in any way similar to those of humans is the profoundly circular assumption that cognition requires language, human language at that, and that therefore animals cannot have cognition because they lack language. This is simply declaring by fiat that humans alone have cognition, before research has been conducted. Such ideas are misguided by their anthropocentric framing of the questions.⁷²

Koch argues that consciousness is not dependent on language ability.⁷³ He complains that '[t]he perennial habit of introspection has led many intellectuals to devalue the unreflective, nonverbal character of much of life and to elevate language to the role of kingmaker'.⁷⁴ In Koch's view, 'self-consciousness is an evolutionary adaptation of older forms of body and

⁶⁷ C N Slobodchikoff, Bianca S Perla, Jennifer L Verdolin, *Prairie Dogs: Communication and Community in an Animal Society* (Harvard University Press, 2009) 73-77.

⁶⁸ Ibid.

⁶⁹ Ibid 85.

⁷⁰ Daniel Everett, *How Language Began: The Story of Humanity's Greatest Invention* (Profile Books, 2017).

⁷¹ Stephen R Anderson, *Doctor Dolittle's Delusion* (Yale University Press, 2004) 305-323. See also Marc D Hauswer, Noam Chomsky, W Tecumseh Fitch, 'The Faculty of Language: What is it, Who has it, and How did it Evolve?' (2002) 298 (5598) *Science* 1569; William D Hopkins, 'Apes, Language and the Brain' in S A Helekar (ed), *Animal Models of Speech and Language Disorders* (Springer, 2013) 263-288; Susan Peason, 'Speaking Bodies, Speaking Minds: Animals, Language, History' (December 2013) 52 *History and Theory* 91.

⁷² Everett, above n 70, 44.

⁷³ Koch, *Confessions*, above n 10, 35.

⁷⁴ Ibid.

pain consciousness'.⁷⁵ Neither does he believe that emotional states are necessary to experience consciousness.⁷⁶

3.2.5 Summary

Whilst it is not possible or appropriate in this thesis to provide a detailed literature review of current thinking of cognitive function in neuroscience, it appears that this brief summary demonstrates that Derrida's propositions of trace and *différance* are not incompatible with current knowledge. This was important to establish since Derrida's propositions about beingness, and hence deconstructions, rely on those premises. It also leaves open questions about rationality and epistemology that further supports arguments for deconstructive readings of texts and 'knowledge'. An unanticipated element of the survey in this chapter was the contemporary questioning of human agency, which Derrida had hinted at in *Force of Law*,⁷⁷ as relevant to interrogation of legal process and legal rules.

Whilst it is a matter of common-sense that human animals uniquely employ alphabetic languages to develop and communicate knowledge, there is still much to be understood about how languages work and get-to-work in the human animal, and how nonhuman animals employ marking and tracing differently. From a Derridean and non-Cartesian and non-Kantian perspective, what needs to be said is that whatever those differences may be biologically, they do not amount to any *reason*, that is, any justification for exploitation of nonhuman animals.

3.3 Bridging the abyss

This section recounts some of the elements of the abyss of human-animal difference posited by Western philosophy as recalled by Derrida. It also briefly points to some additional sources of literature that seek to rethink that trace. In connecting some of the philosophically-thought differences to the application of law today, I briefly recall arguments of Professor Wise as litigator for the Nonhuman Rights Project. He has argued that great apes and elephants have advanced cognitive abilities that warrant them being awarded legal personhood. That leads to a brief recounting of the Argentinian judgment that ordered that Cecilia the chimpanzee, as a sentient nonhuman legal person, be removed to a sanctuary. In that case, the Judge recounted authoritative reverberating voices, recognised Cecilia's 'sentience', and called for empathy.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' (1990) 11 *Cardozo Law Review* 919, 961-65 ('*Force of Law*').

3.3.1 Bridging the abyss

In Appendix 1, Part D, I retraced some of the arguments in Western philosophy, particularly through the lenses of Descartes, Kant, Heidegger, Levinas and Lacan, as recounted by Derrida that serve to construct an 'abyss' of human-animal difference. What nonhuman animals were and perhaps still are presumed to lack include capabilities of: self-reflection,⁷⁸ response beyond mere reaction,⁷⁹ and response specifically in regard to the context of questions and answers.⁸⁰ Further, nonhuman animals have been characterised as: 'poor in the world'⁸¹ and so poor in spirit⁸² in that they cannot form relationships with other beings;⁸³ and as not dying⁸⁴ but merely '[coming] to an end';⁸⁵ as living in a state of benumbment or captivation;⁸⁶ as not identifying with themselves as a 'subject of the signifier'; as unable to erase their own traces, and; as unable to pretend to pretend.⁸⁷ They were also thought to remain in a state of fixity of the imaginary rather than the symbolic, and capable of merely simple coding rather than employing forms of languages.⁸⁸

⁷⁸ Jacques Derrida in Marie-Louise Mallet (ed), *The Animal That Therefore I Am* (David Wills trans, Fordham University Press, 2008) 59 [trans of: *L'animal que donc je suis* (first published 2006)] ('*The Animal That Therefore I Am*').

⁷⁹ Ibid 79, 81-84.

⁸⁰ Ibid 79, 84.

⁸¹ Heidegger, *Being and Time* (John Macquarrie and Edward Robinson trans, Harper and Row, 1962) 177 (*Being and Time*). See also, Jacques Derrida, *Of Spirit: Heidegger and the Question* (Geoffrey Bennington and Rachel Bowlby trans, University of Chicago Press, 1989) 51, 57 [trans of: *De l'esprit* (first published 1987)] ('*Of Spirit*').

⁸² See also, Derrida, *Of Spirit*, above n 81, 47-57.

⁸³ Martin Heidegger, *The Fundamental Concepts of Metaphysics: World, Finitude, Solitude* (William McNeill and Nicholas Walker trans, Indiana University Press, 1995) 311 ('*Metaphysics*') quoted in Derrida, *The Animal That Therefore I Am*, above n 78, 143.

⁸⁴ Heidegger, *Being and Time*, above n 81, 179. See also Derrida, *The Animal That Therefore I Am*, above n 78, 143-44, 154.

⁸⁵ Heidegger, *Being and Time*, above n 81, 267. See also Jacques Derrida in Michel Lisse, Marie-Louise Mallet and Ginette Michaud (eds), *The Beast & the Sovereign Volume II* (Geoffrey Bennington trans, University of Chicago Press, 2011) 116, 121-22 [trans of: *Seminaire: La bete el le souverain Volume II (2002-2003)* (first published 2010)] ('*The Beast & the Sovereign Vol II*').

⁸⁶ Heidegger, *Being and Time*, above n 81, 267. See also Derrida, *The Beast & The Sovereign Vol II*, above n 85, 115-16; 122-23 218 quoting Martin Heidegger, *Einführung in die Metaphysik* (Niemeyer, 1976) 443 ('*Metaphysik*').

⁸⁷ Derrida, *The Animal That Therefore I Am*, above n 78, 120 citing Jacques Lacan, 'The Subversion of the Subject and the Dialectic of Desire in the Freudian Unconscious' in Jacques Lacan, *Ecrits* (Alan Sheridan trans, Norton, 1977) 305 ('*Sheridan Ecrits*'). See also Derrida, *The Animal That Therefore I Am*, above n 78, 128-35; Jacques Derrida in Michel Lisse, Marie-Louise Mallet and Ginette Michaud (eds), *The Beast & the Sovereign Volume I* (Geoffrey Bennington trans, University of Chicago Press, 2009) 121-33 [trans of: *Seminaire: La bete el le souverain Volume I (2001-2002)* (first published 2008)] ('*The Beast & the Sovereign Vol I*').

⁸⁸ Derrida, *The Animal That Therefore I Am*, above n 78, 122, 137-39; Derrida, *The Beast & The Sovereign Vol I*, above n 87, 112-15.

In Chapters 4 and 5 I list some additional sources of philosophically-based literature that disputes traditional notions of human-animal difference. That literature emanates from animal law related philosophies,⁸⁹ Critical Animal Studies and related disciplines,⁹⁰ and posthumanist thinking.⁹¹ Other areas of study in the avalanche of literature that contributes toward recasting human-animal differences include animal law,⁹² environmental law and ecology,⁹³ philosophies,⁹⁴ sciences,⁹⁵ theology,⁹⁶ anthropology,⁹⁷ economics,⁹⁸ bioethics,⁹⁹ political science¹⁰⁰ and other disciplines.¹⁰¹

⁸⁹ See Chapter 4 and Chapter 5, section 5.6.

⁹⁰ See Chapter 5, section 5.3.

⁹¹ See Chapter 5, section 5.4.

⁹² There are a wide selection of journals including: Journal of Animal Ethics which is collaboration with the Oxford Centre for Animal Ethics. See Oxford Centre for Animal Ethics, *Welcome* <<http://www.oxfordanimalethics.com/about-the-centre/welcome/>>: 'We want to put ethical concern for animals on the intellectual agenda, and contribute to an enlightened public debate about animals.'

See also Lewis & Clark Law School, *Animal Law Review*

<http://law.lclark.edu/law_reviews/animal_law_review/>; Syracuse University College of Law, *Animal Law eJournal* <https://www.ssrn.com/update/lisn/lisn_animal-law.html>; Åbo Akademi University (Finland), *Global Journal of Animal Law* <<https://ojs.abo.fi/ojs/index.php/gjal>>; University of Louisville Brandeis School of Law, *Journal of Animal and Environmental Law* <<http://louisvillejael.com/>>.

⁹³ See, eg, David R Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (ECW Press, 2017); Joyce D'Silva and John Webster, *The Meat Crisis: Developing More Sustainable and Ethical Production and Consumption* (Taylor & Francis, 2017); Randall S Abate, *What can Animal Law Learn from Environmental Law?* (Environmental Law Institute, 2015).

⁹⁴ See, eg, Mark H Bernstein (ed), *The Moral Equality of Humans and Animals* (Palgrave MacMillan, 2015); Kelly Oliver, *Animal Lessons: How they Teach Us to Be Human* (Columbia University Press, 2009); Louise Westling, *The Logos of the Living World: Merleau-Ponty, Animals and Language* (Fordham University Press, 2014); Bernard Rollin, 'Raising consciousness about chicken consciousness' (2017) 17 *Animal Sentience* 2; M Rowlands, 'Are animals persons?' (2016) 10 *Animal Sentience* 1; Matthew Senior, David L Clark and Carla Freccero (eds), *Animots: Postanimality in French Thought* (Yale University Press, 2015).

⁹⁵ See, eg, Carl Safina, *Beyond Words: What Animals Think and Feel* (Picador, 2015); Frans de Waal, *Are We Smart Enough to Know How Smart Animals Are?* (WW Norton, 2016); Jonathan Balcombe, *Second Nature: The Inner Lives of Animals* (Palgrave Macmillan, 2010); Gisela Kaplan, *Bird Minds: Cognition and Behaviour of Australian Native Birds* (CSIRO, 2015); Jane Goodall, *In the Shadow of Man* (Mariner Books, 2010); Irene M Pepperberg, *Alex & Me* (Scribe, 2009); Kristin Andrews, 'Cow Persons? How to Find Out Commentary on Marino and Allen (2017): The Psychology of Cows' (2017) 4(4) *Animal Behaviour Cognition* 499; Marino Lori, 'The inconvenient truth about thinking chickens' (2017) 17 *Animal Sentience* 1

<<http://animalstudiesrepository.org/animisent/vol2/iss17/1/>>.

⁹⁶ See, eg, Cornel W du Toit, 'Pursuing an understanding of animal consciousness: Implications for animal morality and a creaturely theology' (2015) 36(3) *Verbum et Ecclesia* <<http://dx.doi.org/10.4102/ve.v36i3.1442>>; Andrew Linzey, *Why Animal Suffering Matters: Philosophy, Theology and Practical Ethics* (Oxford University Press, 2009).

⁹⁷ See, eg, Geoffrey Dierckxsens et al (eds), *The Animal Inside: Essays at the Intersection of Philosophical Anthropology and Animal* (Rowman & Littlefield, 2017); Monika Milosavljević, 'Savage Man as the Measure of Alterity' (2016) 6(3) *Etnoantropološki Problemi* 607; Ivana Živaljević, 'Animals between Nature and Culture: The Story of Archaeozoology' (2016) 8(4) *Etnoantropološki Problemi* 1137.

3.3.2 Professor Wise's and the Nonhuman Rights Project arguments

As litigator and advocate for the Nonhuman Rights Project, Professor Wise's arguments, in the United States' courts, go some way toward bridging the abyss of human-animal difference. However, at this time, his approach utilises a 'same as us' argument that if successful, may serve to simply shift and reinstate exclusionary limits for other nonhuman animals. For example, what was reported in one transcript was that Professor Wise stated that '[chimpanzees] are not cabined by instinct like many perhaps in the nonhuman kingdom are'.¹⁰²

So far, Professor Wise has failed in his argument for legal personhood for the purpose of the writ of habeus corpus, for the chimpanzees Leo and Hercules.¹⁰³ In the 2015 New York Supreme Court case of *Matter of Nonhuman Rights Project Inc v Stanley*,¹⁰⁴ he argued that:

because chimpanzees possess fundamental attributes of personhood in that they are demonstrably autonomous, self-aware, and self-determining, and otherwise are very

⁹⁸ See, eg, Wayne Pacelle, *The Humane Economy* (Harper Collins, 2016); Yew-Kwang Ng, 'How welfare biology and commonsense may help to reduce animal suffering' (2016) 7(1) *Animal Sentience* <<http://animalstudiesrepository.org/animsent/vol1/iss7/1/>>.

⁹⁹ See, eg, Marc Bekoff and Jessica Pierce, 'Animal welfare cannot adequately protect nonhuman animals: The need for a science of animal well-being' (2017) 7(2) *Animal Sentience* <<http://animalstudiesrepository.org/animsent/vol1/iss7/2/>>.

¹⁰⁰ See, eg, Paola Cavalieri (ed), *Philosophy and the Politics of Animal Liberation* (Palgrave Macmillan, 2016); Dinesh Joseph Wadiwel, *The War Against Animals* (Brill, 2015); Matthew Chrulew and Dinesh Joseph Wadiwel, *Foucault and Animals* (Brill, 2016); Sue Donaldson and Will Kymlicka, 'Linking animal ethics and animal welfare science: Commentary on Broom on animal welfare' (2016) 5(5) *Animal Sentience* <<http://animalstudiesrepository.org/animsent/vol1/iss5/5/>>; Dinesh Wadiwel, 'Fish and pain: The politics of doubt' (2016) 3(8) *Animal Sentience* <<http://animalstudiesrepository.org/cgi/viewcontent.cgi?article=1054&context=animsent>>.

¹⁰¹ See, eg, Yamini Narayanan, 'Cow Protection as "Casteised Speciesism": Sacralisation, Commercialisation and Politicisation' (2018) *South Asia: Journal of South Asian Studies* <<https://www.tandfonline.com/doi/abs/10.1080/00856401.2018.1419794?journalCode=csas20>>; Philip Armstrong, *What Animals Mean in the Fiction of Modernity* (Routledge, 2008); University of Wollongong Australia, *Animal Studies Journal* <<http://ro.uow.edu.au/asj/>>.

¹⁰² Transcript of Proceedings, *Stanley* (New York Supreme Court, 152736/2015, Jaffe J, 29 July 2015) 35 (Wise).

¹⁰³ The Nonhuman Rights Project reports, that independently of any litigation, Hercules and Leo have been transferred to a sanctuary: Nonhuman Rights Project, *NhRP Statement on the Transfer of Hercules and Leo to Project Chimps* (22 March 2018) <<https://www.nonhumanrights.org/blog/hercules-leo-project-chimps/>>.

¹⁰⁴ (NY, 152736/15, 29 July 2015) ('*Stanley*'). Available at New York State Unified Court System, *WebCivil Supreme – Case Search Results* <https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=TpnB5z2uPzz_PLUS_rgweAG0Lww==&system=prod>.

much like humans, “justice demands” that they be granted the fundamental rights of liberty and equality afforded to humans.¹⁰⁵

Jaffe J refused the petition¹⁰⁶ on the basis that the Court was obliged to follow the precedent of *The Nonhuman Rights Project on Behalf of Tommy v Lavery*¹⁰⁷ that:

[r]elying on the so-called “social contract” and the common law in determining that chimpanzees are disqualified from receiving the status of legal personhood ... according to chimpanzees the status of legal personhood is inappropriate as they are incapable of bearing any legal responsibilities and social duties.¹⁰⁸

That annihilated Wise’s attempt to usurp the application of the social contract in law. He is quoted in the transcript as arguing that: ‘there is no social contract ... it’s a mythical thing’ and that in any case, the law ‘has reached entities that are not part of the social contract’, including human slaves.¹⁰⁹

In connection to some of the philosophically-positing human-animal differences, Jaffe J summarised some key points of ‘experts’¹¹⁰ that Wise had relied on:

[Chimpanzees] share with humans similarities in brain structure and cognitive development, including parallel development of communication skills, as shown by their use of sign language ... Chimpanzees also demonstrate self-awareness, recognizing themselves in mirrors and photographs and on television, and have the capacity to reflect on their behaviour ... They manifest a capacity for empathy ... and imitate and emulate others ... they behave in ways that reflect moral inclinations ... and demonstrate compassion and depression when a member of their familial group dies ... They also have a cooperative social life, engage in imaginary play, and display a sense of humor.¹¹¹

¹⁰⁵ Ibid 22.

¹⁰⁶ Ibid 33.

¹⁰⁷ *Nonhuman Rights Project Inc v Lavery*, 124 AD 3d 148, 150 (NY, 2014) (‘*Lavery*’). That judgment was later affirmed in the New York Court of Appeals in *Nonhuman Rights Project on Behalf of Tommy v Lavery* (NY, Ct App, 2014) Slip Op 08531 (‘*Lavery COA*’). Available at: New York Courts, Reporter <http://www.nycourts.gov/reporter/3dseries/2014/2014_08531.htm>.

¹⁰⁸ *Stanley* (NY, 152736/15, 29 July 2015) 6 citing *Lavery*, 124 AD 3d 148, 150 (NY, 2014) 152-53.

¹⁰⁹ Transcript of Proceedings, *Stanley* (New York Supreme Court, 152736/2015, Jaffe J, 29 July 2015) 41 (Wise).

¹¹⁰ Jaffe J listed the names of the experts in the affidavits: *Stanley* (NY, 152736/15, 29 July 2015) 5-6 n 1.

¹¹¹ Ibid 5.

Beyond this case of *Stanley*,¹¹² also of interest is the amici curiae brief¹¹³ of seventeen philosophers¹¹⁴ in support of the NhRP's leave to appeal in *Lavery COA*.¹¹⁵ The philosophers suggested that 'personhood' in 'contemporary philosophical discussions'¹¹⁶ includes core capacities of:

autonomy ... emotions, linguistic mastery, sentience (the capacity for conscious awareness, sensation, pleasure, and pain), rationality, reflective self-awareness (that is, being aware of ourselves as 'selves'), and reciprocity.¹¹⁷

The Nonhuman Rights Project is also pursuing another case for some elephants for which a number of affidavits were submitted by scientists and others attesting to elephants' cognitive abilities and autonomy.¹¹⁸

3.3.3 A successful case for Cecilia in Argentina

Cecilia is a chimpanzee who was forced to live at a zoo in Argentina. According to an English translation of the judgement in Spanish,¹¹⁹ the Court ordered that under Argentina's General Environment Law, Cecilia was to be sent to a sanctuary. Judge María Alejandra Mauricio in the Third Court of Guarantees in Mendoza, declared that: '[i]t is undeniable that great apes, like the chimpanzee, are sentient beings and therefore they have nonhuman rights'.¹²⁰ Mauricio J ordered that legal resources be provided 'to cease the serious captivity situation in inappropriate conditions of the zoo animals ... that do not belong in the

¹¹² *Stanley* (NY, 152736/15, 29 July 2015).

¹¹³ Index No 162358/15. Submitted 23 February 2018 ('*Brief of 17*'). See Nonhuman Rights Project, *Habeas Corpus Experts Offer Support for Chimpanzee Rights Cases* (8 March 2018) <<https://www.nonhumanrights.org/blog/habeas-corpus-experts/>>.

¹¹⁴ The philosophers are Kristin Andrews, Gary Comstock, GKD Crozier, Sue Donaldson, Andrew Fenton, Tyler M John, L Syd M Johnson, Robert Jones, Will Kymlicka, Letitia Meynell, Nathan Nobis, David Peña-Guzmán, James Rocha, Bernard Rollin, Jeffrey Sebo, Adam Shriver, Rebecca L Walker.

¹¹⁵ (NY, Ct App, 2014) Slip Op 08531.

¹¹⁶ *Brief of 17*, above n 113, 29.

¹¹⁷ Ibid citing Kristin Andrews, 'Life in a cage' (2017) 76 *The Philosopher's Magazine* 72-77; David DeGrazia, 'Human-animal chimeras: Human dignity, moral status, and species prejudice' (2007) 38(2-3) *Metaphilosophy* 309-29; Daniel Dennett, 'Conditions of personhood' in Michael F Goodman (ed), *What is a Person?* (Humana Press, 1988) 145-67.

¹¹⁸ See, eg, Nonhuman Rights Project, *Torn from their families and forced to perform for humans for decades* <<https://www.nonhumanrights.org/clients-beulah-karen-minnie/>>.

¹¹⁹ Mendoza, 3 November 2016, Case number P-72.254/15. See also Nonhuman Rights Project, *The NhRP Praises Argentine Court's Recognition of Captive Chimpanzee's Legal Personhood and Rights* (5 December 2016) <<https://www.nonhumanrights.org/media-center/12-5-16-media-release-nhrp-praises-argentine-court-on-legal-personhood-for-chimpanzee/>> which provides the link to the English translation. Translated by lawyer and translator Ana María Hernández JD MA (stated at 33) ('*English translation*').

¹²⁰ Ibid 24.

geographical and climate area of the Province of Mendoza'.¹²¹ It was ordered that Cecilia be transferred 'to a better destination' outside of Argentina, to a sanctuary in Brazil.¹²² Part of the reasoning was to do with how Argentinian law caters for the 'natural patrimony'¹²³ of the community. Cecilia was deemed a part of it.¹²⁴ Mauricio J explained 'it is part of the quality of life of the community, the protection of that patrimony is part of the physical-emotional balance ... which is the same as Cecilia's wellbeing'.¹²⁵ Mauricio J also cited the Universal Declaration of Animal Rights,¹²⁶ and the national and provincial Constitutions.¹²⁷

While that logic tied Cecilia's wellbeing to the quality of life of the human community, Cecilia's 'sentience' was recognised – but only because her 'well-being' is part of, or has value for, the quality of life of the *human* community. As such, the fullness of the logic remained in context to the broader philosophically—thought scope of human—animal difference, and beyond chimpanzees' (as a species), own capacities for feeling. The concern is not directly for Cecilia herself. In addition, and similarly to Professor Wise's arguments, the logic relied on the 'same as us' proposition. Mauricio J is translated as stating:

Animals are sentient beings inasmuch as they understand basic emotions. Experts agree unanimously about the genetic proximity of chimpanzees with human beings and they add that chimpanzees have the capacity to reason, they are intelligent, are conscientious of themselves, they have culture diversity, expressions of mental games, they manifest grief, use and construction of tools to access food or to solve simple problems of daily life, abstraction capacity, skills to handle symbols in communication, conscience to express emotions such as happiness, frustration, desires or deceit, planned organization for intraspecific battles and ambush for hunting, they have metacognitive abilities, they

¹²¹ Ibid 32.

¹²² Ibid.

¹²³ See, eg, Ibid 23 where Mauricio J is translated as stating:

I am aware that for more than one decade our society has started a slow process of awareness and learning about the impact of the excessive and illegitimate use of property that is part of the patrimony of private or public legal persons, so that there has been a strong enforcement of the idea of the protection and preservation of the environment.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid 30.

¹²⁷ See, eg, *ibid* 1-2, 9. The Argentina Constitution does not specifically mention nonhuman animals, and includes under section 41, that:

All inhabitants are entitled to the right to a healthy and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations; and shall have the duty to preserve it ...

See: Constitution of the Argentine Nation s 41. See <<http://www.biblioteca.jus.gov.ar/argentina-constitution.pdf>>. Available at Ministerio de Justicia y Derechos Humanos Presidencia de la Nación, *Departamento de Biblioteca y Centro de Documentación* <<http://www.biblioteca.jus.gov.ar/>>. The rights of humans are protected, including the rights to 'perform any lawful industry' and 'to make use and dispose of their property': Constitution of the Argentine Nation s 14.

have a moral, psychic, and physical status, they have their own culture, they have affectionate feelings (they caress and groom each other), they are capable of lying, they have symbols for human language and use tools.¹²⁸

It was decided that Cecilia has a 'right to live in an environment and conditions appropriate for her species'.¹²⁹ It also appears that Mauricio J generously suggested that it is necessary to recall the traces of authoritative voices in considering our relationship with nonhuman animals:

Remember the following expressions: "We can judge the heart of a man by his treatment of animals" (Immanuel Kant). "Until one has loved an animal a part of one's soul remains unawakened" (Anatole France). "When a man has pity on all living creatures, only then he is noble" (Buda). "The greatness of a nation and its moral progress can be judged by the way its animals are treated" (Gandhi).¹³⁰

There appears to be scarce other sources of subsequent commentary, in English, regarding this case.¹³¹

3.4 The science(s) of 'sentience'

The purpose of this section is to very briefly survey to what degree sciences that study nonhuman animals remain Cartesian in their approach. Its purpose is to also ascertain if veterinary science thinking, at least in some texts, reinstitutes the philosophically-thought abyss of human-animal difference, and whether *that* positioning of nonhuman animals may impact what is thought to be 'objective' veterinary sciences. The 'abyss' relates to the many posited differences carried in the Western inheritance, many of which I have briefly referred to in section 3.3.1 above and Appendix 1, Part D (as recounted by Derrida). A focus in this section is an interrogation of what is defined as 'sentience' since that particular concept is being expressed in law, in some jurisdictions, to purportedly restrict some forms of harms to

¹²⁸ Hernández, *English translation*, above n 118, 23-24 (grammar and spelling is as it appears in the text).

¹²⁹ Ibid 32.

¹³⁰ Ibid 33.

¹³¹ See, eg, David R Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (ECW Press, 2017) 50-52; Nonhuman Rights Project, *Chimpanzee Cecilia Finds Sanctuary: An Interview with GAP Brazil* (20 April 2017) <<https://www.nonhumanrights.org/blog/chimpanzee-cecilia/>>. The case was also reported at the time in the press of England, the United States and New Zealand. See also a report in the Brazilian press: Agencia EFE, *Brazil Animals: Marcelino, new mate for Argentine chimpanzee Cecilia in Brazil* (5 September 2017) <<https://www.efe.com/efe/english/life/marcelino-new-mate-for-argentine-chimpanzee-cecilia-in-brazil/50000263-3369916>>.

some nonhuman animals. I also briefly investigate how sciences may be being employed *against* the interests of nonhuman animals.

3.4.1 Sentience from a neuroscience perspective

According to Feinberg and Mallet, within neuroscience, consciousness is thought to consist of ‘neural representations of the world that are experienced subjectively as referred mental *images*’.¹³² Whereas ‘sentience’ is often assumed as including the capacity for other experiences (types of qualia)¹³³ that are not ‘externalized images’ but are ‘subjectively experienced as internal *feelings* or body *states*’.¹³⁴ In law and animal law literature, perhaps most notably from Bentham, sentience is more often limited to capacity to experience pain and pleasure.¹³⁵ Whilst the affects of feeling can be conscious, some neuroscientists believe that its affects can also be unconscious.¹³⁶ Feinberg and Mallatt argue that ‘affective aspects of consciousness’ are even evident for fish and amphibians through the optic tectum as ‘isomorphic sensory consciousness’ and through ‘the subcortical limbic structures of all vertebrates as ‘affective consciousness’.¹³⁷ This is important as the link between sentience, ‘affective states’ and a ‘life worth living’ has been traversed in animal welfare-related literature as relevant to ethical standards, in what human animals owe to particular nonhuman animals.¹³⁸

3.4.2 Sentience in veterinary sciences

Broom and Fraser, leading writers in veterinary science,¹³⁹ explain that ‘sentience’ is the ‘capacity to have feelings’.¹⁴⁰ They also explain that there can be degrees of sentience

¹³² Feinberg and Mallatt, above n 25, 129 (italics in original).

¹³³ Ibid 7: Qualia are:

the subjectively experienced felt qualities of sensory consciousness, such as a perceived color, sound, or smell, or a negative affect. Many investigators consider quality to be the central puzzle of consciousness.

¹³⁴ Ibid 129 (italics in original).

¹³⁵ See Chapter 6, section 6.2.4.

¹³⁶ Feinberg and Mallatt, above n 25, 130. They list Joseph LeDoux as one example.

¹³⁷ Ibid 170.

¹³⁸ See, eg, James W Yeates, ‘How Good? Ethical Criteria for a “Good Life” for Farm Animals’ (2017) 30(1) *Journal of Agricultural and Environmental Ethics* 23 citing T C Green and J D Mellor, ‘Extending Ideas About Animal Welfare Assessment to Include “Quality of Life” and Related Concepts (2011) 59(6) *New Zealand Veterinary Journal* 263; J Yeates, ‘Is a “life for living” a concept worth having?’ (2011) 20 *Animal Welfare* 397; J Yeates, ‘Quality time: Temporal and other aspects of ethical principles based on a life worth living, (2012) 25(4) *Journal of Agricultural and Environmental Ethics* 607.

¹³⁹ Donald Broom is Emeritus Professor Animal Welfare at University of Cambridge. St Catherine’s College Cambridge, *Professor Donald Broom* <<https://www.caths.cam.ac.uk/directory/professor-donald-broom>>:

relative to capacities to experience happiness, pain, fear and grief.¹⁴¹ They also extend the definition of a sentient being to one that:

has some ability to evaluate the actions of others in relation to itself and third parties: to remember some of its own actions and their consequences; to assess risks and benefits; to have some feelings, and to have some degree of awareness.¹⁴²

Broom and Fraser acknowledge that some opinions include some invertebrates as sentient.¹⁴³

Sentience is usually relevant to ethical arguments against harms to nonhuman animals.¹⁴⁴ It is also relevant to construction of what may be deemed to constitute good 'welfare' in the treatment of them. Linking ethics and welfare together and the putting of scientific opinion first is evident in the following statement of Broom and Fraser:

The assessment of welfare should be carried out in an objective way, taking no account of any ethical questions about the systems, practices or conditions for individuals that are being compared. Once the scientific evidence about welfare has been obtained, ethical decisions can be taken.¹⁴⁵

The definition and demands of good 'welfare' has extended beyond merely negative impacts on nonhuman animals, to positive effects such as 'happiness, contentment, control of interactions with environment and possibilities of exploiting abilities'.¹⁴⁶ Some positive elements of nonhuman animal welfare are now reflected in law in the 'five freedoms' that

Professor Donald Broom is the author of over 200 refereed scientific papers and seven books, and a member of the Home Office Animal Procedures Committee and the E.U. Scientific Committee on Animal Health and Animal Welfare.

Andrew Ferguson Fraser is a veterinarian and former professor at two Canadian universities, and a prolific author of texts on animal ethology and behaviours and 'has been a pioneer in the scientific study of applied animal behaviour and was the original editor-in-chief of the journal *Applied Animal Behaviour Science* for 16 years': A F Fraser, *The Behaviour and Welfare of the Horse* (CABI, 2nd ed, 2010) vii.

¹⁴⁰ D M Broom and A F Fraser, *Domestic Animal Behaviour and Welfare* (CABI, 5th ed, 2015) 4 citing J K Kirkwood, 'The distribution of the capacity for sentience in the animal kingdom' in Jacky Turner and Joyce D'Silva (eds), *Animals, Ethics and Trade: The Challenge of Animal Sentience* (Compassion in World Farming Trust, 2006) 12-26.

¹⁴¹ Broom and Fraser, above n 140, 4.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ *Contra* Timothy Hsiao, 'In Defense of Eating Meat' (2015) 28 *Journal of Agricultural and Environmental Ethics* 277, 285: Hsiao does not believe that sentience is sufficient for any moral status of nonhuman animals and demands that rationality is a basis for moral worth.

¹⁴⁵ Broom and Fraser, above n 140, 7. For a discussion of the relationship between animal ethics and science, see Bernard E Rollin, 'The Inseparability of Science and Ethics in Animal Welfare' (2015) 28 *Journal of Agricultural and Environmental Ethics* 765.

¹⁴⁶ Broom and Fraser, above n 140, 7.

indicate what should be some minimum standards of care.¹⁴⁷ Broom believes the 'five freedoms' are now insufficient and do not reflect current 'knowledge of animal needs and how to assess welfare'.¹⁴⁸

Another issue of entanglement is that studies of 'welfare' may be commissioned and focussed on the desires of human animals. This is evident in the following paragraph of Broom and Fraser where they state the facts from the general perspective of industry, (and it should not be read as reflecting their own personal views):¹⁴⁹

Reproductive behaviour is of great importance to those managing a stock unit. Behaviour assessment is the major method of oestrus detection in dairy cows and pigs. Work on mating preferences and factors affecting libido is of critical importance in the management of sheep, goats, beef cattle and horses where a high proportion of successful matings is desired. Each animal whose offspring production fails, or is delayed, costs the farmer money. The frequency with which maternal behaviour fails in domestic animals and problems with the survival of the young, especially piglets, lambs or calves, can all be reduced by a knowledge of behaviour and consequential improvements in stockmanship.¹⁵⁰

Harfeld et al explain that '[t]he striving for objectivity in mainstream animal welfare science' can result in 'a mechanistic and functional understanding of welfare terminology' that 'typically try to avoid emotions, inner lives, or animal experiences, and instead focus on explicit phenomena such as illness, injuries, and hygiene'.¹⁵¹ As a result, it contributes to the

¹⁴⁷ See Chapter 6, section 6.4. See also Steven P McCulloch, 'A Critique of FAWC's Five Freedoms as a Framework for the Analysis of Animal Welfare' (2013) 26 *Journal of Agricultural and Environmental Ethics* 959, 974: McCulloch provides criticisms of the five freedoms and argues that they describe an 'ideal' and are therefore unattainable, and that they do not constitute an ethical standard.

¹⁴⁸ Donald M Broom, 'Sentience and animal welfare: New thoughts and controversies Response to Commentary on Broom on Animal Welfare' (2016) 5(7) *Animal Sentience* <<http://animalstudiesrepository.org/cgi/viewcontent.cgi?article=1024&context=animsent>> 5 ('New Thoughts').

¹⁴⁹ See, eg, *ibid*:

Efforts that result in changing animal production methods in ways that improve animal welfare are widely regarded as desirable in a society where the animal usage is continuing ... Much more important in my view are the changes affecting millions of animals such as bans on keeping calves in crates; sows tethered or in stalls; and hens in battery cages; and methods of animal handling, transport and killing that result in poor welfare.

¹⁵⁰ Broom and Fraser, above n 140, 11.

¹⁵¹ Jes Lynning Harfeld et al, 'Seeing the Animal: On the Ethical Implications of De-animalization in Intensive Animal Production Systems' (2016) 29(3) *Journal of Agricultural and Environmental Ethics* 407, 409.

objectification of nonhuman animals as products.¹⁵² It therefore avoids ethical consideration of them as individual beings.¹⁵³ L'animot disappears.

As highlighted by Goodfellow, funding in the livestock industry is directed toward productivity.¹⁵⁴ Further, he claims that:

welfare is valued in terms of its relationship with productivity. If improved welfare contributes to productivity it is embraced and promoted by the Departments [of agriculture or primary industries equivalents in the State and Federal Governments of Australia]. If, however, a proposed welfare measure has a negative correlation with productivity, it is dismissed or severely compromised.¹⁵⁵

From a European perspective, Harfeld et al reported that extended animal welfare schemes are unlikely in 'modern agriculture' unless they result in economic benefit.¹⁵⁶ Lusk and Norwood reported in 2011, in context of the European market, that '[p]roduction economics reveals that producers will *not* maximize animal welfare, even if animal well-being is highly correlated with output'.¹⁵⁷ McMullen highlights that individual food producers who are at the mercy of large purchasing firms with market power, have little choice but to compete and therefore *not* 'innovate with more humane production techniques unless they produce cost savings'.¹⁵⁸ In an Australian Productivity Commission report of 2016, the Commission stated that:

¹⁵² Ibid 413. See also Joyce D'Silva, 'Adverse impact of industrial animal agriculture on the health and welfare of farmed animals' (2006) 1 *Integrative Zoology* 53, 53: The selective breeding of animals for higher yields can cause health problems in farmed animals. Broom and Fraser highlight a plethora of welfare issues for farmed animals throughout their text: Broom and Fraser, above n 140.

¹⁵³ Harfeld et al, above n 151, 410.

¹⁵⁴ Jed Goodfellow, 'Regulatory Capture and the Welfare of Farm Animals in Australia' in Deborah Cao and Steven White (eds), *Animal Law and Welfare – International Perspectives* (Springer, 2016) 195-235, 235 ('Capture'); Jed Goodfellow, *Animal Welfare Regulation in the Australian Agricultural Sector: A Legitimacy Maximising Analysis* (PhD Thesis, Macquarie University, 2015) 221-22. See also David Robinson Simon, *Meatonomics: How the Rigged Economics of Meat and Dairy Make you Consume Too Much – and How to Eat Better, Live Longer, and Spend Smarter* (Conari Press, 2013). See, eg, CSIRO, *Case Study: Measuring how farm animals 'feel'*

<<https://www.csiro.au/en/Research/AF/Areas/Animal-Science/Animal-Health-Welfare/How-animals-feel>>:

The expected outcomes of this research will be to expand our understanding of the emotional and cognitive functions of livestock and we can use this information to alter farming practices that will improve animal welfare and therefore should have a positive effect on animal production.

¹⁵⁵ Goodfellow, *Capture*, above n 154, 198.

¹⁵⁶ Harfeld et al, above n 151, 413.

¹⁵⁷ Jayson L Lusk and F Bailey Norwood, 'Animal Welfare Economics' (2011) 33(4) *Applied Economic Perspectives and Policy* 463, 463.

¹⁵⁸ Steven McMullen, *Animals and the Economy* (Palgrave MacMillan, 2016) 87.

Producers have an incentive to improve animal welfare where it increases the productivity and profitability of their business, including when consumers demand higher welfare products. But animal welfare, productivity and profitability do not always go hand-in-hand.

The challenge for policy makers is to determine the level of regulation that weighs up the cost of improved animal welfare against its value to the community.¹⁵⁹

The Productivity Commission's recommendation 5.1 stated that:

To facilitate greater rigour in the process for developing national farm animal welfare standards, the Australian Government should take responsibility for ensuring that scientific principles guide the development of farm animal welfare standards.¹⁶⁰

The Productivity Commission recommended that an Australian Commission for Animal Welfare (ACAW) be established, and that it should have five members, 'appointed on the basis of skills and experience, not as representatives of a particular industry, organisation or group'.¹⁶¹ It also recommended that the ACAW 'should also include animal science and community ethics advisory committees to provide independent, evidence-based advice on animal welfare science and community values'.¹⁶² Additionally it recommended a 'separation between agriculture policy matters and farm animal welfare monitoring and enforcement functions' and 'adequate resourcing' for enforcement activities'.¹⁶³ The Australian Government has not acted on these recommendations to date.

To further examine perspectives of industry, the submissions to the Productivity Commission can be reviewed.¹⁶⁴ As an example, the National Farmers' Federation (NFF) agreed with the recommendations about enforcement.¹⁶⁵ However, it suggested that:

community welfare beliefs do not always translate into purchasing decisions for the majority of consumers. In a 2008 usage and attitude survey commissioned by Australian Pork Limited, 63 per cent of respondents indicated that animal welfare was a low priority

¹⁵⁹ Australian Government Productivity Commission, *Regulation of Australian Agriculture Final Report* (Report No 79, 2016) 199 ('Agriculture').

¹⁶⁰ Ibid 38.

¹⁶¹ Ibid. See also below n 194 and accompanying text. A version of ACAW previously existed but was disbanded in 2013.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ See Australian Government Productivity Commission *Regulation of Agriculture Submissions* <<https://www.pc.gov.au/inquiries/completed/agriculture/submissions>>.

¹⁶⁵ National Farmers' Federation, *Submission to the Productivity Commission Draft Report on the Regulation of Australian Agriculture* (19 August 2016) <https://www.pc.gov.au/data/assets/pdf_file/0019/207145/subdr216-agriculture.pdf> 28.

in their decision to purchase pork products, while only 17 per cent nominated it as a high priority. Key factors behind purchase decisions were taste, price and health benefits.¹⁶⁶

As a result, the NFF recommended that:

the Australian Government ... undertake research into consumer perceptions of animal welfare, consumer expectations of animal welfare ... to determine how animal welfare outcomes of production animals along the agricultural supply chain can be communicated and improved to match consumer beliefs and consumer purchasing decisions.¹⁶⁷

The NFF objected to the 'introduction of an independent body tasked with developing national standards and guidelines for farm animal welfare'.¹⁶⁸ Rather, it suggested 'a process for achieving national consistency, whereby Industry, Federal, State and Territory Governments agree on a set of science-based principles for animal welfare[,] and corresponding standards are then adopted by States and Territories without variation'.¹⁶⁹ Thereby, it seems that the NFF wishes for standards to be fixed without consideration of the views of those who are concerned for animal welfare, unless those views are already incorporated into the positions of the NFF or governments. It also stated:

[w]hile the NFF is opposed to the introduction of a national office of animal welfare, the NFF strongly advocates for national principles for science-based animal welfare outcomes. Harmonisation will reduce compliance uncertainty and bring transparency into the currently confusing landscape of diverging animal welfare principles.¹⁷⁰

It is understandable that the NFF perceives nonhuman animals as products and is concerned with economic benefits. Plowman, Pearson and Topfer earlier reported that the livestock industries faced 'uncertainty' as a result of a lack of consistency, and inadequate clarity in the drafting of animal protection laws and codes of practice.¹⁷¹

¹⁶⁶ Ibid 26. No report was cited. But see Kathleen Plowman, Alan Pearson and John Topfer, 'Animals and the Law in Australia: a Livestock Industry Perspective' (2007) 91 *Australian Law Reform Commission - Reform Journal* 25, 29 citing G J Coleman, M Hay and S R Toukshtai, 'Effects of Consumer Attitudes and Behaviour in the Egg and Pork Industry' (2003) Monash University:

A further confounding factor is the apparent dichotomy that occurs between citizens' general attitudes to animals as expressed verbally or politically and their behaviour as consumers. It has been shown through social and consumer research that consumers often buy products at point of purchase that are not consistent with their expressed ethical values or attitudes.

¹⁶⁷ National Farmers' Federation, above n 165, 26.

¹⁶⁸ Ibid 27.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Plowman, Pearson and Topfer, above n 166, 27.

In their survey of North American studies, Van der Schot and Phillips found that there is a bias in scientific articles that report on animal welfare outcomes.¹⁷² They identified a further issue that there is no 'universally accepted definition of animal welfare' even though the 'five freedoms' are often utilised.¹⁷³ They found that 'funding source may bias the authors' assessment of the benefits of new treatments, rather than the actual benefits'.¹⁷⁴ They suggest one potential problem is that it may undermine the benefits arising from research in animal welfare'.¹⁷⁵ Broom provides a different perspective in that he claims, perhaps in regard to research in the United Kingdom, that:

I find that almost all animal welfare science is objective and independent of such aims. Most funding comes from governments and only a small proportion from the animal industry or animal protection society sources that have an agenda to defend.¹⁷⁶

Not all research accepts that many nonhuman animals are fully sentient.¹⁷⁷ For example, Le Neindre et al¹⁷⁸ whose study was performed under a contract with the European Food Safety Authority,¹⁷⁹ retain a strange logic and traces of Cartesianism in that they suggest the following, relying on the opinion of a professor of philosophy in this case, rather than science:

¹⁷² Agnes A van der Schot and Clive Phillips, 'Publication Bias in Animal Welfare Scientific Literature' (2013) 26 *Journal of Agricultural and Environmental Ethics* 955, 945-46: 'It is concluded that preliminary evidence was provided of several forms of publication bias in animal welfare science'. See also R P Haynes, 'Competing conceptions of animal welfare and their ethical implications for the treatment of nonhuman animals' 59 *Acta Biotheoretica* 105.

¹⁷³ Van der Schot and Phillips, above n 172, 955.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid 957.

¹⁷⁶ Broom, *New Thoughts*, above n 148, 5.

¹⁷⁷ See, eg, Heather M Hill, 'The Psychology of Cows? A Case of Over-interpretation and Personification: Commentary on Marino and Allen The Psychology of Cows (2017)' (2017) 4(4) *Animal Behaviour Cognition* 506, 510: Hill warns that scientists must remain scientifically objective.

¹⁷⁸ Pierre Le Neindre et al, 'Animal Consciousness' (External Scientific Report No EFSA-Q-2015-00390, European Food Safety Authority, 24 April 2017) 2.

¹⁷⁹ See European Food Safety Authority *Governance*

<<https://www.efsa.europa.eu/en/about/governance>>: The EFSA website explains that its board: has 15 members with a wide range of expertise related to the food chain but do not represent a government, organisation or sector. Four members have a background in organisations representing consumers and other interests in the food chain. The European Commission is also represented. Members are appointed by the Council of the European Union – after consulting the European Parliament ...

... nonverbal animals most probably lack a “biographical sense of self” and the ability to tell stories about themselves and others, their integrity may not matter as much [to] them as it does to typical humans.¹⁸⁰

Whilst acknowledging ethical considerations,¹⁸¹ the authors concluded that it would still be a good idea to perform experiments on livestock:

... extensive behavioural and cognitive capacities that have until recently been thought to be exclusive to humans and some primates have been identified in non-primate animal species. Among the most elaborate capacities, there is evidence that animals have knowledge of their own state (bodily self). They have the capacity to know and deal with their own knowledge, and also to evaluate the psychological state of their conspecifics, potentially leading to some form of empathy. One important outcome of this work is that the present report may be used for designing future ways of rearing animals.

We still need to emphasise that these conclusions are based on results from very few experiments on few species. To strengthen them further research is necessary, particularly to increase our understanding of the levels and contents of the different types of consciousness.

A pragmatic approach could be to adapt to livestock species experimental protocols that have been found useful in laboratory animals.¹⁸²

As another example of a study that seems to defy common-sense, the Australian Professional Rodeo Association funded a University of Queensland study to assess if calf roping stresses calves.¹⁸³ The study found that ‘calf roping causes stress to the animals’ as the calves:

showed behavioural responses, fleeing from the rider and an eyeroll following the event, which further suggested significant stress. In the group where the calf was handled and marshalled by a mounted rider for the first time it would be expected to bring a heightened response.¹⁸⁴

It appears that despite findings of neuroscience in relation to sentience and beingness, testing of sentience in some cases at least, remains thought as necessary.

¹⁸⁰ Le Neindre et al, above n 178 citing Gary E Varner, *Personhood, Ethics, and Animal Cognition: Situating Animals in Hare’s Two Level Utilitarianism* (Oxford University Press, 2012).

¹⁸¹ See, eg, Le Neindre et al, above n 178.

¹⁸² Ibid.

¹⁸³ The University of Queensland School of Veterinary Science, *Centre for Animal Welfare and Ethics: Statement Regarding UQ Research Study on Calf Roping* (20 September 2016) <<https://veterinary-science.uq.edu.au/centre-animal-welfare-and-ethics>>.

¹⁸⁴ Ibid.

3.5 Examples of 'sentience' in law

In this section I do not provide a comprehensive analysis of sentience in international law since sentience is not an element of the law in question in this thesis, under the *Animal Care and Protection Act 2001* (Qld) ('ACPA').¹⁸⁵ However, sentience was something that was considered in the *Brambell Report*,¹⁸⁶ and the development of the 'five freedoms' that influenced the development of the duty of care under ACPA s 17. That report and the relevant history is traced in Chapter 6.¹⁸⁷ It is also relevant since the concept of sentience, may be imported into Queensland law in the future, as it is being employed in an increasing number of jurisdictions that may be influential in the development of Queensland and Australian law more broadly. As such, it is worth considering here since it appears to be foundational in conceptions of animal welfare ethics. In addition, this section illustrates that even if 'sentience' is imported to laws, at this stage, it appears that it has little real impact in ameliorating the effects of the utilitarian focus of animal protection statutes.

3.5.1 Australia

The *Australian Constitution* has no reference to animal welfare, although federal laws can impact animals in regard to trade,¹⁸⁸ quarantine and biosecurity issues,¹⁸⁹ coordinating the development of animal standards and guidelines,¹⁹⁰ and through application of consumer protections,¹⁹¹ as examples. Those areas of legislation are not currently, directly concerned with animal sentience. The Australian Government also has responsibility for approving State Management Plans for 'the welfare of kangaroos killed for commercial purposes', 'the conduct of introduced animal management under the Department of Environment National

¹⁸⁵ *Animal Care and Protection Act 2001* (Qld) s 3(b) provides that the Acts's purpose includes to 'provide standards for the care and use of animals that ... (ii) allow for the effect of advancements in scientific knowledge of animal biology and changes in community expectations about practices involving animals'. The *Animal Care and Protection Act Regulation 2012* (Qld) does not make reference to sentience. I could not locate any reference to considerations of animal sentience in any of the currently available documents on the Department of Agriculture and Fisheries website as at 3 April 2018: Queensland Government, *Department of Agriculture and Fisheries* <<https://www.daf.qld.gov.au/>>.

¹⁸⁶ F W Rogers Brambell, *Report of the Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems* (Her Majesty's Stationery Office, 1965) ('*Brambell Report*').

¹⁸⁷ See Chapter 6, section 6.4.

¹⁸⁸ See, eg, *Australian Meat and Live-stock Industry Act 1997* (Cth); *Export Control (Animals) Order 2004* (Cth).

¹⁸⁹ *Biosecurity Act 2015* (Cth).

¹⁹⁰ See, eg, Australian Government, *Australian Animal Welfare Standards and Guidelines (Model Codes of Practice)* (23 September 2015) Department of Agriculture and Water Resources <<http://www.agriculture.gov.au/animal/welfare/standards-guidelines>>.

¹⁹¹ *Competition and Consumer Act 2010* (Cth).

Threat Abatement Plans' 'and animal welfare aspects of wild animal management and animal research on Australian Government lands'.¹⁹² It also has powers for 'representing Australia's position on animal welfare providing legislation with regard to the import and export of animals and animal products, and promoting these to the public'.¹⁹³

The Australian Government disbanded the Australian Animal Welfare Advisory Committee in December 2013. It *had* provided a:

national framework to identify priorities, coordinate stakeholder action and improve consistency across all animal use sectors including: livestock and production animals; animals used for work, recreation entertainment and display; companion animals; native, introduced and feral animals; aquatic animals; and animals used in research and teaching.¹⁹⁴

As a result, there is currently no nationally coordinated government body in Australia that is concerned for the welfare of nonhuman animals. Rather, there is coordination across industries and governments that influence development of law and practices, including codes of practice.¹⁹⁵ There is also the National Primary Industries Research, Development & Extension (RD&E) Framework¹⁹⁶ that promotes a 'collaborative national RD & E model'.¹⁹⁷ It has representation from the Australian and State Governments, CSIRO, Cotton Research & Development Corporation, AgriFutures (Rural Industries Research & Development Corporation), Dairy Australia, Horticulture Innovation Australia, Council of Rural Research & Development Corporations and Australian Council of the Deans of Agriculture.¹⁹⁸ It claims it

¹⁹² Australian Government, *Animal Welfare in Australia* (7 January 2016) Department of Agriculture and Water Resources <<http://www.agriculture.gov.au/animal/welfare/animal-welfare-in-australia#legislation>>.

¹⁹³ Ibid.

¹⁹⁴ Australian Government, *Australian Animal Welfare Strategy – AAWS* (4 March 2015) <<http://www.agriculture.gov.au/animal/welfare/aaws>>.

¹⁹⁵ See, eg, Animal Health Australia, *Company Profile* (12 March 2018) <<https://www.animalhealthaustralia.com.au/who-we-are/company-profile/>>:

Animal Health Australia (AHA) is a not-for-profit public company that facilitates innovative partnerships between governments, major livestock industries and other stakeholders to protect animal health and the sustainability of Australia's livestock industry.

¹⁹⁶ Research & Innovation Committee, *National Primary Industries Research Development & Extension Framework* <<https://www.npirdef.org/>>. See also Australian Government, *National Primary Industries Research Development and Extension Framework* Department of Agriculture and Water Resources (11 January 2017) <<http://www.agriculture.gov.au/ag-farm-food/innovation/national-primary-industries>>.

¹⁹⁷ Research & Innovation Committee, *National Primary Industries Research Development & Extension Framework* <<https://www.npirdef.org/>>.

¹⁹⁸ Research & Innovation Committee, *Who is Involved?* <<https://www.npirdef.org/framework-involved>>.

is the 'sole, national, cross-sectoral body in the animal welfare R & D space'.¹⁹⁹ As mentioned in section 3.4.2 above, in 2016, the Australian Productivity Commission recommended that the Australian Commission for Animal Welfare (ACAW) be re-established. That has not eventuated.

None of the Australian state jurisdictions' animal protection statutes currently make reference to animal sentience.²⁰⁰ However, in regard to 'sentience' specifically, the Victorian Government's recently published *Animal Welfare Action Plan* states that:

Science demonstrates that animals are sentient. This means they experience feelings and emotions such as pleasure, comfort, discomfort, fear and pain. Sentience is the primary reason that animal welfare is so important. All people and industries within Victoria have a responsibility to treat all animals with care and respect.²⁰¹

The Action Plan lists one of its reform actions for the *Protection of Cruelty to Animals Act 1986* (Vic) is to: '[u]ndertake parliamentary processes to introduce new principal animal welfare legislation for Victoria that includes recognition of sentience and obligations around animal care'.²⁰² There has been no outcome in regard to this action to date. However, an Animal Welfare Advisory Committee has been established by the Victorian Government 'to provide the Minister of Agriculture with expert and strategic advice on animal welfare related issues'.²⁰³ It has eight members and an 'independent chairperson', and appears to include representation across areas of expertise including: 'agricultural, animal or veterinary science'; 'commercial, recreational, display and scientific use of animals'; 'care, breeding and management of companion animals'; 'ethical standards and conduct in respect of animals'; 'animal welfare expertise'; 'wildlife and conservation management', and; 'public policy'.²⁰⁴

¹⁹⁹ Steering Committee of the National Primary Industries Animal Welfare RD&E Strategy, *National Primary Industries Research Development & Extension Framework: Animal Welfare RD&E Strategy* (May 2017) 8. Available at: <<https://www.npirdef.org/content/24/f7cd0081/Animal-Welfare-RDE-Strategy.pdf>>.

²⁰⁰ See Appendix 3, Table 5 that includes extracts of the statutes in relation to their stated purposes.

²⁰¹ State of Victoria, 'Animal Welfare Action Plan: Improving the Welfare of Animals in Victoria' (Department of Economic Development, Jobs, Transport and Resources, December 2017) 12.

²⁰² Ibid 14: Action 1.4.

²⁰³ Agriculture Victoria, *Animal Welfare Advisory Committee (AWAC)* (26th February 2018) <<http://agriculture.vic.gov.au/agriculture/animal-health-and-welfare/animal-welfare/committees>>.

²⁰⁴ Agriculture Victoria, *What is the Animal Welfare Advisory Committee (AWAC)* (26th February 2018) <<http://agriculture.vic.gov.au/agriculture/animal-health-and-welfare/animal-welfare/committees/question-and-answers>>. See also Laura Poole, 'Victorian Farmers Federation is upset at make-up of new animal welfare advisory committee', *ABC News* (online), 2 December 2015 <<http://www.abc.net.au/news/rural/2015-12-02/no-farmers-on-new-victorian-animal-welfare-committee/6994220>>. The VFF were reported at being upset that Animals Australia has a

3.5.2 New Zealand

The New Zealand *Animal Welfare Act 1999* describes that it is an Act:

(a) to reform the law relating to the welfare of animals and the prevention of their ill-treatment; and, in particular,— (i) to recognise that animals are sentient ...²⁰⁵

However, the term ‘sentient’ is not defined within the Act. The protections for animals are limited to what are deemed ‘reasonable steps’ in accordance with ‘good practice’ and ‘scientific knowledge’,²⁰⁶ and suffering must not be ‘unreasonable or unnecessary’.²⁰⁷ Compliance with codes of welfare also can be used as ‘rebuttable evidence that the person charged with the offence failed to comply with’²⁰⁸ an offence.

A recent case, *Erickson v Ministry for Property Industries*²⁰⁹ in the New Zealand Court of Appeal, considered sentencing issues. The defendant caused suffering to a large number of bobby calves under seven days old. One calf suffered ‘significant and prolonged pain’ as a result of head injuries after being driven head first on to the concrete floor.²¹⁰ Another calf was kicked in the head and abdomen causing internal injuries.²¹¹ Another calf was thrown onto a concrete floor and suffered ‘shock, trauma, pain and suffering’.²¹² Three other calves were thrown by one limb.²¹³ Another was dumped onto the floor from the defendant’s head height.²¹⁴ Two further calves were dragged and kicked in the abdomen.²¹⁵ Ninety- five calves were hit in the head with an object, thrown, dragged, thrown, dropped or kicked, including fourteen calves who were kicked in the head or abdomen.²¹⁶ Another calf, still alive was hung on a hook by its pierced shin, and whilst it ‘bellow[ed] loudly’ it was ignored for some time until another person ‘dispatched [that calf] using the blunt end of an axe’.²¹⁷ A further eight calves were ‘stunned’ by the defendant by hitting them in the head with a metal bar, and he then applied the ‘thoracic stick’ to slit their throats when they had been

representative on the committee that was otherwise described as including a barrister, veterinarians and industry representatives as well as the CEO of RSPCA Victoria.

²⁰⁵ *Animal Welfare Act 1999* Pt 1.

²⁰⁶ *Animal Welfare Act 1999* s 9(a).

²⁰⁷ *Ibid* ss 9(b), 10, 11, 12.

²⁰⁸ *Ibid* s 13(1A).

²⁰⁹ [2017] NZCA 271.

²¹⁰ *Ibid* [5].

²¹¹ *Ibid* [6].

²¹² *Ibid* [7].

²¹³ *Ibid*.

²¹⁴ *Ibid*.

²¹⁵ *Ibid* [8].

²¹⁶ *Ibid* [9].

²¹⁷ *Ibid* [10].

inadequately 'stunned'. It was noted that '[i]f full unconsciousness is not immediately produced, the pain of the blow can be felt fully.'²¹⁸

The only mention of the 'sentience' requirement in the judgment was in relation to its existence, and that a purpose of the Act was its reform 'to recognise that animals are sentient'.²¹⁹ There does not appear that there was any application of that recognition beyond that scope. The Court considered other sentencing factors and the end result was that the original sentence of two years and six months imprisonment was quashed.²²⁰ A sentence of eighteen months imprisonment was ordered with concurrent serving of charges,²²¹ along with an order for 'substitution of a sentence with home detention'.²²²

3.5.3 Québec

On 4 December 2015, the *Civil Code of Québec* art 898.1 was amended to provide that:

Animals are sentient beings and not things. They are sentient beings and have biological needs.

In addition to the provisions of special Acts which protect animals, the provisions of this Code and of any other Act concerning property nonetheless apply to animals.²²³

The *Animal Welfare and Safety Act*²²⁴ Part II was also amended and included the statement that: 'AS animals are sentient beings that have biological needs ...' Under s 3, regulations can be made to exempt a person or animals from application of provisions of the Act. The duty to provide for the biological needs,²²⁵ and the prohibition against causing the animal 'distress',²²⁶ are exempted 'in the case of agricultural activities, veterinary medicine activities, teaching activities or scientific research activities carried on in accordance with generally recognized rules'.²²⁷

It appears that 'sentience' for nonhuman animals in Québec is a symbolic signification that does not trump their continued designation as property.

²¹⁸ Ibid [11].

²¹⁹ Ibid [32].

²²⁰ Ibid [71].

²²¹ Ibid 72]-[73].

²²² Ibid [74].

²²³ *Civil Code of Québec* art 898.1.

²²⁴ RSQ 2018, c B-3.1

²²⁵ Ibid s 5: this includes elements similar to the 'five freedoms'. For explanation of the 'five freedoms' see Chapter 6, section 6.4.

²²⁶ *Animal Welfare and Safety Act* RSQ 2018, c B-3.1, s 6: this includes where the animal will suffer death or serious harm, is suffering acute pain, or is caused extreme anxiety or suffering.

²²⁷ Ibid s 7.

3.5.4 United States

The World Animal Protection Animal Protection Index website notes that at the Federal level, there is no recognition of animal 'sentience' under United States law.²²⁸ In a search of ten separate states' cruelty statutes, I was unable to locate any use of the term 'sentience'.²²⁹

3.5.5 European Union: Treaty of Lisbon

Under the *Treaty on the Functioning of the European Union*²³⁰ (which was amended by the Lisbon Treaty, art 13 of Title II 'Provisions having general application'), requires that:

In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

Kelch notes that the Treaty 'may ultimately be more symbolic than effective for animals' interests'.²³¹

3.5.6 England and Wales

A House of Commons Briefing Paper of 2 Feb 2018²³² notes that there are concerns that the *Animal Welfare Act 2006* does not use the term 'sentience' and that the EU Withdrawal Bill does not 'include provision to transfer the principle contained in Article 13 of the Lisbon Treaty recognising animals as sentient beings into UK legislation'.²³³ Further that on 12 December 2017, the Government announced that that 'it would be introducing legislation to recognise animal sentience and introduce tougher sentencing for animal cruelty offences'.²³⁴

²²⁸ World Animal Protection, *USA Recognising Animal Protection* <<https://api.worldanimalprotection.org/country/usa>>.

²²⁹ The individual states' cruelty statutes can be accessed at: The National Agricultural Law Center, *States' Animal Cruelty Statutes* <<http://nationalaglawcenter.org/state-compilations/animal-cruelty/>>.

²³⁰ *Treaty on the Functioning of the European Union (Consolidated Version 2016)*, signed 13 December 2007, OJ C 202 (2016) (entered into force 1 December 2009) Title II, art 13.

²³¹ Thomas G Kelch, *Globalization and Animal Law: Comparative Law, International Law and International Trade* (Wolters Kluwer, 2011) 87.

²³² Elena Ares, *Animal Sentience and Brexit*, House of Commons Paper No 8155, House of Commons, Session 2017-2019 (2018).

²³³ *Ibid* 1.

²³⁴ *Ibid*.

Following consultations and discussions, a draft Bill²³⁵ was to be introduced to include the clause:

1 Welfare needs of animals as sentient beings

(1) Ministers of the Crown must have regard to the welfare needs of animals as sentient beings in formulating and implementing government policy.

(2) In discharging that duty Ministers of the Crown must also have regard to matters affecting the public interest.²³⁶

A subsequent report was published that recommended amongst other things, that ‘a separate piece of legislation on animal sentience be introduced’.²³⁷ It is yet to be seen how a separate statute would impact the utilitarian focus of existing legislation.

3.5.7 Summary regarding ‘sentience’

This brief review of some areas of international law demonstrate that governments have found it necessary to respond to public demands to recognise animal sentience. However, there is no evidence in this brief survey, that the importing of the term ‘sentience’ into legislation has any meaningful effect for the protection of nonhuman animals.

3.6 Conclusions

Despite the emerging prevalence of views that nonhuman animals of many different types experience consciousness and sentience, in some areas of animal welfare sciences and law, philosophical ideas about human-animal differences and limited conceptions of sentience remain. On that basis, Derrida’s contention appears correct, that Western sciences despite their claims to objectivity, do emerge, from the philosophical bases of the Western inheritance. However, it does appear that with the findings of sciences, those philosophical bases may be eroded. New knowledge may have the potential to support a greater acceptance of nonhuman animal experiences, for a broadening range of species. However, the utilisation of the term ‘sentience’ also has potential to *reinstate* philosophically-thought differences, if it remains closed to acceptance of a broader range of qualia as affecting nonhuman animals. This survey has demonstrated that so-called ‘objective’

²³⁵ Animal Welfare (Sentencing and Recognition of Sentience) Draft Bill 12 December 2017.

²³⁶ Ibid s 1 quoted in Ares, above n 231, 7.

²³⁷ Parliament UK, *Pre-Legislative Scrutiny of the draft Animal Welfare (Sentencing and Recognition of Sentience) Bill 2017* (31 January 2018) Contents
<https://publications.parliament.uk/pa/cm201719/cmselect/cmenvfru/709/70906.htm#_idTextAnchor017> [8].

sciences may remain infected by the politics of Cartesianism and Kantianism. Those politics can support the restriction of ethical commitments in favour of nonhuman animals, and the economic interests of those who benefit.

Derrida was correct to be concerned about the logic of the social contract. Its reliance on the human-animal difference of speech, does undermine protections for nonhuman animals. That is, at least in the cases litigated in the United States by the NonHuman Rights Project. However, the Argentinian case for Cecilia shows that some forms of relief may be available for some nonhuman animals where environment-related laws that nevertheless institute an anthropocentric focus, may be applied successfully. Unfortunately, Australian laws do not incorporate any notion of a shared wellbeing as Argentinian law does. In addition, the brief survey conducted above finds that some international jurisdictions whose laws refer to 'sentience' appear to have little real impact in ameliorating the effects of the utilitarian focus of animal protection statutes.

As explored in sections 3.1 and 3.2 above, it appears that elements of Derrida's propositions related to trace and *différance* are not broadly inconsistent with current knowledge in neurosciences. This research has found that leading scientists do support some similarities in cognitive processes and sentience between some animals, human and nonhuman. These findings should lead us to reconsider the bases of our epistemologies and our duties toward nonhuman animals.

The following Chapter 4, contrasts the views of prominent Anglo-American theorists who propose systems of 'ethics' concerning nonhuman animals, with Derridean justice. It further highlights some retrictions in thinking as a result of the metaphysics of presence and the elevation of the human animal.

CHAPTER 4: DUTIES TOWARD NONHUMAN ANIMALS IN ANGLO-AMERICAN THOUGHT, AND CONSTITUTIONAL RECOGNITION

4.1 Introduction

This chapter answers the thesis sub-question: *how do key Anglo-American theorists' perspectives on the human-animal relationship differ from Derrida's perspective?* This chapter briefly surveys the views of the prominent Anglo-American theorists: Singer, Regan, Francione, Wise, Posner, Garner, Nussbaum, Favre, and Donaldson and Kymlicka. All of which have differing positions regarding duties owed to nonhuman animals. Some of those theorists posit that the 'dignity' of nonhuman animals should be recognised. To follow that possibility, this chapter also briefly surveys some international regimes where there is Constitutional recognition of nonhuman animals. Some import the concept of 'dignity'. I question whether Constitutional recognition has made any significant difference to enhancing protections for the majority of domesticated nonhuman animals in those jurisdictions.

This chapter is not intended to be a comprehensive survey of all contemporary views about duties owed to nonhuman animals. Rather, its purpose is to contrast the positions of the prominent theorists against Derrida's justice. In the introduction, I also very briefly mention some of the key historical contributors to Western thought that have *denied* that duties are owed to nonhuman animals.

Some of the Derridean propositions and revelations about Western thought and Western beingness, highlighted in Chapter 2, are relevant to the analysis in this chapter. They include: the human animals' seeking of grounded truths and the drive to conceptualisation, knowledge and mastery; the effects of economies (in the sense of returns to the self) at work; denials and repressions of otherness; constructions of the hegemony of rationality; whether aporias in decision making and ethical rule application are appreciated or ignored; to what degree l'animot is recognised in ethical rules or philosophies that purportedly cater for nonhuman animal interests, and; whether there is acknowledgment of who and what is sacrificed in the application of ethical rules. In this chapter, I also consider whether some of the theorists' approaches appreciate the necessity to work toward undoing the constructs of carnophallogocentrism.¹

¹ As part of his definition of 'carnophallogocentrism' Derrida proposed that animal sacrifice is essential to human subjectivity, is a basis of western culture and law, and that carnophallogocentrism encapsulates anthropocentric domination: Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' (1990) 11 *Cardozo Law Review* 919, 951 ('*Force of Law*'). It also encapsulates his

4.2 Tracing the western inheritance: duties and nonhuman animals

Some of the traces contributing to Western attitudes toward nonhuman animals were written by Aristotle, the Stoics, Saint Augustine and Saint Thomas Aquinas. According to Steiner, Aristotle advocated that rational contemplation by human animals was a divine activity.² Aristotle suggested that it separated human, from nonhuman animals whom he assumed were merely subject to their passions.³ For Aristotle, nonhuman animals were not rational or linguistic and were perceived to be limited to reactions caused by pleasure and pain.⁴ Steiner explains that as a result, 'Aristotle categorically [excluded] animals from the sphere of justice'.⁵

Purportedly, a Stoic notion was that human animals experience a connectedness with their own kind and, with reason, are 'able to act in accordance with principles of "rectitude and propriety"'.⁶ That perspective, Steiner claims, influenced Kant's and Rawls' logics that beings without rational agency are to be excluded from rights.⁷ That lack of kinship was also believed by the Stoics to justify human animals' 'use of beasts for "their own purposes without injustice"'.⁸

Clark suggests that the assumption of human animal superiority espoused in ancient times, has had 'enormous influence' on Western thought, and may even stretch to 'our *duty* as rational beings to conquer, subdue and domesticate the merely "animal" in ourselves and in

characterisation of the human subject as 'phallogocentric' that concurrently privileges the masculine schema, posited as virile and autonomous: Jacques Derrida, "'Eating Well" or the Calculation of the Subject' in Elisabeth Weber (ed), *Points... Interviews, 1974-1994* (Peggy Kamuf et al trans, Stanford University Press, 1995) 255-87, 280-81 [trans of: *Points de suspension, Entretiens* (first published 1992)] ('*Eating Well*'). See also Appendix 1, Part D, section D2.2.

² Gary Steiner, *Animals and the Moral Community: Mental Life, Moral Status, and Kinship* (Columbia University Press, 2008) 133 ('*Animals and the Moral Community*') citing Aristotle, *Nicomachean Ethics* Book X, ch 7 at 1177b20-30 ('*Nicomachean Ethics*') in Jonathan Barnes (ed), *The Complete Works of Aristotle: Volume 2* (Princeton University Press, 1995) 1861.

³ Steiner, *Animals and the Moral Community*, above n 2, 133 citing Aristotle, *Nicomachean Ethics*, above n 2.

⁴ Steiner, *Animals and the Moral Community*, above n 2, 133 citing Aristotle, *Politics*, bk I, ch 2, 1253a7-17.

⁵ Steiner, *Animals and the Moral Community*, above n 2, 133 citing Aristotle, *Politics*, bk I, ch 2, 1253a7-17.

⁶ Steiner, *Animals and the Moral Community*, above n 2, 136 citing Cicero, *De officiis* (On Duties) 1.107, in A A Long and D N Sedley (eds), *The Hellenistic Philosophers* (A A Long and D N Sedley trans, Cambridge University Press, 1990) 66E.

⁷ Steiner, *Animals and the Moral Community*, above n 2, 136.

⁸ Ibid quoting Cicero, *De Finibus Bonorum et Malorum* (H Rackham trans, Harvard University Press, 1999) 287 (describing Chrysippus's view).

the outer world.⁹ Whilst Steiner acknowledges that the Christian Bible contains some ‘conflicting views regarding human obligations toward animals’, he concludes it does ‘not establish moral obligations toward animals’.¹⁰

In 4 AD, the Christian theologian Saint Augustine taught that rationality, as a uniquely human animal capability, was a path to the truth as disclosed by (his) God.¹¹ Augustine did not advocate that human animals should enjoy unrestrained exploitation of *everything* other, or as Steiner put it, that ‘unbridled will to mastery’ was desirable.¹² However, Augustine was not concerned for nonhuman animals but rather that a lack of restraint detracts from the human animals’ appreciation of (his) God.¹³ Augustine rejected the possibility that the command: ‘thou shall not kill’, applied to nonhuman animals and declared ‘their life and their death are subject to our needs.’¹⁴ Further, Augustine denied any possibility of obligation toward nonhuman animals, since they were deemed as being without rationality, were excluded from human community, and despite acknowledging their cries of pain, ‘we make little of this’ since they are ‘not related to us by a common nature’.¹⁵

For the Catholic Saint Thomas Aquinas in the thirteenth century, nonhuman animals, as non-rational beings, were means to human animal ends.¹⁶ He declared: ‘it is not wrong for man to make use of them, either by killing or in any other way whatsoever’.¹⁷ However, Aquinas was concerned that human animals were obligated not to mistreat nonhuman animals in particular ways, but only because of the effect that it has on other humans, or, because it was thought to lead to the possibility of acting cruelly toward humans.¹⁸

⁹ Stephen R L Clark, ‘Animals in Classical and Late Antique Philosophy’ in Tom L Beauchamp and R G Frey (eds), *The Oxford Handbook of Animal Ethics* (Oxford University Press, 2011) 35-60, 48 (italics in original) (highlighting not in original).

¹⁰ Gary Steiner, *Anthropocentrism and Its Discontents: The Moral Status of Animals in the History of Western Philosophy* (University of Pittsburgh Press, 2014) 115 (‘Discontents’). At 116: ‘the New Testament reflects the influence of Stoic thought, which denies intellect to animals and argues that animals were created for the sake of human beings’.

¹¹ Ibid 117 citing Augustine, ‘The Teacher’ in *Against the Academicians and The Teacher* (Peter King trans, Hackett, 1995) 140.

¹² Steiner, *Discontents*, above n 10, 118.

¹³ Ibid 118.

¹⁴ Ibid 119 quoting Augustine, *City of God*, bk 1, ch 20, 32.

¹⁵ Steiner, *Discontents*, above n 10, 119 quoting Augustine, *The Catholic and Manichaean Ways of Life*, bk 2, ch 17, 105.

¹⁶ Steiner, *Discontents*, above n 10, 127 citing Saint Thomas Aquinas, *Summa Contra Gentiles* 3, ch 3, in Anton C Pegis (ed), *Basic Writings of St. Thomas Aquinas Volume 1* (Hackett, 1997) 612.

¹⁷ Steiner, *Discontents*, above n 10, 130 citing Saint Thomas Aquinas, *Summa Contra Gentiles* 3, ch 92, in Anton C Pegis (ed), *Basic Writings of St. Thomas Aquinas Volume 2* (Hackett, 1997) 222.

¹⁸ Steiner, *Discontents*, above n 10, 131.

Rawls' liberal ideas of justice¹⁹ also only pertain to human animals.²⁰ While he conceded that nonhuman animals' '[capacities] for feelings of pleasure and pain ... clearly imposes duties of compassion and humanity', he contended that those 'beliefs' were 'outside the scope of the theory of justice'.²¹ He could not see a way to include nonhuman animals in the social contract 'in a natural way'.²² He was happy to rely on 'metaphysics ... to work out a view of the world which is suited for this purpose; it should identify and systematize the truths decisive for these questions'.²³ For him, in terms of his exclusive conception of justice:

... the guiding idea is that the principles of justice for the basic structure of society ... are ... that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association.²⁴

Rawls' greater definitions of justice, and what is 'good' makes reference to Aristotelian notions, and are further explicated within his text. However, in short, his conception of liberal, natural duties include: to not be cruel or to harm another person; to help another person when they are in need if that does not pose 'excessive risk or loss to oneself'; and 'not to cause unnecessary suffering' to a person.²⁵ His idea of justice included abidance with (what he assumed could be) *just* laws and institutions.²⁶ While Rawls' notions include a social contract (generally following Locke, Rousseau and Kant),²⁷ he did not require that citizens voluntarily accept their duties under that social contract.²⁸ In confirming rights for human animals, he suggested that '[e]ach person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override'.²⁹ He seemed to reject utilitarianism in denying that 'the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many'.³⁰ However, he did admit, that 'an injustice is tolerable only

¹⁹ I focus on Rawls' conception of the social contract here, since Nussbaum adopts parts of his position in the development of her capabilities approach as described in section 4.3.6 below.

²⁰ John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 512:

... no account is given of right conduct in regard to animals and the rest of nature ... it does seem that we are not required to give strict justice anyway to creatures lacking [the capacity for a sense of justice].

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.* 11.

²⁵ *Ibid.* 114.

²⁶ *Ibid.* 115.

²⁷ *Ibid.* 11.

²⁸ *Ibid.* 115. For further differentiation of Rawlsian contractarianism see Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2006) ('*Frontiers*') 12-13.

²⁹ Rawls, above n 20, 3.

³⁰ *Ibid.* 4.

when it is necessary to avoid an even greater injustice'.³¹ He believed that a commonly shared perception of justice was necessary for 'well-ordered human association',³² and that social justice was possible where basic rights and duties applied to all, and equally, in the community.³³ For that to be possible, there also must be 'a set of related distributive principles that enable the determination of 'a proper *balance* between competing claims'.³⁴ He believed that 'any reasonably complete ethical theory' must be able to resolve this societal problem, and that the principles of that theory would 'constitute its doctrine of justice'.³⁵ With this, Rawls intimates that justice and ethical conduct can be *produced* through the application of rules, and through the 'principles in assigning rights and duties and in defining the appropriate division of social advantages'.³⁶

Rawls was critical of traditional utilitarianism, such as that of Bentham and Sidgwick,³⁷ in his claim that it 'does not take seriously the distinction between persons'.³⁸ He also worried that traditional utilitarianism was not concerned with the 'source or quality' of its outcomes.³⁹ Within Rawls' rationality, any ethical doctrine that did not judge the rightness of its consequences 'would be simply irrational, crazy'.⁴⁰ Rawls' justice more directly addressed issues of fair distribution among particular groups or persons rather than simply maximising the good for society as a whole.⁴¹ When considering the plight of an individual *human* animal, Rawls claimed that: 'in a just society the basic liberties are taken for granted and the rights secured by justice are not subject to political bargaining or to the calculus of social interests'.⁴² But of course, that rule could be broken, where there was a risk of an even greater injustice, and he believed that rational and right judgment *could* resolve questions of competing interests, as described above.

This brief review of the views of Augustine and Rawls demonstrates there has been a denial that duties are owed to nonhuman animals. It demonstrates that the denial is a product of the dogma of human-animal difference, particularly in relation to the perceived human capability of rationality. Of course, rationality was not only perceived to be the justification, it also, in whatever strain of rationality was employed, produced the effect (of justified reason).

³¹ Ibid.

³² Ibid 5.

³³ Ibid 5-7.

³⁴ Ibid 10 (*italics not in original*).

³⁵ Ibid.

³⁶ Ibid.

³⁷ See, eg, *ibid* 31-32. See also Chapter 6, section 6.2.4 regarding Bentham.

³⁸ Rawls, above n 20, 27.

³⁹ Ibid 30.

⁴⁰ Ibid 30.

⁴¹ Ibid 10, 30-31.

⁴² Ibid 28.

That is, its own exclusionary logic. What the different forms of rationality espouse, by excluding nonhuman animals from the sphere of justice, is *justified* sacrifice of nonhuman animals for human animal ends. That presumption also feeds the calculus of utilitarianism and the exclusion of nonhuman animals from the social contract. It is clear that justice for human animals is *produced*.

4.3 Anglo-American theorists concerned for nonhuman animals

In this section I retrace the positions of some of the most well-known Anglo-American theorists that are concerned with nonhuman animals' status in law. I highlight some of the similarities and differences to Derridean propositions.

4.3.1 Singer

Singer uses the term 'speciesism' to denote 'the idea that it is justifiable to give preference to beings simply on the grounds that they are members of the species *Homo sapiens*'.⁴³ Singer argues that speciesism is indefensible and that no philosophy has yet produced 'a plausible theory of the moral importance of species membership'.⁴⁴ He recounts that the contractarian argument is: that since nonhuman animals cannot participate in the social contract, then 'we have no direct duties to them'.⁴⁵ Derrida intimated that he had a similar complaint to Singer that the contractarian argument is not robust, since not all human animals at all times, are capable of reciprocity of duties.⁴⁶ Derrida wrote:

I cannot tackle here the immense question of whether we can recognize the rights of subjects that are exempted from or incapable of duties. It is generally thought not, except in some exceptional cases. Such a possibility is not excluded in the history of the law, but it is a thorny problem ...⁴⁷

Singer clarifies that his denunciation of speciesism does not imply that nonhuman animals or even human animals at all times, would be granted equivalent rights, or that they possess equivalent non-legal interests.⁴⁸ In *Practical Ethics*, Singer limits beings with interests to

⁴³ Peter Singer, 'Introduction' in Peter Singer (ed), *In Defense of Animals: The Second Wave* (Blackwell Publishing, 2006) 1-12, 3 ('*Defense Introduction*') (italics and capitalisation is as it appears in the text).

⁴⁴ Ibid 4.

⁴⁵ Ibid.

⁴⁶ Singer, *Defense Introduction*, above n 43, 4.

⁴⁷ Jacques Derrida in Marie-Louise Mallet (ed), *The Animal That Therefore I Am* (David Wills trans, Fordham University Press, 2008) 88 [trans of: *L'animal que donc je suis* (first published 2006)] ('*The Animal That Therefore I Am*'). See also Chapter 7, section 7.2.2.

⁴⁸ Ibid 5.

those that are deemed to at least, have capacities for suffering, and enjoyment or happiness.⁴⁹

As a utilitarianist, Singer does construct a particular rationality for making decisions about who or what might be sacrificed.⁵⁰ He demands equal consideration of the different interests and preferences of individuals to determine whose interests should be used or sacrificed when such decisions must be made.⁵¹ His index also implies that judgment of the mental capabilities of the members of the species in question could be relevant in some circumstances.⁵² He intimates that there may be comparable interests between members of different species who share what may be deemed to be equivalent mental capabilities.⁵³ By not excluding human animals in these calculations, Singer appears respectful to nonhuman animals to a degree, and claims to be non-speciesist. He is also not succumbing to the traditional Western view that human life is always sacred or that nonhuman animals without question, can be used as means to human animal ends. Singer argues that a rejection of speciesism would find that factory farming,⁵⁴ and experimentation on animals where it does not lead to saving a greater number of other beings,⁵⁵ as morally objectionable. Other examples he gives that would also be morally objectionable include farming fur, hunting, 'circuses, rodeos, zoos, and the pet business'.⁵⁶

Singer has been described as espousing preference utilitarianism.⁵⁷ In 2013, Singer explained that he had also become persuaded by some of the arguments of hedonistic utilitarianism⁵⁸ as it had been articulated by Sidgwick⁵⁹ and Parfit.⁶⁰ Singer explained that a

⁴⁹ Peter Singer, *Practical Ethics* (Cambridge University Press, 2nd ed, 1993) 57-58 ('*Practical Ethics*').

⁵⁰ Singer, *Defense Introduction*, above n 43, 5.

⁵¹ *Ibid*; Singer, *Practical Ethics*, above n 49, 55-56.

⁵² See, eg, Singer, *Defense Introduction*, above n 43, 5: In explicating examples, Singer refers to the capability of anticipation of dread and states that: 'In this example, the superior mental powers of normal adult humans would make them suffer more. In other circumstances, the nonhuman animal may suffer more because he or she cannot understand what it happening.'

⁵³ *Ibid*.

⁵⁴ Singer, *Practical Ethics*, above n 49, 63-64.

⁵⁵ *Ibid* 67.

⁵⁶ *Ibid* 68.

⁵⁷ See, eg, Martha C Nussbaum, 'Beyond "Compassion and Humanity": Justice for Nonhuman Animals' in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 299-320, 304 ('*Beyond*'); Alex Bruce, *Animal Law in Australia: An Integrated Approach* (LexisNexis, 2012) 49 citing Peter Singer, *Writings on an Ethical Life* (Harper Collins, 2001) 133.

⁵⁸ New York City Skeptics, 'RS97 – Peter Singer on Being a Utilitarian in the Real World', *RationallySpeaking: Exploring the Borderlines Between Reason & Nonsense*, 24 November 2013 (Peter Singer) 10:00-17:00.

subject's preference should be recognised as involving a state of mind, that is, a conscious experience of it.⁶¹ If there is no consciousness then it cannot be said that there is anything good in the world, or preferences, for that subject. That view would be shared by hedonistic and preference utilitarians.⁶² What was puzzling for Singer was that a preference utilitarianist would typically consider that when a perceived good happens for a subject, even where the subject does *not* consciously register it, that good would still figure in the utilitarian calculus.⁶³ This is difference between preference utilitarianism that is more 'paternalistic' in that it does not necessarily account for the subjective, conscious experience of the subject, and hedonistic utilitarianism that does so to a greater degree.⁶⁴ Hedonistic utilitarianism seems to take into account that the subject may value different modes and degrees of pleasure or suffering. The good of the conscious experience of those subjects is relevant in weighing up the sum of interests. It appears that both types of utilitarianists assume that it is possible for a human animal decision maker to determine the particular interests of any other being. Within hedonistic utilitarianism, this also seems to point toward a more individualised consideration of the subject, perhaps as animot, rather than the more conceptualised and extracted, paternalistic view under preference utilitarianism. In his short discussion, Singer did not further clarify the value of goods as relevant to a subject even if that subject did not consciously experience the value of that good. It may be possible that hedonist utilitarianism may, in the case of nonhuman animals, leave it open to excuse the malnourishment of them, just because the nonhuman animals would not appreciate the potential future suffering that the malnourishment may cause. That appears to open the potential to limit duties owed to another. The classical description of hedonistic utilitarianism also appears anthropocentric in that it places a high value on intellectually registered pleasures.⁶⁵ I question whether that can properly survive the test of speciesism. All conceptions of utilitarianism inherently involve an acceptance of sacrifice of the nonhuman animal which is antithetical to Derridean justice.

Another point of interest discussed in this interview was that Singer admitted to being persuaded that some moral judgments are objectively true, in that 'some ethical propositions

⁵⁹ See, eg, Julia Driver, *The History of Utilitarianism* (Winter 2014) Stanford Encyclopedia of Philosophy <<https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=utilitarianism-history>> [3 Henry Sidgwick] citing Henry Sidgwick, *The Methods of Ethics* (1874).

⁶⁰ Singer mentioned Derek Parfit, *On What Matters Volume One* (Oxford University Press, 2013).

⁶¹ Singer, above n 58.

⁶² Ibid. See also, Nussbaum, *Beyond*, above n 57, 304.

⁶³ Singer, above n 58.

⁶⁴ Ibid.

⁶⁵ See, eg, Julia Driver, *The History of Utilitarianism* (Winter 2014) Stanford Encyclopedia of Philosophy <<https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=utilitarianism-history>>.

are self-evident'.⁶⁶ He agreed that some moral judgments can be thought as 'truths of reason' in an objective sense.⁶⁷ Singer also appears to be convinced that *reason* can 'objectively' produce moral truths and ethical decisions. That ignores, in Derridean terms, the proposition that 'truths' are *constructed* through the individual trace of the subject – upon which the 'truths' are derived. They are products of inheritance(s) written in the mind, and other forms of intuition. As explored in Chapter 3, decision making may also involve reactionary processes of the body beyond consciousness.⁶⁸ It appears that duties toward nonhuman animals for utilitarianists, and perhaps for Singer, are limited in each case by whatever type of calculus is applied.⁶⁹ It should also be noted that claims of resisting speciesism are also made from the comfortable and secure position of human animals who are, in the main, not subject to the needs and desires of nonhuman animals.

4.3.2 Regan

Regan's rights view posits that 'certain individuals have [an inherent] value, and that the respect principle requires that 'a direct duty of justice' is owed to each of them.⁷⁰ He also posits that moral patients and moral agents must be deemed to have equal inherent value.⁷¹ In differentiation from utilitarian perspectives, the inherent value of individuals espoused by Regan does not measure value through the experiences of the subject, or the utility they represent to another.⁷² What moral patients and moral agents share that make them recipients of duties in Regan's view, is that they are each a 'subject-of-a-life'.⁷³ It connotes more than being alive and more than mere consciousness.⁷⁴ What they share is that:

⁶⁶ Singer, above n 58.

⁶⁷ Ibid.

⁶⁸ See Chapter 3, sections 3.2.1 and 3.2.2.

⁶⁹ For other criticisms of Singer's position, see, eg, Elisabeth de Fontenay, 'Between Possessions and Persons' in *Without Offending Humans: A Critique of Animal Rights* (Will Bishop trans, University of Minnesota Press, 2012) 47-71: I take up her criticisms in Chapter 5; Bruce, above n 57, 52-53; Nussbaum, *Beyond*, above n 57, 304-05; Martha C Nussbaum, 'Working with and for Animals: Getting the Theoretical Framework Right' (2017) 94 *Denver Law Review* 609 ('*Framework*'); Richard Payne, 'Animal Welfare, Animal Rights and the Path to Social Reform: One Movement's Struggle for Coherency in the Quest for Change' (2002) 9 *Virginia Journal of Social Policy and the Law* 587; Tom Regan, *The Case for Animal Rights* (University of California Press, 2004) 204-31; Gary L Francione, 'Animals – Property or Persons?' in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 108-42, 140 n 81 ('*Property or Persons*'); 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) 51-77, 66-69.

⁷⁰ Regan, above n 69, 233.

⁷¹ Ibid 233.

⁷² Ibid 235-37.

⁷³ Ibid 243.

⁷⁴ Ibid.

they have beliefs and desires; perception, memory, and a sense of the future, including their own future; an emotional life together with feelings of pleasure and pain; preference and welfare-interests; the ability to initiate action in pursuit of their desires and goals; a psychophysical identity over time; and an individual welfare in the sense that their experiential life fares well or ill for them, logically independently of their utility for others and logically independently of their being the object of anyone else's interests.⁷⁵

Despite the breadth of this description, it does contain echoes of the traditional Western criteria that has served to *exclude* nonhuman animals from the sphere of justice. In its categorisation of different capabilities, it appears to be subject to scientific opinion, in that a human animal will deem who or what does not have a sense of the future. Derrida may have warned that this kind of criteria serves to replace one cleavage, or set of limits, with another.⁷⁶ Regan's logic is that those beings deemed to be without a subject-of-a-life do not share the same moral status as those that do, and hence they are *not* owed direct duties.⁷⁷ Regan differentiates between the treatments that different beings, with different inherent values, deserve.⁷⁸ His call to egalitarianism is merely that each subject-of-a-life merits direct duties.⁷⁹ However, what those duties entail, that is what they deserve, is based on differing evaluations of inherent value.⁸⁰ What the respect principle demands is merely that treatment respects the inherent value of the individual.⁸¹ This prescription does appear to negate utilitarian justifications for harms to any subject-of-a-life.⁸² They should not be treated as means to another's ends.⁸³ In contrast to the liberal ideas of justice, Regan's justice also demands that duties extend to assisting others who are suffering injustice.⁸⁴ As a result, Regan posits that each subject-of-a-life possesses basic moral rights that give rise to valid claims to respectful treatment.⁸⁵ Regan also attempts to address the problem of conflicting rights. He suggests that the 'miniride' and the 'worse-off' principles should be employed to determine if it is necessary to override the right of an innocent subject-of-a-life.⁸⁶ In this, he

⁷⁵ Ibid.

⁷⁶ See, eg, Derrida, *The Animal That Therefore I Am*, above n 47, 92: 'My sole concern is not that of interrupting this animalist "vision" but of taking care not to sacrifice to it any difference or alterity, the fold of any complication, the opening of any abyss to come'. See also Robert Garner, 'A Defense of a Broad Animal Protectionism' in Gary L Francione and Robert Garner, *The Animal Rights Debate: abolition or regulation?* (Columbia University Press, 2010) 103-174, 114 ('Defense').

⁷⁷ Regan, above n 69, 245.

⁷⁸ Ibid 248.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid 248-49.

⁸³ Ibid 249.

⁸⁴ Ibid.

⁸⁵ Ibid 327.

⁸⁶ Ibid.

falls back to utilitarian ideas to a degree, to say that the rights of a few innocents can be overridden to protect a greater number of subjects-of-a-life when they all face the prospect of comparable harms.⁸⁷ The 'worse-off' principle deals with the situation where many are faced with the prospect of a lower degree of harms than a smaller number of innocents faced with the prospect of a higher degree of harms.⁸⁸ In that case, the rights of the smaller number of innocent subjects-of-a-life should not be overridden.⁸⁹ Regan's distinction between his rights arguments and utilitarian arguments is that utilitarianism merely treats subjects as 'mere receptacles of value' in that utilitarianism is concerned only with aggregates of harms and benefits.⁹⁰ I wonder if this is a distinction without difference if the end result is the same for individual, sacrificed, animots. I am also concerned about whom or what decides whom is an 'innocent'. There cannot be Derridean justice for any being that is sacrificed. Other commentators have also criticised Regan's postulate of comparable harms as anthropocentric.⁹¹

4.3.3 Francione versus Posner

Francione campaigns against the legal classification of nonhuman animals as property.⁹² He believes that nonhuman animals' interests can only be recognised when they stop being signified as property.⁹³ He is opposed to the animal welfarist position and he advocates for abolition of nonhuman animal use.⁹⁴ He argues that most people would agree the 'sole ground' for the obligation not to inflict unnecessary harm on nonhuman animals is that they

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ See, eg, Gary L Francione, *Animals as Persons: Essays on the Abolition of Animal Exploitation* (Columbia University Press, 2008) 211; Steiner, *Discontents*, above n 10, 5:

By focusing on capacities such as preference satisfaction, selfhood, virtue, or a self-reflective awareness of the future, these philosophers base judgments of moral worth on the degree of sophistication or complexity of a being's subjective inner life. In doing so, they implicitly support the notion of the autonomous human individual that has become the linchpin of liberal political theory.

For broader criticisms of rights theories, see also Josephine Donovan and Carol J Adams in 'Introduction' in Josephine Donovan and Carol J Adams (eds), *The Feminist Care Tradition in Animal Ethics* (Columbia University Press, 2007) 5-6; Catherine A MacKinnon, 'Of Mice and Men: A Fragment on Animal Rights' in Josephine Donovan and Carol J Adams (eds), *The Feminist Care Tradition in Animal Ethics* (Columbia University Press, 2007) 317-32.

⁹² See, eg, Francione, *Property or Persons*, above n 69, 108.

⁹³ Ibid.

⁹⁴ Ibid. See also Gary L Francione, 'The Abolition of Animal Exploitation' in Gary L Francione and Robert Garner, *The Animal Rights Debate* (Columbia University Press, 2010) 1-102, 1-85.

are sentient beings.⁹⁵ He also highlights that under laws that prohibit merely 'unnecessary suffering':

[t]he property status of animals renders meaningless any balancing that is supposedly required under the humane treatment principle or animal welfare laws, because what we really balance are the interests of property owners against the interest of their animal property ... [and] [i]t is, of course, absurd to suggest that we can balance human interests, which are protected by claims of right in general and of a right to own property in particular, against the interests of property, which exists only as a means to the ends of humans.⁹⁶

Further, Francione explains that the decision of whose rights prevails is 'predetermined by the property status of the animal' and that the right of the property owner 'counts more than animal suffering'.⁹⁷ He claims that as long as the economic use is deemed a benefit, then 'there is no effective limit on our use or treatment of animals'.⁹⁸ This seems somewhat of an overstatement, given that cruelty and duty of care laws are not always ineffective. Nevertheless, Francione highlights how decision makers are rarely faced with a true decision. In a Derridean sense that is true, since if nonhuman animal interests were to be properly weighed then the decision would have to address the aporia of 'balancing' the interests of the property owner, that may directly conflict with, the interests of the nonhuman animal. It would be a true decision since it could not rely on any biased form of rationality. What seems to be the case, in reality, is that a determination is made that is already highly directed in law toward the interests of the property owner (or the offender who is not the owner).⁹⁹

Francione also makes reference to, and criticises what essentially, Derrida described as the philosophically-constructed 'abyss' of human-animal difference that justifies human animals' mistreatment of nonhuman animals.¹⁰⁰ Francione also makes reference to the consciousness capabilities of nonhuman animals, and to a degree the autobiographical element of some nonhuman animals' lives.¹⁰¹ Additionally, in what seems to reflect commonality with Derridean thought, is that Francione mentions that nonhuman animals may have a 'core consciousness' that delivers a sense of time and place.¹⁰² In Derridean

⁹⁵ Francione, *Property or Persons*, above n 69, 112.

⁹⁶ *Ibid* 117.

⁹⁷ *Ibid*.

⁹⁸ *Ibid*.

⁹⁹ See, eg, *Animal Care and Protection Act 2001* (Qld) ('ACPA') ss 3(b)(i), 17(4). See also Chapter 9; Chapter 10.

¹⁰⁰ Francione, *Property or Persons*, above n 67, 129. See also Appendix 1, Part D, sections D3-D4; Chapter 2, section 2.8.

¹⁰¹ Francione, *Property or Persons*, above n 69, 128-30.

¹⁰² *Ibid* 128.

terms, that sounds like a recognition of the operation of trace and *différance* as a possibility common to human and nonhuman animals' lives, where both are always writing, in forms of autobiography.¹⁰³

In contrast, Richard Posner believes that the best way to protect nonhuman animals is for them to remain as property in law, and for the existing laws to be extended and more vigorously enforced.¹⁰⁴ Posner mentions those laws that 'forbid inflicting gratuitous cruelty'.¹⁰⁵ He also acknowledges that neglect of animals is wrong.¹⁰⁶ His argument against cruelty also incorporates the anthropocentric notion of indirect duties to nonhuman animals.¹⁰⁷ Posner's reliance on economics as incentive not to harm nonhuman animals, reflects, from a Derridean perspective, what appears to be an unfortunate truth: that we are driven by economic (monetary and non-monetary) returns.¹⁰⁸ Whilst Posner does not say it directly in his response to Wise or Singer, I believe Posner only mentions the prohibition of 'gratuitous cruelty' because that is the only form of cruelty where the economic incentive is likely to coincide with nonhuman animals' interests.¹⁰⁹ It is usually not in an owner's economic interests to inflict gratuitous cruelty. That is, to damage the body of their nonhuman animal(s) for *no reason*. Whereas, it may be in an owner's interests to either neglect or inflict other than gratuitous cruelty on their nonhuman animals as a means to achieve greater economic or other returns if that is their objective. In fact, some laws condone it to some degrees. For example, as discussed in Chapter 9, only 'unreasonable' pain and suffering can constitute cruelty, and some penalties for mistreatment of some nonhuman animals are so low that it has been suggested that some business interests may regard them as a potential cost of doing business.¹¹⁰

¹⁰³ See Appendix 1, Part A, section A3; Chapter 2, section 2.3. See also Derrida, *The Animal That Therefore I Am*, above n 47, 52-118.

¹⁰⁴ Posner, above n 69, 59. I use Posner's first name here to make it clear that I am not discussing the opinions of Eric Posner.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid 63.

¹⁰⁷ Ibid 70.

¹⁰⁸ See Chapter 2, section 2.2.1.2; Appendix 1, section A3.1.

¹⁰⁹ See Posner, above n 69, 57, 63.

¹¹⁰ See, eg, Chapter 9, section 9.2.5 where I discuss that low penalties may be interpreted as a cost of doing business, and section 9.3.1 where exemptions to animal protections are discussed; Appendix 3, Table 5 where excuses and defences are referenced within Australian animal protection statutes. See also Peter Singer, 'Ethics Beyond Species and Beyond Instincts: A Response to Richard Posner' in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 78-92, 90 ('*Response to Posner*'): Of the several billion animals that suffer and die each year in the United States in factory farms: '[a]ll of those animals are fully "commodities," and their property status is indisputable. It does them no good at all'.

4.3.4 Wise versus Posner

As mentioned in Chapter 3, Professor Wise litigates for the NonHuman Rights Project.¹¹¹ His position is to take an incremental approach to attaining legal rights, through the United States' courts, for nonhuman animals, starting with primates. Wise relies on the argument that under United States' law, '[e]quality demands that likes be treated alike'.¹¹² Arguing through analogy that not all human animals always act autonomously,¹¹³ and because the law assigns legal personhood to non-autonomous human animals, and to some non-beings,¹¹⁴ he contends that '[j]udges who deny personhood to every nonhuman animal act arbitrarily'.¹¹⁵ Wise relies on 'practical autonomy' as a cognitive ability, as a high degree of consciousness, as a reason to award the 'basic liberty rights of bodily integrity and bodily liberty' to some nonhuman animals.¹¹⁶ One of Nussbaum's criticisms of Wise's approach is that Wise sets up limits against the interests of other nonhuman animals:

Wise's strategy ... validates and plays upon the old familiar idea of a *scala naturae* (ladder of nature) with us at the top. Some animals get in, but only because they are like us. The first door is opened, but then it is slammed shut behind us: nobody else gets in.¹¹⁷

Richard Posner is highly critical of Wise's approach. Whilst Posner does see that the law's adoption of the traditional conceptions of the human-animal divide is less than ideal,¹¹⁸ he argues that rights for individuals should be based on the characteristics of the individual rather than 'basing their legal status on the biological or other ascriptive group to which they happen to belong'.¹¹⁹ That does seem surprising given that whilst the law does recognise human animals as *animot* (properly as an individual), it does so precisely *because* each human animal *is* human. It would also be unreasonable to ask an advocate not to rely on science about species prior to arguing the capabilities of any particular individual, given that 'scientific' presumptions about nonhuman animals at the species level, already exist in law. Posner seeks to demolish Wise's argument that rights should be tied to cognitive capacity through employment of various other analogous examples including potential rights of human fetuses and of intelligent computers.¹²⁰ Posner's other criticisms include the fact

¹¹¹ See Chapter 3, section 3.3.2.

¹¹² Steven M Wise, 'Animal 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) 19-50, 30.

¹¹³ *Ibid* 31.

¹¹⁴ *Ibid* 32.

¹¹⁵ *Ibid* 31.

¹¹⁶ *Ibid* 35.

¹¹⁷ Nussbaum, *Framework*, above n 69, 613.

¹¹⁸ Posner, above n 69, 52.

¹¹⁹ *Ibid* 55.

¹²⁰ *Ibid* 54-56.

that Wise is 'asking judges to set sail on an uncharted sea with out a compass' since awarding rights to nonhuman animals would leave it to the courts to decide where lines should be drawn, including in cases where there are conflicts of rights.¹²¹ It appears that Posner, as judge, is rightfully terrified at having to address a real, and actual aporia, where a real decision, not already directed in law, would have to be made. To do so would cast him, and other judges, all at sea, and perhaps without any raft to secure their own economic (in the non-monetary sense) returns. That can't be read as a criticism, since the work of the judge is to act within the legal rules, and not to make major shifts in law. A judge cannot, as Derrida required, in principle – rather than as a practical directive, achieve Derridean justice, unless they examine each case, and each rule, in every case, toward deriving Derridean justice.¹²²

4.3.5 Garner

Garner argues that advocates for nonhuman animals should engage with the political process to argue for animal welfare reforms rather than adopt abolitionist positions.¹²³ He believes that nonhuman animals have benefitted from improvements in protections,¹²⁴ and that the work of advocates educates the community that additional improvements are necessary.¹²⁵ He describes the practical, real-world political obstacles facing abolitionists and nonhuman animal rights advocates.¹²⁶ He also suggests that human animals' concerns about implementing rights for nonhuman animals are ameliorated when those rights would conflict on their own.¹²⁷ From the point of view of the totality of suffering of entire populations of nonhuman animals, Garner argues that just because a greater number of nonhuman animals *are* subjected to exploitation today, that does *not* provide 'an adequate measure of suffering' in that things could have been 'worse still' without the improvements to animal protections that *have* been implemented in law.¹²⁸ In his argument on that point, he selectively mentions the case of genetically modified animals in scientific testing and posits that 'not all genetically modified animals suffer'.¹²⁹ It seems that he believes human animals could or should possibly play the role of adjudicator of 'suffering', and do so across entire populations, rather than choosing to consider the degree of suffering for every individual

¹²¹ Ibid 57.

¹²² Derrida, *Force of Law*, above n 1, 961. See also Chapter 2, section 2.6.2; Appendix 1, Part C, section C3.2.5.

¹²³ Garner, *Defense*, above n 76, 120-21.

¹²⁴ Ibid 122.

¹²⁵ Ibid 123.

¹²⁶ Ibid 125.

¹²⁷ Ibid 126.

¹²⁸ Ibid 132.

¹²⁹ Ibid.

nonhuman animal in every situation. It seems trite, and erroneous at least numerically, to argue that it could have been worse, particularly when increasing numbers of nonhuman animals are made to suffer at the hands of humans.

Garner argues that the legal concept of 'unnecessary suffering', has capability to evolve along with public sentiments, and that it *can* be effective.¹³⁰ That also appears trite and overly simplistic in that the law does not effectively protect nonhuman animals from harms since what is 'unnecessary' is subject to the purported 'balancing' of human animal interests. From a Derridean perspective, Garner does face up to the real-world problem that human animals are interested in their own returns. However, Garner seeks a solution that does not seek to re-write cultural inheritance. He also optimistically posits that the exclusively human animal-focussed social contract and democratic processes can provide a path to meaningful political change in favour of nonhuman animals.

4.3.6 Nussbaum

Nussbaum's capabilities approach¹³¹ is concerned for individual nonhuman animals¹³² even though she constructs needs based on what are perceived to be species norms.¹³³ Following Aristotle,¹³⁴ it therefore rejects some of the premises of utilitarianism¹³⁵ since it is concerned with the flourishing of each individual.¹³⁶ Her capabilities approach for nonhuman animals involves consideration of ten categories of entitlements as follows:

- (i) life, (ii) bodily health, (iii) bodily integrity, (iv) senses, imagination and thought, (v) emotions, (vi) practical reason, (vii) affiliation, (viii) other species, (ix) play, and (x) control over one's environment.¹³⁷

Nussbaum claims that these entitlements 'are most essential to a flourishing life, a life worthy of the dignity of each creature,' and that '[a]nimals have entitlements based upon justice'.¹³⁸ Nussbaum does take on the difficult question about the degree of harm involved in terminating lives of nonhuman animals who are assumed to have varying degrees of

¹³⁰ Ibid 141-46.

¹³¹ See, eg, Nussbaum, *Frontiers*, above n 28; Nussbaum, *Beyond*, above n 57.

¹³² Nussbaum, *Frontiers*, above n 28, 357-58, 349.

¹³³ Ibid 392.

¹³⁴ In that Aristotle claimed that flourishing involved living a good life in the context of each individual's own capabilities and limitations. See also ibid 327, 328: 'Aristotelians argued that all of nature is a continuum, and that all living creatures are worthy of respect and even wonder'; 347-49.

¹³⁵ Ibid 338-46, 370. See also Nussbaum, *Framework*, above n 69, 619: 'Benthamism supplies no account of urgent entitlements grounded in justice, and we badly need such an account to make sense of the human-animal relationship'.

¹³⁶ Nussbaum, *Frontiers*, above n 28, 349, 351, 357.

¹³⁷ Ibid 393-401.

¹³⁸ Ibid 392.

sentience.¹³⁹ Among other practices that she claims should be banned, are the ‘painful killings in the process of raising animals for food’.¹⁴⁰ Therefore her entitlement to life for nonhuman animals is a limited one, at least in the meantime, until we can ‘[move] gradually toward a consensus against killing ... for food’.¹⁴¹ Nussbaum’s approach is not merely conceptual but also offers some political practicality. She does not shy away from the issues of conflicts of rights, or, the conflict of capabilities entitlements between human and nonhuman animals. She concedes that painless killing of nonhuman animals may be necessary in the meantime in order to ‘[secure] all the human capabilities’.¹⁴² This would not render justice for nonhuman animals in this circumstance since it still supports human animal supremacy, and it advocates for the utilitarian use of nonhuman animals to be raised and killed for human consumption. Similarly, Nussbaum does not seek an immediate ban on *all* scientific testing on nonhuman animals, but a phasing out of the practice where possible.¹⁴³ From a Derridean perspective, Nussbaum’s capabilities approach does appear to weigh the experience and needs of l’animot. However, that is ameliorated since humans would retain sovereignty over the right for nonhuman animals in some circumstances, to suffer scientific testing, and to live or to die.

More broadly, Nussbaum attacks the traditional notion of the social contract in its exclusion of otherness including otherness of human animals. In her view, the social contract does not properly cater for human animals with ‘severe and atypical physical and mental impairments’,¹⁴⁴ the impacts of different nationalities and place of birth and the interdependence of different societies,¹⁴⁵ or species membership.¹⁴⁶ For Nussbaum, these exclusions are ‘issues of justice’.¹⁴⁷

Nussbaum extends the reach of ‘dignity’,¹⁴⁸ to nonhuman animals, as a justification for their rights to enjoy their capabilities.¹⁴⁹ In defence of that claim, she cites the Kerala High Court

¹³⁹ Ibid 385-89, 393.

¹⁴⁰ Ibid 393. See also ibid 402: Nussbaum seeks a compatibility between human and nonhuman animal capabilities.

¹⁴¹ Ibid.

¹⁴² Ibid 402.

¹⁴³ Ibid 403-05.

¹⁴⁴ Ibid 14, 14-18. I note that the current *Disability Act 2006* (Vic) s 5(2) includes within its principles that: ‘[p]ersons with a disability have the same right as other members of the community to—(a) respect for their human worth and dignity as individuals’.

¹⁴⁵ Nussbaum, *Frontiers*, above n 28, 18-21.

¹⁴⁶ Ibid 21-22.

¹⁴⁷ Ibid 22.

¹⁴⁸ Ibid 78, 346.

¹⁴⁹ Nussbaum, *Frontiers*, above n 28, 326:

Dignified existence would seem at least to include the following: adequate opportunities for nutrition and physical activity; freedom from pain; squalor; and cruelty; freedom to act in ways

in *Nair v Union of India*¹⁵⁰ where the Court complained that circus animals were forced to live an 'undignified way of life', and that as beings they were 'entitled to dignified existence and humane treatment sans cruelty and torture ...'¹⁵¹ She also recognises the Judeo-Christian and Kantian inheritance that posits that dignity stems from 'reason and moral choice', and that beings who do not possess it, fall 'outside the ethical community'.¹⁵² In Nussbaum's approach, nonhuman animals would be granted 'political rights and the legal status of dignified beings',¹⁵³ and legal standing to be represented by a guardian.¹⁵⁴

However, 'dignity' is not a thing, it *is* a metaphysical notion.¹⁵⁵ On a first reading, I found that Nussbaum's definition of dignity is one that Derrida would have found difficult to robustly apply to nonhuman animals since, in the Kantian sense, it is a mechanism to distinguish human animals from nonhuman animals. In the common usage, human animals are assumed to carry dignity and are therefore differentiated from nonhuman animals.¹⁵⁶

Bennington noted that Derrida had made a connection between dignity and the Kantian usage which signifies the human animal as ends and not means.¹⁵⁷ Derrida stated: 'Kant's *Würde* is a majesty of man, a dignity attached to the human person as an end in itself'.¹⁵⁸

that are characteristic of the species ...; freedom from fear and opportunities for rewarding interactions with other creatures of the same species, and of different species; a chance to enjoy the light and air in tranquillity.

¹⁵⁰ No 155 / 1999, June 2000.

¹⁵¹ Nussbaum, *Frontiers*, above n 28, 326 quoting *Nair v Union of India* No 155 / 1999, June 2000.

¹⁵² Nussbaum, *Frontiers*, above n 28, 329-30.

¹⁵³ *Ibid* 398-99.

¹⁵⁴ *Ibid* 401.

¹⁵⁵ See Scott Cutler Shershow, *Deconstructing Dignity: A Critique of the Right-to-Die Debate* (University of Chicago Press, 2014) 32-33 citing Jacques Derrida, 'Economimesis' (Summer 1981) 11(2) *Diacritics* 2, 5:

... the concept of "human dignity" in the general or universal sense ... merely recapitulates on a higher level the same semantic triangle of worth, status, and bearing. This three-fold structure of meaning seems to persist in dignity throughout its long and difficult genealogy, whether it is understood in terms of a Stoic, classical, or humanist vision of man as the measure of all things, or the Judeo-Christian vision of the godlikeness of humanity, or, in Kantian terms, as the incalculable "inner worth" of the human person ... humanity is placed on a "chain of being" ... human dignity necessarily names humanity's exceptional status among all other living creatures ... philosophical humanism similarly elevates humanity over what Derrida calls "animality in general ... as if there were only a single "animal" structure that could be opposed to the human".

¹⁵⁶ Oxford University Press, *British & World English: dignity*, English Oxford Living Dictionaries <<https://en.oxforddictionaries.com/definition/dignity>>: 'The state or quality of being worthy of honour or respect'; '[a] high rank or position'; '[a] composed or serious manner or style'; '[a] sense of pride in oneself; self-respect'; '... from Latin dignitas, from dignus "worthy"'.
¹⁵⁷ Geoffrey Bennington, 'Derrida's Dignity' in John William Phillips, *Current Perspectives in Derrida Studies* (Polity Press, 2016) ch 2 citing Jacques Derrida in Michel Lisse, Marie-Louise Mallet and Ginette Michaud (eds), *The Beast & the Sovereign Volume I* (Geoffrey Bennington trans, University of Chicago Press, 2009) 214 [trans of: *Seminaire: La bete el le souverain Volume I (2001-2002)* (first published 2008)] ('*The Beast & the Sovereign Vol I*).

¹⁵⁸ Derrida, *The Beast & the Sovereign Vol I*, above n 156, 181.

Therefore 'dignity' in the Kantian sense is tied up with the notions of *human* rights and what is thought to be justice, solely for *human* animals. In that sense an initial reading of Nussbaum should question the use of the word 'dignity' in her application to nonhuman animals. It may indicate a glazing over of the problem at the crux of the human-animal divide, that in reality, justifies their sacrifice, and puts a stop to the elevation of *their* rights. However, in her introduction, Nussbaum highlights that she argues within her text

that dignity does not rest on some actual property of persons, such as the possession of reason or other specific abilities ... It is also argued that dignity is not a value independent of the capabilities, but that the articulation of the political principles involving capability are (partial) articulations of the notion of a life with human dignity.¹⁵⁹

Given her extending of the application of dignity to nonhuman animals, it appears that her usage of the term rejects divisive connotations of the Kantian definition. She suggests it is something more than a receptacle for particular capabilities. With her recognition of dignity as potentially applying to a broader range of beings, it seems to me that 'dignity' for her, is more of an enabler of political inclusion, or, a consequence of political inclusion. However, it does seem to retain an element of the metaphysical, as something awarded partially on the basis of capabilities. That is despite Nussbaum's claim that for human animals, 'dignity' is *not* merely metaphysical, but rather, that equal dignity for human animals is 'a central element in political conceptions'.¹⁶⁰ Nussbaum appears to be isolating the traditional political *application or purpose* of the concept, rather than merely highlighting its circular, and dogmatic logic. What becomes clear is that Nussbaum discusses 'dignity' as a *device* to counteract exclusive contractarianism that relies on the conception of human dignity to *justify merely* human animal political superiority. Nussbaum confirms that her solution is to *not* 'rely on ['dignity'] ...' since people differ in their conceptions of it, and that it 'is a divisive metaphysical idea'.¹⁶¹ Rather, she attempts to shift the focus toward 'the looser idea that all creatures are entitled to adequate opportunities for a flourishing life.'¹⁶²

In her attempt to overcome the limitations of the Kantian divide and contractarianism, Nussbaum's capabilities approach also involves 'compassion of a special sort ... that focuses on wrongful action and sees the animal as an agent and an end.'¹⁶³ Nussbaum's proposition extends beyond merely trying to solve ethical rule and legal problems. She is cognisant of the writing of culture and acknowledges the deficiencies of the social contract and its lack of demand for the 'extensive benevolence' that *is* required under the capabilities

¹⁵⁹ Nussbaum, *Frontiers*, above n 28, 7.

¹⁶⁰ Ibid 383.

¹⁶¹ Ibid 384.

¹⁶² Ibid 384.

¹⁶³ Ibid 338.

approach.¹⁶⁴ Nussbaum highlights Hobbes', Kant's, Locke's, and Hume's shared pessimism about the human animals' capabilities to actually address moral sentiments, and Rawls' greater degree of openness to the possibilities of education cultivating moral concerns.¹⁶⁵ Nussbaum also acknowledges Rousseau's proposition that 'education, based upon compassion, [can support] social justice'.¹⁶⁶ Nussbaum recognises that our cultural inheritance needs to be rewritten to work toward her conception of justice in that it:

must devote sustained attention to the moral sentiments and their cultivation – in child development, in public education, in public rhetoric, [and] in the arts.¹⁶⁷

Nussbaum is also conscious of the cage of Western thought and explains that:

a particular picture of who we are and what political society is has for some time imprisoned us, preventing us from imagining other ways in which people might get together and decide to live together.¹⁶⁸

Nussbaum also does not rush to any claim of mastery and carefully explains that she has not shown how 'the realization of justice as I construe it is possible', but that her 'argument removes one obstacle to seeing it as possible'.¹⁶⁹ That obstacle is the opening toward her conception of a different future, through the picture she has painted, that calls for a disarming of cynicism and a belittling of her program as merely utopian.¹⁷⁰ Criticisms of Nussbaum's capabilities approach have been offered by McEwan,¹⁷¹ Singer,¹⁷² Loder,¹⁷³ and numerous others.¹⁷⁴

¹⁶⁴ Ibid 408.

¹⁶⁵ Ibid 408-10.

¹⁶⁶ Ibid 410.

¹⁶⁷ Ibid 414.

¹⁶⁸ Ibid. See also Nussbaum, *Framework*, above n 69, 609: 'The world needs an ethical revolution, a consciousness raising movement of truly international proportions'.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Alexandra McEwan, 'Martha Nussbaum's Capabilities Approach for Non-human Species: A Preliminary Critique' (January 2010) ResearchGate

<[https://www.researchgate.net/publication/280246927 Martha Nussbaum's Capabilities Approach for Non-human Species A Preliminary Critique](https://www.researchgate.net/publication/280246927_Martha_Nussbaum's_Capabilities_Approach_for_Non-human_Species_A_Preliminary_Critique)>: at 15 n 90 McEwan notes that this is an updated version of: 'Alexandra McEwan, 'Martha Nussbaum's Capabilities Approach for Non-human Species: A Preliminary Critique' (2010) 4 Australian Animal Protection Law Journal, 4. December 2012 version'.

¹⁷² Peter Singer, 'Reply to Martha Nussbaum, "Justice for Non-Human Animals"' (Speech delivered at The Tanner Lectures on Human Values, November 13, 2002) <<http://www.utilitarian.net/singer/by/20021113.htm>>.

¹⁷³ Reed Elizabeth Loder, 'Animal Dignity' (2016) 23 *Animal Law* 1.

¹⁷⁴ See, eg, Jeffrey Reiman, 'No Idea of Justice: A Social Contractarian Response to Sen and Nussbaum' (2011) 30 (1) *Criminal Justice Ethics* 23; Marcel Wissenburg, 'The Lion and the Lamb: Ecological Implications of Martha Nussbaum's Animal Ethics' (2011) 20(3) *Environmental Politics* 391.

4.3.7 Favre

Favre does not reject the arguments for property status for nonhuman animals. Rather, he suggests an incremental approach that opens the possibility for nonhuman animals to maintain property rights in themselves through an equitable title.¹⁷⁵ It would also enable persons to have standing to take legal action for them.¹⁷⁶ Transfer of the property rights of a human owner may occur voluntarily, or involuntarily by way of a court order, or legislative provision (and for a broader range of beings).¹⁷⁷ A human owner would only have the property right and not the full rights as a result of the equitable title of the animal, and therefore the owner is described by Favre as the trustee.¹⁷⁸ Favre suggests that the owner should be called the 'guardian', who has 'being' accountability.¹⁷⁹ Further, Favre suggests that laws governing the relationship should develop from existing cruelty statutes and it should borrow concepts from parent-child relationship-related statutes.¹⁸⁰ However, he stops short of insisting that states must act as guardians and take direct action against those who perpetrate harms on nonhuman animals.¹⁸¹ He also suggests it *would be* possible to develop laws that '*balance* the desires and resources of the human legal titleholder, the animal guardian, and the interests and needs of the [partially] self-owned animal'.¹⁸²

While Favre offers a legal solution toward better protections for nonhuman animals, he assumes that the actual aporia can be addressed in purportedly balancing the incommensurable interests of human animal owners and the nonhuman animals themselves. Additionally, the law already has the power to extinguish the property rights of nonhuman animal owners,¹⁸³ and those rights are already less-than-absolute.¹⁸⁴ Favre also does not address the economies of interests that would still be at play even if human animal advocates did act for nonhuman animals.

¹⁷⁵ David Favre, 'A New Property Status for Animals' in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 234-50, 239-40.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid 241.

¹⁷⁸ Ibid 242.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid 243.

¹⁸¹ Ibid. See also Chapter 9, section 9.2.3 where I discuss Eekelaar's finding that rights and guardianship for human children arose in law when the English child protection regime imposed duties on government authorities to protect children.

¹⁸² Favre, above n 174, 244 (italics not int original).

¹⁸³ See Chapter 7, section 7.3.3; Appendix 3, Table 8.

¹⁸⁴ See Chapter 7, section 7.3.3.

4.3.8 Donaldson and Kymlicka

Donaldson and Kymlicka review the 'limits of existing welfarist, ecological, and rights approaches'¹⁸⁵ to animal protections to argue that nonhuman animal protections require 'a moral framework that acknowledges animals as bearers of certain inviolable rights,'¹⁸⁶ and institution of particular positive and negative duties.¹⁸⁷ The authors also argue that some forms of citizen rights should be extended to nonhuman animals.¹⁸⁸ They agree that sentience is a basis for inviolable rights, but that animal rights need to cater for the different types of relationships that humans have with animals.¹⁸⁹ They assert that the domestication of nonhuman animals for example, change our responsibilities toward those animals and should result in them being granted rights of citizenship.¹⁹⁰ They also claim that wild animals should have 'their own autonomy and territory',¹⁹¹ and that urban wildlife should have 'rights of residency without participating in a shared co-operative scheme with us'.¹⁹²

For domesticated animals to be subjected to co-citizenship, Donaldson and Kymlicka explain that they would inherit 'duties of civility and contribution'.¹⁹³ The authors also explain that many types of nonhuman animals have already demonstrated their capabilities in living in concert with humans in society to meet that requirement.¹⁹⁴ The proposition is that humans should take account of the subjective needs and desires of the nonhuman animals,¹⁹⁵ who should be recognised as individuals.¹⁹⁶ Donaldson and Kymlicka suggest it would take an emancipatory approach,¹⁹⁷ and one where the capacity for rationality is no longer a precondition of citizenship.¹⁹⁸ The authors suggest that thinking of nonhuman animals as part of society could become habituated rather than questioned, as has been the case in the development and adoption of other moral standards.¹⁹⁹ In this way, the character required

¹⁸⁵ Sue Donaldson and Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford University Press, 2011) ('*Zoopolis*') 3.

¹⁸⁶ *Ibid* 4.

¹⁸⁷ *Ibid* 9.

¹⁸⁸ Will Kymlicka and Sue Donaldson, 'Animals and the Frontiers of Citizenship' (2014) 34(2) *Oxford Journal of Legal Studies* 201 ('*Frontiers*'); Donaldson and Kymlicka, *Zoopolis*, above n 184.

¹⁸⁹ Kymlicka and Donaldson, *Frontiers*, above n 187, 202.

¹⁹⁰ *Ibid* 202-03.

¹⁹¹ *Ibid* 203.

¹⁹² *Ibid*.

¹⁹³ *Ibid* 208

¹⁹⁴ *Ibid* 214-15.

¹⁹⁵ *Ibid* 210.

¹⁹⁶ *Ibid* 211.

¹⁹⁷ *Ibid* 212.

¹⁹⁸ *Ibid* 216.

¹⁹⁹ *Ibid* 216.

for citizenship is 'norm responsiveness in inter-subjective relationships'.²⁰⁰ The authors suggest this would be merely an extension of this thinking to nonhuman animals as it has been applied for children and persons with disabilities.²⁰¹

While this very brief description of Donaldson and Kymlicka's propositions sounds inviting and appears to offer an improvement of the political status of some nonhuman animals, it does still institute human animal norms, and categorisations, as forms of sovereignty over nonhuman animals. Nonhuman animals do not possess the contextual traces and understanding in order to voluntarily conform to what is demanded.²⁰² That is, nonhuman animals do not have the same inheritances of culture, do not possess the necessary language facilities, or bases upon which to make decisions in order to either understand or to voluntarily conform with 'duties of civility and contribution' or 'norm responsiveness'. In that way Donaldson and Kymlicka's propositions remain selective and exclusive at least to a degree. An underlying focus is the continued comfort of, and returns to, human animals demanding conformance and subjection. I also wonder what laws would apply to nonhuman animals as 'citizens' who are deemed to owe duties, and that fail to live up to expectations. The authors clarify the legal duties that would be owed to nonhuman animal citizens and they particularly demand the proper recognition in law, of harms to them.²⁰³

Citizens are entitled to the full benefit and protection of the law, and this means that the duty of humans not to harm animals is not simply a moral or ethical responsibility, but ought to be a legal one. Harms to animals, like harms to humans should be criminalized. This would include both the criminalization of deliberate harm, and also of negligence leading to harm or death.²⁰⁴

4.4 Constitutional recognition of nonhuman animals

Some nations including Germany, Switzerland, India and Brazil include in their Constitutions, recognition of nonhuman animals.

²⁰⁰ Ibid 217.

²⁰¹ Ibid.

²⁰² Donaldson and Kymlicka dismiss this problem by arguing that 'self-control, compliance with social norms, and cooperative behaviour are all possible without rational reflection' and habitual: Kymlicka and Donaldson, *Zoopolis*, above n 184, 116. At 166-21, the authors also seem to dismiss the effects and writing of human animal cultural traces in understanding societal norms, and equate that ability with nonhuman animals' own behaviours that appear to be the same or similar. Their discussion does not either properly address nonhuman animal conformance as a result of violence or the threat of violence, that is, subjection by human animals.

²⁰³ Ibid 123-33.

²⁰⁴ Ibid 133.

4.4.1 Germany

In Germany, the clause that protects the environment was extended to include nonhuman animals in 2002.²⁰⁵ It provides:

Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.²⁰⁶

Kelch confirms that: it is of normative value predominantly; it does not change the property status of nonhuman animals, or effect human utilisation of them as permitted under other laws, and; it does not resolve conflicts between human and nonhuman animal rights.²⁰⁷

4.4.2 Switzerland

In Switzerland the Federal Constitution was amended to recognise the 'dignity of living beings' but only in the Confederation's duty to legislate on the use of reproductive and genetic material in the context of the 'safety of human beings'.²⁰⁸ The Constitution also includes a duty of the Confederation to legislate on nonhuman animal use.²⁰⁹ That was introduced in 1992.²¹⁰

4.4.3 India

In India, the Constitution demands that '[i]t shall be the duty of every citizen ... to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures'.²¹¹ There is also a provision that requires the State to 'take

²⁰⁵ Thomas G Kelch, *Globalization and Animal Law: Comparative Law, International Law and International Trade* (Walters Kluwer, 2011) 276.

²⁰⁶ *Grundgesetz für die bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany] Art 20a. See Bundesministerium der Justiz und für Verbraucherschutz <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0123>.

²⁰⁷ Kelch, above n 204, 276-82.

²⁰⁸ Federal Constitution of Switzerland Art 120. See The Federal Council: The portal of the Swiss Government, *Federal Constitution of the Swiss Confederation* <<https://www.admin.ch/opc/en/classified-compilation/19995395/index.html>>. See also Erin Evans, 'Constitutional Inclusion of Animal Rights in Germany and Switzerland: How Did Animal Protection Become an Issue of National Importance?' (2010) 18 *Society and Animals* 231; Steven White, 'Regulation of Animal Welfare in Australia and the Emergent Commonwealth: Entrenching the Traditional Approach of the States and Territories or Laying the Ground for Reform?' (2007) 35 *Federal Law Review* 347, 363-364.

²⁰⁹ Federal Constitution of Switzerland art 80.

²¹⁰ Kelch above n 204, 283.

²¹¹ India Constitution art 51A(g). See <https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf> at Government of India,

steps to' prohibit, the slaughtering of cattle.²¹² Yet, in 2016, India had the world's largest bovine population of 304 million, was the world's largest exporter of beef and buffalo meat, and slaughtered 38 million cattle mainly consisting of 'unproductive water buffalo cows and bulls from the dairy sector'.²¹³ The Supreme Court of India suspended a ban that was imposed by the Indian Government on the sale of cattle for slaughter in July 2017.²¹⁴

Whilst there are no prohibitions on cruel treatment or directives as to conduct, the India Constitution also, through general provisions, gives standing to animal interest groups.²¹⁵ The Constitutional provisions have influenced determination of cases in the interests of nonhuman animals, but still within the context of permissive statutory provisions that only prohibit unnecessary pain and suffering and that permit utilisation of nonhuman animals.²¹⁶

4.4.4 Brazil

Brazil's Constitution art 225, introduced in 1988, states:

All have the right to an ecologically balanced environment, which is an asset of common use and essential to a health quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations.²¹⁷

There is also a sub-paragraph relating to protection of fauna that may be at risk in regard to 'their ecological function', extinction or cruel practices.²¹⁸ The clause has been employed to influence interpretation of other laws.²¹⁹ Standing has also been granted to animal protection groups.²²⁰ Although it seems like an overstatement, Trajano de Almeida Silva argues that the 1988 Constitution 'changed the legal status of animals from trans-individual goods to

National Portal of India: Constitution of India (Full Text) <<https://www.india.gov.in/my-government/constitution-india/constitution-india-full-text>> .

²¹² India Constitution art 48:

The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

²¹³ Meat & Livestock Australia, *Market Supplier Snapshot Beef India*

<https://www.mla.com.au/globalassets/mla-corporate/prices--markets/documents/os-markets/red-meat-market-snapshots/mla-ms_india_-snapshot-2017.pdf>.

²¹⁴ BBC News, 'India Supreme Court suspends cattle slaughter ban' *BBC News* (online), 11 July 2017 <<http://www.bbc.com/news/world-asia-india-40565457>>.

²¹⁵ India Constitution art 32.

²¹⁶ Kelch, above n 204, 287-88.

²¹⁷ Brazil Constitution art 225. See <<http://english.tse.jus.br/arquivos/federal-constitution>>.

²¹⁸ Ibid art 225(1)(VII). See also Michigan State University, *Animal Legal & Historical Center: Article VIII of Brazilian Constitution* <<https://www.animallaw.info/statute/brazil-constitutional-provision-animal>>.

²¹⁹ Kelch, above n 204, 289.

²²⁰ Ibid.

individual consideration in the legal system'.²²¹ He cites a number of cases including *Suíça v Zoological Garden of the City of Salvador*²²² that he claims 'recognized the possibility of the great apes to be as considered persons by the legal system'.²²³ He also quotes Judge Ana Barbuda Ferreira, in an article,²²⁴ who stated that:

the Brazilian legal system should ensure an effective and individualized protection of the non-human animal, since the Constitution itself precludes any form of animal cruelty, the judge must protect all forms of dignity, respect and care for life.²²⁵

What is of key interest here, is that Barbuda Ferreira is reported as intimating that the State has a duty to protect nonhuman animals, at least in some cases. Trajano de Almeida Silva reports the duty is one that falls on the State and citizens.²²⁶ He suggests that these provisions occur in a 'post-humanism age' to better protect nonhuman animals.²²⁷ However, I note that Brazil still maintains the second largest beef industry globally, and slaughtered 29.6 million cattle in 2016,²²⁸ and a recent ban on live animal exports was reversed.²²⁹ Additionally, none of these protections can be taken on face value in context of the rate of

²²¹ Tagore Trajano de Almeida Silva, 'The Constitutional Defense of Animals in Brazil' in Deborah Cao and Steven White (eds), *Animal Law and Welfare – International Perspectives* (Springer, 2016) 181-93, 190 citing Danielle Tetü Rodrigues, *O Direito & os Animais: uma abordagem ética, filosófica e normativa* (Juruá, 2nd ed, 2008) 70.

²²² Sentencia Habeas Corpus n 833085-3/2005 (Edmundo Lucio da Cruz J) 9th Criminal Court of the State of Bahia (Brazil).

²²³ Trajano de Almeida Silva, above n 221, 190 citing Edmundo Cruz, 'Sentença do Habeas Corpus impetrado em favor da chimpanzé Suíça' (2006) 1(Jan/Dez) *Revista Brasileira de Direito Animal*, Instituto de Abolicionismo Animal, 281, 281. For a confirmation in English regarding this case, see also Patricia MacCormack, *The Animal Catalyst: Towards Ahuman Theory* (Bloomsbury, 2014) 44. A translation of the writ of Habeas Corpus can be found at: Valdelane Azevedo Clayton, *A Habeas Corpus on Behalf of Chimpanzee* <<https://www.animallaw.info/sites/default/files/Habeas%20Corpus%20on%20Behalf%20of%20a%20Chimp%20Rev2.pdf>>.

²²⁴ Trajano de Almeida Silva, above n 221, 190 quoting Ana Conceição Barbuda Sanches Guimarães Ferreira, 'Ministério Público do Estado da Bahia, Associação Brasileira terra verde viva e associação célula mãe v. Portugal produções artísticas Ltda "Circo Portugal"' (2013) 8(12 Jan/abr) *Revista Brasileira de Direito Animal* 187. This is the Brazilian Journal of Animal Law, see Revista Brasileira de Direito Animal <<https://portalseer.ufba.br/index.php/RBDA/index>>.

²²⁵ Barbuda Ferreira, above n 223, 187 quoted in Trajano de Almeida Silva, above n 221, 190.

²²⁶ Trajano de Almeida Silva, above n 229, 190 citing Tagore Trajano de Almeida Silva, *Direito Animal & Ensino Jurídico: formação e autonomia de um saber pós-humanista* (Evolução, 2103) 70; Fernanda Luiza Fontoura de Medeiros, *Direito dos animais* (Livraria do Advogado, 2013) 70.

²²⁷ Trajano de Almeida Silva, above n 221, 191.

²²⁸ Brazil accounts for 16% of the world's beef production: Meat & Livestock Australia, *Market Supplier Snapshot Beef Brazil* <https://www.mla.com.au/globalassets/mla-corporate/prices--markets/documents/os-markets/red-meat-market-snapshots/mla-ms_brazil_-snapshot-2017.pdf>.

²²⁹ See, eg, Warwick Long, 'Live export ban in Brazil comes to end as judge overturns injunction on cattle shipment' *ABC News* (online), 6 February 2018, <<http://www.abc.net.au/news/rural/2018-02-06/brazil-court-orders-live-export-cattle-ban/9399438>>.

deforestation undertaken in Brazil, which apparently, is linked to the cattle and soybean industries.²³⁰

4.5 Conclusions

Singer's position is interesting in that he claims to reject speciesism, but yet he relies on consciousness capabilities of individuals in regard to their registering of preferences, as an element in justifying making decisions about others. He retains the belief, that whilst sacrifices should be avoided, they can be rationally justified. He also appears to confess his adoption of the particular arché, that objective rationality does *not* produce truths, but rather reveals them. It appears that through that position his rationality could at least repress consideration of some moral aporias where they do not fall within *his* definition of morality. On the utilitarian scale there is the real risk that consideration of l'animot may become an irrelevancy where the ends are deemed to justify sacrifices as means. However, Singer's position is rare since he does recognise the aporia in dealing with competing claims and of course, he must base his decision making on some criteria. He also avoids the need to award metaphysical 'dignity' and the problems associated with a utopian and impossible ideal of persistent and 'equivalent' legal rights and interests.

In different ways, Regan, Wise and Nussbaum are concerned with individual animots. They base their particular judgments about individuals' needs or capacities, on what is known or assumed about the species in question. A consideration is that while we could only work with what we do know, any such judgments are violent in their sovereignty, and simultaneously work to repress otherness. That is not to say that Regan, Wise and Nussbaum are not aware of these problems. Nevertheless, that unavoidable conceptualisation renders a form of violence and sacrifice of what and who is other. Regan's calculations using his principles do appear to reveal the aporias they would deliver, and it seems that sacrifices of individuals would be recognised. Wise's ideal of an incremental approach to greater protections suffers from the problem of instituting 'same as us' thinking, that will serve, if it succeeds on those arguments, to simply shift the limits and borders of which species of animals will enjoy greater protections.

Francione's abolitionist approach appears to be the most direct in working toward an end to nonhuman animal sacrifice. He is also clearly aware of the aporias and impossibility of

²³⁰ See, eg, Daniel C Nepstad, Claudia M Stickler and Oriana T Almeida, 'Globalization of the Amazon Soy and Beef Industries' (2006) 20(6) *Conservation Biology* 1595
<<http://web.nateko.lu.se/courses/ngen03/j.1523-1739.2006.00510.x.pdf>>; Yale School of Forestry & Environmental Studies: Global Forest Atlas, *Cattle Ranching in the Amazon Region*
<<https://globalforestatlas.yale.edu/amazon/land-use/cattle-ranching>>.

claims that the law could balance incommensurate interests of human and nonhuman animals. He is also cognisant of the human animal's drive to economic return that undermines that possibility. Francione's reference to consciousness capabilities seems more in line with Derrida's in that, rather than it acting as a limit, it connotes sentient life itself that should not be sacrificed. Francione also seems to be most critical of the law and its failings to protect nonhuman animals.

Garner and Posner in contrast, do not see that the property status of nonhuman animals in law is an obstacle to greater protections. Posner also seems to ignore that politics works to encourage economic returns and actually undermines the possibility of greater protections. Garner is also cognisant of the need for real-world solutions to address the problems of human animal returns, however his thinking is also somewhat closed to consideration of real justice for individual animots. It appears that particularly Garner and Posner, but also Singer, Regan and Wise to a lesser extent, remain captured with the trace of the Western inheritance in that they believe that existing modes of thought can be adjusted to render greater improvements for nonhuman animals.

Nussbaum does write a differently articulated justification for nonhuman animal flourishing that appears to have potential to escape the confines of Kantian thought. As a philosopher, Nussbaum is clearly cognisant of the need to take on more than legal problems and conceptualisations. She does consider the problem of conflicting claims and does not seek to repress inescapable aporias. In that sense, neither does she deny ongoing sacrifice. Her recourse to dignity however differs from Derrida's approach. She appears to use it to connote an element in delivering political recognition, and it seems to retain a trace of the metaphysical. Nussbaum appears to want to apply her idea of protection-enabling dignity equally to the human and the nonhuman, but only for those beings that meet particular thresholds of capabilities.

Donaldson and Kymlicka do recognise animots, and also propose an adjustment to the current models of laws to recognise different situations, and different modes of citizenship, for nonhuman animals. Their thinking also remains, to a degree, embedded in the social contract and Kantian thought. They would impose reciprocal duties at least on domesticated animals, and that is even though they purport to reject rationality as a precondition of citizenship. This seems a strange and unjust imposition on beings who are without the Western logos. Favre suggests a different application of the law which he insists would improve protections and provide greater recognition of nonhuman animal interests, although I am left wondering what real difference this would make in the real world since nonhuman animals would still be left to the mercy of human animal advocates. That is, advocates who

are wedded to the metaphysics of presence, and who believe that justice involves penalties in the present, as payment for wrongs in a past present. That is simply too late for nonhuman animals who I assume, only wish that human animals would not abuse them in the first place.

The brief review of the Constitutional clauses of some States, and the reality of the horrendous volumes of harms that persist, despite those grand claims, is more than troubling. It seems to indicate that human animals enjoy some form of economic return (in the general sense) in congratulating themselves for their *potential* for empathy and kindness, rather than exercising it to manifest more meaningful and effective protections.

The following Chapter 4 briefly examines alternate schools of thought about the human-animal relationship that appear to attempt an escape from the confines of traditional, Western rationality.

CHAPTER 5: TRACING DERRIDEAN JUSTICE AND COMPASSION TOWARD NONHUMAN ANIMALS

*The simplisticness, misunderstanding, and violent disavowal that we are analyzing at present also seem to me to be betrayals of repressed human possibilities, of other powers of reason, of a more comprehensive logic of argument, of a more demanding responsibility, concerning the power of questioning and response*¹

5.1 Introduction

This chapter answers the thesis sub-question: *what evidence is there toward new openings for rethinking nonhuman animal lives, that is more in concert with the Derridean perspective?* Chapter 4 highlighted some of the contrasts and commonalities between predominant Anglo-American legal-philosophical perspectives of the human-animal relationship, and Derridean justice. A dilemma remains. While Derridean justice is impossible, it demands deconstruction of traditional notions and attitudes, *and* a working toward it. In Chapter 2, some of the undesirable characteristics of the human animal were highlighted through the lenses of Derrida and others, in that our consuming mode of beingness inflicts, perpetuates and justifies violence. In Chapter 4, that beingness is reflected in some aspects of what is thought to be 'ethics' that continues to justify violence toward nonhuman animals through conceptions such as contractarianism and utilitarianism inherent in law and legal thinking. As Derrida quoted Pascal: '[t]here are, no doubt, natural laws; but this fine thing called reason has corrupted everything'.²

Chapter 4 also highlighted that the different rationalities underpinning those contemporary conceptions of 'ethics', are deconstructible in the respect that their logics still incorporate actual sacrifice of nonhuman animals, unless they incorporate the absolute abolition of nonhuman animal utilisation. An aim of this chapter is to highlight why Derridean justice was posited by him as undeconstructible. For him, his proposition of justice must be the

¹ Jacques Derrida in Marie-Louise Mallet (ed), *The Animal That Therefore I Am* (David Wills trans, Fordham University Press, 2008) 105 [trans of: *L'animal que donc je suis* (first published 2006)] ('*The Animal That Therefore I Am*').

² Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' (1990) 11 *Cardozo Law Review* 919, 941 ('*Force of Law*') quoting Pascal, *Pensées* section IV, number 294. See Blaise Pascal, *Pascal's Pensées* (E P Dutton, 1958) 84: Pascal discusses natural law as opposed to legislated laws and he is translated there as stating '[d]oubtless there are natural laws; but good reason once corrupted has corrupted all', and he references works of Cicero, Montaigne, Seneca and Tacitus. The *Pensées* were first published around 1670: Desmond Clarke, *Blaise Pascal* (22 June 2015) Stanford Encyclopedia of Philosophy <<https://plato.stanford.edu/entries/pascal/>>.

grounding, the unassailable foundation that subverts the violence of rationality. In exploring this further, I rely on the guidance of de Fontenay,³ a contemporary of Derrida's. De Fontenay is an Emeritus Professor of Philosophy at the University of Paris Panthéon Sorbonne.⁴ I interpret that her writing both precedes⁵ and extends the trace of Derrida. She does so through a European perspective and experience. She highlights what some of the predominant Anglo-American traces lack. That is, a less rationality-based conception of justice that emanates from the memory of the horrors of war. Following Derrida, de Fontenay urges a more compassionate response that takes into account our responsibility to those 'most vulnerable'.⁶

To demonstrate that it *is* possible to generate different modes of thinking, I also briefly highlight a fraction of the burgeoning literature that explores different approaches to the human-animal relationship. More compatible with a more compassionate response-ability are non-legal approaches including what is loosely described as Critical Animal Studies. Another approach which does not necessarily rely on compassion, but sometimes, a grounding in cross-species justice, is posthumanism. I very briefly mention these increasing accumulations of traces, and others, that through multi-disciplinary approaches, may reject the traditional hegemony of rationality. These writings evidence a deeper empathy for, and connection to, nonhuman animals. However, the focus remains, as it must for this thesis, on the Derridean perspective. As a starting point, I recall some of the voices that have long resonated, calling for a compassionate response to nonhuman animals.

5.2 Echoes of compassion

Not all ancients denied all forms of justice to nonhuman animals.⁷ According to Clark, Pythagoras (ca 580 - ca 490 BC) arguably felt an obligation to respond to the dog that

³ Elisabeth de Fontenay, 'Between Possessions and Persons' in *Without Offending Humans: A Critique of Animal Rights* (Will Bishop trans, University of Minnesota Press, 2012) 47-71.

⁴ See, eg, France Culture, *Elisabeth de Fontenay* <<https://www.franceculture.fr/personne/elisabeth-de-fontenay>>.

⁵ De Fontenay's well regarded earlier text was published in 1998, six years before Derrida's death and long before his final animal texts were published posthumously. Unfortunately it is only published in French: Elisabeth de Fontenay, *Le silence des bêtes: La philosophie à l'épreuve de l'animalité* (Fayard, 1998). Derrida cited another of de Fontenay's works and her deconstruction of 'rationalist humanism': Derrida, *The Animal That Therefore I Am*, above n 1, 104-05 citing Elisabeth de Fontenay, *Plutarch: Trois Traités pour les animaux* (POL, 1992) 71.

⁶ See, eg, de Fontenay, above n 3, 65.

⁷ For a rich source of nonhuman animal advocacy throughout history see Aaron Garrett, 'Animals and Ethics in the History of Modern Philosophy' in Tom L Beauchamp and R G Frey (eds), *The Oxford Handbook of Animal Ethics* (Oxford University Press, 2011) 61-87. See also Catherine Osbourne, *Dumb Beasts and Dead Philosophers: Humanity and the Humane in Ancient Philosophy and Literature* (Oxford University Press, 2009).

howled in complaint at being beaten.⁸ Lucretius (99-55 BC) believed that duties were owed to domesticated animals in return for their service.⁹ Hebrew scriptures directed that some animals, in some circumstances should not be treated badly.¹⁰ According to Clark, those directions could have been interpreted as 'animal welfare laws', but were later discredited in the Corinthians.¹¹ Epictetus (55-135 AD) intimated, that '[t]he ideal humanity is' one that lets animals 'be themselves'.¹² Plutarch (46-120 AD) believed that the cries of animals were a "begging for mercy, entreating, seeking justice".¹³ Later, Porphyry (234-305 AD) also advocated for nonhuman animals.¹⁴ In 1580, Montaigne argued that we have obligations toward some nonhuman animals:

But when, amongst the more moderate opinions, I meet with arguments that endeavour to demonstrate the near resemblance betwixt us and animals, how large a share they have in our greatest privileges, and with how much probability they compare us together, truly I abate a great deal of our presumption, and willingly resign that imaginary sovereignty that is attributed to us over other creatures. But supposing all this were not true, there is nevertheless a certain respect, a general duty of humanity, not only to beasts that have life and sense, but even to trees, and plants. We owe justice to men, and graciousness and benignity to other creatures that are capable of it; there is a certain commerce and mutual obligation betwixt them and us.¹⁵

In 1880, Nietzsche remained sceptical, or perhaps history has shown he was realistic, in his warning that:

[t]he origin of our morality may still be observed in our relations with animals. Where advantage or the reverse do not come into play, we have a feeling of complete irresponsibility.¹⁶

⁸ Stephen R L Clark, 'Animals in Classical and Late Antique Philosophy' in Tom L Beauchamp and R G Frey (eds), *The Oxford Handbook of Animal Ethics* (Oxford University Press, 2011) 35-60, 51.

⁹ Lucretius, *On the Nature of Things* (W H D Rouse and Martin F Smith trans, Heinemann, 1924) 864-67 cited in Clark, above n 8, 37.

¹⁰ For example, there was a direction against an omission to 'leave a beast trapped in a well on the pretext that today is holy': Clark, above n 8, 54 citing Deuteronomy 22:4; Luke 14:5.

¹¹ Clark, above n 8, citing 1 Corinthians 9:8-9.

¹² Clark, above n 8, 51 citing Epictetus, *Discourses* (P E Matheson trans, 1916) 4.1.

¹³ Plutarch, *On the Eating of Flesh I*, 994E, in *Moralia*, 550 quoted in Gary Steiner, *Anthropocentrism and its Discontents: The Moral Status of Animals in the History of Western Philosophy* (University of Pittsburgh Press, 2014) 94 ('Discontents').

¹⁴ Clark, above n 8, 37 citing Porphyry, *On Abstinence from Killing Animals*.

¹⁵ Michel de Montaigne, 'Chapter XI - Of Cruelty' in Charles Cotton (ed), *Essays: Book The Second* (William Carew Hazlitt trans, Floating Press, 2009) 319-28, 328.

¹⁶ Friedrich Nietzsche, 'II The Wanderer and His Shadow' in Friedrich Nietzsche, *Human, All Too Human: A Book for Free Spirits Volume II* (Alexander Harvey trans, Floating Press, 2013) 280-438, 317 [57: Intercourse with Animals].

5.3 CRITICAL ANIMAL STUDIES AND OTHER APPROACHES

Examples of thinking beyond the predominant Anglo-American conceptions of duties owed to nonhuman animals are found in an avalanche of texts. This section is not intended to represent a full survey of different approaches. It merely demonstrates that there is a wide variety of sources concerned with the human-animal relationship beyond what I have considered in the previous chapters. Open and innovative thinking, that is, thinking beyond closure(s), should not be, and is not, constrained to existing legal doctrines.

Firstly, beyond all Western conceptions, the anthropologist Deborah Bird Rose shows us that we have a lot to learn by contrasting the way we think, and the way we destroy, with indigenous peoples' thoughts and ways of life. Somewhat in common with how Derrida worked toward his proposition of justice through deconstructions, Rose contends that 'part of our moral burden is an injunction to hold the memory of violence within our texts', and that '[a] moral engagement of the past in the present thus resists closure.'¹⁷ In a sense, deconstructions in their re-tracings, do and can excavate violence to hold us to moral account, to help ensure we do not forget what we should have learnt, and to highlight the real dangers of representation.¹⁸

Aaltola and Hadley's 2015 text suggests breaking with the lack of innovation in the 'moral extensionism' they claim is inherent in the predominant Anglo-American modes of thinking about the human-animal relationship.¹⁹ Different concepts of ethics that take into account nonhuman animals are brought together in Willett's *Interspecies Ethics*.²⁰ Calarco and Atterton collected a number of essays that highlight consideration and (sometimes) concern for the nonhuman animal in Continental philosophies.²¹ Wadiwel follows Foucault, Spivak and Derrida in arguing that we wage a biopolitical war against animals.²² Garner and O'Sullivan gather a number of essays that consider the links between politics and ethics in

¹⁷ Deborah Bird Rose, *Reports from a Wild Country: Ethics for Decolonisation* (University of New South Wales Press, 2004) 14. See also Deborah Bird Rose, *Dingo Makes Us Human: Life and Land in Australian Aboriginal Culture* (Cambridge University Press, 2000); Deborah Bird Rose, *Wild Dog Dreaming: Love and Extinction* (University of Virginia Press, 2011).

¹⁸ See, eg, Derrida, *Force of Law*, above n 2, 973-75 nn 1-4, 1044-45.

¹⁹ Elisa Aaltola and John Hadley, *Animal Ethics and Philosophy: Questioning the Orthodoxy* (Rowman & Littlefield, 2015).

²⁰ Cynthia Willett, *Interspecies Ethics* (Columbia University Press, 2014).

²¹ Peter Atterton and Matthew Calarco (eds), *Animal Philosophy: ethics and identity* (Continuum, 2012). See also, Matthew Calarco, *Zoographies: The Question of the Animal from Heidegger to Derrida* (Columbia University Press, 2008); David Farrell Krell, *Derrida and our Animal Others: Derrida's Final Seminar "The Beast and the Sovereign"* (Indiana University Press, 2013).

²² Dinesh Wadiwell, *The War Against Animals* (Brill, 2015).

considering the position of nonhuman animals.²³ Morton argues that we need to ‘slip out from underneath physically massive beings such as global warming and neoliberalism’²⁴ and work toward a ‘solidarity with nonhumans’.²⁵ Lynch and McLean urge that we employ our capacities for empathy (as specifically human), to determine how we should treat nonhuman animals.²⁶

Critical Animal Studies is often concerned with the power relation between human and nonhuman animals.²⁷ McCance challenges traditional Western modes of thinking about ethics and nonhuman animals, and she complains about the reverberations of Cartesianism.²⁸ Taylor and Twine explain that Critical Animal Studies is concerned with ‘the nexis of activism, academia and animal suffering and maltreatment’,²⁹ and has its roots in ecofeminism.³⁰ There are a wide variety of texts available in this area of thought that engages with sociology, feminism,³¹ anthrozoology, philosophy, politics, anthropology, the arts and other disciplines.³²

5.4 Posthumanism

Posthumanism is defined in the Oxford dictionary as:

²³ Robert Garner and Siobhan O’Sullivan (eds), *The Political Turn in Animal Ethics* (Rowman & Littlefield, 2016).

²⁴ Timothy Morton, *Humankind: Solidarity with Nonhuman People* (Verso, 2017) 188.

²⁵ Ibid 189.

²⁶ Tony Lynch and Lesley McLean, ‘How to do Animal Ethics’ (2016) 29(4) *Journal of Agricultural and Environmental Ethics* 597.

²⁷ Erika Cudworth and Stephen Hobden, *The Emancipatory Project of Posthumanism* (Taylor & Francis, 2017) 94.

²⁸ Dawne McCance, *Critical Animal Studies: An Introduction* (State University of New York Press, 2013) 13.

²⁹ See, eg, Nik Taylor and Richard Twine (eds), *The Rise of Critical Animal Studies: From the Margins to the Centre* (Routledge, 2014) 2.

³⁰ Ibid 4. For ecofeminist works, see, eg, Carol J Adams & Lori Gruen (eds), *EcoFeminism: Feminist Intersections with Other Animals & The Earth* (Bloomsbury, 2014).

³¹ See, eg, Josephine Donovan and Carol J Adams (eds), *The Feminist Care Tradition in Animal Ethics* (Columbia University Press, 2007); Carol J Adams and Josephine Donovan (eds), *Animals & Women* (Duke University Press, 1995).

³² Taylor and Twine, above n 29, 4. See, eg, Human Animal Research Network Editorial Collective (eds), *Animals in the Anthropocene: Critical Perspectives on Non-human Futures* (Sydney University Press, 2015); Joanna Zylinska, *Minimal Ethics for the Anthropocene* (Open Humanities Press, 2014); Kathryn Gillespie, *Critical Animal Geographies: Politics, Intersections and Hierarchies in a Multispecies World* (Taylor and Francis, 2015); *Journal for Critical Animal Studies*.

The idea that humanity can be transformed, transcended, or eliminated either by technological advances or the evolutionary process; artistic, scientific, or philosophical practice which reflects this belief.³³

That definition is not particularly helpful, and so it is better to start with 'humanism'. Common definitions of 'humanism' include '[a] rationalist outlook or system of thought attaching prime importance to human rather than divine or supernatural matters'; '[a] Renaissance cultural movement which turned away from medieval scholasticism and revived interest in ancient Greek and Roman thought'; and '(among some contemporary writers) a system of thought criticized as being centred on the notion of the rational, autonomous self and ignoring the conditioned nature of the individual'.³⁴

Cudworth and Hobden adopt the term 'posthumanism' to connote 'a sense of the world comprised of the more-than-human',³⁵ and specifically, 'the "more-than-human" character of human existence'.³⁶ They want to 'reject humanist ideas that see the human species as in some way unique, exceptional, essential or distinct from the rest of nature'.³⁷ Haraway looms large in the 'posthumanities' even though she denies ever wanting to be signified in that way.³⁸ She explained she was more interested in 'being with' nonhuman animals and by 'trying to respond where curiosity and sometimes unexpected caring lead'.³⁹ Taylor and Signal approach the posthumanist and poststructuralist conception of the human-animal relationship, as highlighting issues for epistemology.⁴⁰

A famous analysis of humanism is Agamben's *The Open: Man and Animal*, where he traces the Western inheritance and describes the 'anthropological machine'.⁴¹ Wolfe found that

³³ Oxford University Press, *British & World English: posthumanism* English Oxford Living Dictionaries <<https://en.oxforddictionaries.com/definition/posthumanism>>.

³⁴ Oxford University Press, *British & World English: humanism* <<https://en.oxforddictionaries.com/definition/humanism>>. See also Cary Wolfe, *What is Posthumanism?* (University of Minnesota Press, 2009) xi ('*Posthumanism*'): Wolfe referred to the then current Wikipedia definition of 'humanism' that included:

Humanism is a broad category of ethical philosophies that affirm the dignity and worth of all people, based on the ability to determine right and wrong by appeal to universal human qualities—particularly rationality ... Humanism entails a commitment to the search for truth and morality through human means in support of human interests ... Humanists endorse universal morality based on the commonality of the human condition, suggesting that solutions to human social and cultural problems cannot be parochial.

³⁵ Cudworth and Hobden, above n 27, 13.

³⁶ Ibid 15.

³⁷ Ibid 16.

³⁸ Donna J Haraway, *When Species Meet* (University of Minnesota Press, 2008) 17.

³⁹ Ibid 301.

⁴⁰ Tania Signal and Nik Taylor (eds), *Theorizing Animals: Re-Thinking Humananimal Relations* (Brill, 2011) 1.

⁴¹ Giorgio Agamben, *The Open: Man and Animal* (trans Kevin Attell, Stanford University Press, 2004) [trans of: *L'aperto: L'uomo e l'animale* (first published 2002)].

'posthumanism' includes 'irreconcilable definitions'.⁴² Of great relevance is that Wolfe's posthumanism springs directly and partially from Derrida's propositions of trace and the workings of the animal(s) and therefore deconstruction(s), and Luhmann's differential systems theory approach.⁴³ One of Wolfe's objectives in applying his posthumanism, following Derrida and others, is that he is concerned not just with 'decentering of the human' but also with, what thinking must become.⁴⁴ Wolfe argues for a multidisciplinary approach to posthumanism that does not, by refusing to follow narrow disciplinary approaches, contribute to the closure of knowledge.⁴⁵ Wolfe also considered postmodern approaches to ethical rule making and the aporias it delivers. Following Derrida, (although it seems likely Derrida would have objected to the term 'posthumanism') Wolfe determined that the way toward a posthumanist approach is to consider the animals in(side) all of us.⁴⁶

5.5 Reflecting on Derrida's justice

In *Force of Law*, Derrida interrogated legal justice. As one starting point, he turned to the intertwining of Montaigne's and Pascal's texts, and Montaigne's use of the phrase the "mystical foundation of authority".⁴⁷ Through Montaigne's text, Derrida identified that in law, legal justice carries an assumption of the 'truth' of legal justice.⁴⁸ It acts as a 'legitimate fiction', that justice in law, is deemed truly justice.⁴⁹ As such, it acts as a 'supplement' (that is, to not merely add to, but replace), in that legal justice, replaces a lack of justice in nature, in natural law: 'as if the absence of natural law called for the supplement of historical or positive, that is to say, fictional, law (*droit*) ...'⁵⁰ In that sense, following Pascal, the truth of justice in law is forged and forced.⁵¹ Force then becomes inherent in legal justice.⁵² Derrida suggests that this line of thinking could lead to: 'a desedimentation of the superstructures of law that both hide and reflect the economic and political interests of the dominant forces of

⁴² Wolfe, *Posthumanism*, above n 34, xi.

⁴³ Ibid xvi-xxvi.

⁴⁴ Ibid xvi. See also Cary Wolfe, 'Meaning and Event; or, Systems Theory and "The Reconstruction of Deconstruction"' in Wolfe, *Posthumanism*, above n 34, 3-30.

⁴⁵ Cary Wolfe, "'Animal Studies,' Disciplinarity, and the (Post)Humanities' in Wolfe, *Posthumanism*, above n 34, 99-126, 117.

⁴⁶ Cary Wolfe, *Animal Rites: American Culture, The Discourse of Species, and Posthumanist Theory* (University of Chicago Press, 2003) 207.

⁴⁷ Derrida, *Force of Law*, above n 2, 939 citing Michel de Montaigne, 'XIII De l'expérience' in *Essais III* (Éditions Gallimard, La Pléiade ed) 1203.

⁴⁸ Derrida, *Force of Law*, above n 2, 939.

⁴⁹ Ibid.

⁵⁰ Ibid (italics in original).

⁵¹ Ibid 939-41 citing Pascal, above n 2.

⁵² Derrida, *Force of Law*, above n 2, 941.

society'.⁵³ Besides that, Derrida found that law is deconstructible since it is 'transformable' as an historical 'textual strata', and because all regimes are founded by force, law's 'ultimate foundation is by definition unfounded'.⁵⁴ Law needs to be deconstructible so that it remains transformable.⁵⁵ Whereas, non-legal, Derridean justice 'exists, outside or beyond law, it is not deconstructible'.⁵⁶ Further, that '[d]econstruction is justice'.⁵⁷

[D]econstruction takes place in the interval that separates the undeconstructibility of justice from the deconstructibility of *droit* (authority, legitimacy, and so on).⁵⁸

The impossibility of Derrida's justice is connected to the impossibility of considering everything, in every relevant trace, and at the same time, it is concerned for the singularity of every other.⁵⁹ Justice represents an aporia, something we cannot experience in full.⁶⁰ It is unattainable.⁶¹ In this way, as discussed in Chapter 2, conformance with legal, ethical or other rules is calculation, and not Derridean justice.⁶² Deconstructions are motivated by 'the [im]possibility of justice'.⁶³ An element of the application of laws or any decision, is that:

[t]he undecidable remains caught, lodged, at least as a ghost-but an essential ghost-in every decision, in every event of decision. Its ghostliness deconstructs from within any assurance of presence, any certitude or any supposed criteriology that would assure us of the justice of a decision, in truth of the very event of a decision.⁶⁴

Deconstructions need to take into account the presumption of a present[able] justice in law and legal decisions.⁶⁵ Mere rationality does not deliver justice, even as it is embedded in law.

The purpose of this section was to underscore Derrida's claim to the undeconstructibility of his proposition of justice as an unshakeable grounding, prior to presenting an interpretation of de Fontenay's argument that an anti-humanist approach, may *undermine* the potential for justice. De Fontenay's perspective is directly relevant to Derrida's (not unique)⁶⁶ intimation in

⁵³ Ibid.

⁵⁴ Ibid 943.

⁵⁵ Ibid 945.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid 945.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid 957.

⁶⁴ Ibid 965.

⁶⁵ Ibid 965.

⁶⁶ See, eg, de Fontenay, above n 3, 61: de Fontenay cites some Jewish writers (Vassili Grossman, Isaac Bashevis Singer, Elias Canetti, Primo Levi, Romain Gary, Theodor Adorno and Max

Force of Law,⁶⁷ and more so in *The Animal That Therefore I Am*,⁶⁸ that the plight of nonhuman animals bred for human consumption on the industrial scale, is perhaps comparable in some way, to the ‘final solution’. That is, the terrible plight of Jews under the Nazis, and where subsequently-awakened duties to singular others, in the form of rights, are deemed necessary to contain what may re-emerge as legitimised force.⁶⁹

5.6 De Fontenay

De Fontenay insists that the way forward for improved protections for animals in law and otherwise, is to dismantle the demand for reciprocity of rights and obligations,⁷⁰ to take up the responsibility for those most vulnerable,⁷¹ and to continue with the deconstructions of ‘theoretical humanism’ beyond ‘the opposition between materialism and idealism’.⁷² In her criticisms of Peter Singer’s and Paola Cavalieri’s claims for extended protections for nonhuman animals,⁷³ de Fontenay highlights that solutions must be brought that do not offend humans. In backgrounding one area of difference between her views and Peter Singer’s she also warns that:

it is the scientific manner of judging that we must always first of all recuse when we consider what relationships science and ethics should have ... In the work of certain zoologists, ethologists, geneticists, and cognitivist psychologists, this reductionism seems constantly heavy with the insidious threat of a zoomorphic, biocratic detour – one that is therefore fascistic.⁷⁴

De Fontenay is one respected philosopher of the Jewish and animal questions.⁷⁵ This, of course, helps to explain why she demands that ‘[r]ights cannot be inferred on the basis of scientific facts’.⁷⁶ For her, they must either be accepted through the metaphysical conception

Horkheimer) who she claimed ‘were the first to dare to allow for the understanding that the fate of animals sometimes looked like the fate of Jews, unless it was actually the other way around’.

⁶⁷ See, eg, Derrida, *Force of Law*, above n 2, 973.

⁶⁸ Derrida, *The Animal That Therefore I Am*, above n 1, 25-26.

⁶⁹ See, eg, Derrida, *Force of Law*, above n 2, 1040-45.

⁷⁰ De Fontenay, above n 3, 66.

⁷¹ Ibid 64, 57-58.

⁷² Ibid 64.

⁷³ See, eg, ibid 50. De Fontenay in particular makes reference to Paola Cavalieri, ‘Les droits de l’homme pour les grands singes non humains’ (Jan-Feb 2000) 108 *Le Débat* 156. In regard to Singer’s texts, de Fontenay cites Peter Singer, *Animal Liberation* (Ecco, 2002); Peter Singer, *Practical Ethics* (Cambridge University Press, 1993).

⁷⁴ De Fontenay, above n 3, 49.

⁷⁵ I have selected her work since she was a contemporary of Derrida’s, and because she comments on contemporary animal law: see above nn 4-5.

⁷⁶ De Fontenay, above n 3, 50.

of natural law, or developed through the benefit of experience.⁷⁷ Her concern is also that science remains without ground, always open to new interpretations, always able to 'provide new pretexts for confusion'.⁷⁸ Social organisation should not proceed predominantly on the basis of the biological.⁷⁹ Inscribed with the agony of a European trace, with reference to the holocaust, de Fontenay argues that the development of rights across species should:

be accomplished through political argumentation, laden with memory, nourished with history, philosophy, and social thought, and attentive to the complications of conflicts and the undialecticizable event.⁸⁰

De Fontenay argues that it is proper on the basis of science, to reject the philosophical *scala naturae*,⁸¹ but that does not justify, or assist nonhuman animals if that rejection is used as a means 'of abasing some as a way of elevating others'.⁸² Not only is de Fontenay concerned with not setting limits, she is concerned with the injustices that *that* exclusionary approach encourages for all 'fragile' beings.⁸³ Against the dogma of rational argument, de Fontenay enforces the grounding and therefore dogma of 'the indefectible and minimal belief' of the equality and singularity of every human being.⁸⁴ In criticism of Cavalieri's logic, de Fontenay also points out that rational arguments based on science, whilst purporting to escape humanism (and here I stress the rationalist system of thought dependent on the logos), do nothing of the sort since what they employ is 'the classical process of strategies of rupture: provocation-repression'.⁸⁵ In this way, anti-speciesism that depends on the argument from marginal cases, whilst championing the protections for some or most beings, concurrently inflicts violence, even if only conceptually, on the most vulnerable. The argument for liberation is infected by repression. That is even before the additional violence of utilitarianism with its focus on the greatest good(s), is brought into the equation.

What appears understandably as most offensive to de Fontenay,⁸⁶ is that Cavalieri attacked art 3 of the Nuremberg Code. Whilst it is not the law of any nation, among its restrictions that

⁷⁷ Ibid.

⁷⁸ Ibid 51.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ See also ibid 68.

⁸² Ibid 52.

⁸³ Ibid 52: here de Fontenay is concerned that the argument from marginal cases that can be used to argue against speciesism is 'indecent in relation to these fragile humans'.

⁸⁴ Ibid 52-53.

⁸⁵ Ibid 53. See also at 64 where de Fontenay criticises Singer's and Cavalieri's arguments as being 'stuck in a junsnaturalist philosophy' that is 'paradoxically, entirely within the metaphysics of the proper of man'.

⁸⁶ Ibid 59-60.

aim to *limit* the conduct of experiments on nonhuman animals,⁸⁷ it suggests that research experiments on humans should be preceded by ‘animal experimentation’.⁸⁸ De Fontenay objects to Cavalieri’s treatment of the Code since she claims that Cavalieri has done so in isolation of the terrible history that preceded it.⁸⁹ In de Fontenay’s view, the Nuremberg Code proclaims the dignity of every human being in memory of that history, whilst Cavalieri selectively diverts its meaning for ‘her own ends’.⁹⁰ For de Fontenay, Singer’s and Cavalieri’s arguments are haunted by that historical reality.⁹¹ Perhaps it is not such a great part of their individual traces, to the extent that it is for others.

De Fontenay’s alternative position, whilst she acknowledges that there ‘may be something of a proximity between certain deficient humans and highly evolved animals’, is to address the issue ‘with the wisdom of love as a way of inspiring an approach to human singularity that would be less subject to the criteria of competence’.⁹² De Fontenay calls for the good of humanism⁹³ that motivates the institution of rights for human animals, as an unshakeable grounding, to *also* extend protections for nonhuman animals.⁹⁴ She acknowledges its insufficiencies in that it thus far excludes nonhuman animals from the sphere of legal justice,⁹⁵ and the social contract. She explains that:

only a patient and prudent deconstruction of the theoretical humanism proper to the metaphysics that, beyond the opposition between materialism and idealism, underlie most philosophies can lead to a respect for animals in their lives and in their deaths without offending humankind.⁹⁶

De Fontenay’s distinctions rebuke the ‘same as us’ arguments. She explains:

Yes, it is appropriate to attribute rights to [the great apes], in that same way that – and *not because* – rights are attributed to human beings incapable of enlightened consent, *but* rights that that [sic] are *not* awkwardly mimetic.⁹⁷

⁸⁷ Art 3 states:

The experiment should be so designed and based on the results of animal experimentation and a knowledge of the natural history of the disease or other problem under study, that the anticipated results will justify the performance of the experiment.

⁸⁸ Ibid.

⁸⁹ De Fontenay, above n 3, 59-60.

⁹⁰ Ibid 59.

⁹¹ Ibid 60-61.

⁹² Ibid 57.

⁹³ See, eg, ibid 65.

⁹⁴ Ibid 61.

⁹⁵ Ibid 61.

⁹⁶ Ibid 64.

⁹⁷ Ibid 62 (*italics not in original*).

De Fontenay calls for a more legally robust solution, one that she claims will work as a matter of precedent, and one that does not instil merely shifted limits. Her solution is toward an ‘international ethical codification’ that would enable incremental extensions to other mammals (and here she is excluding invertebrates unfortunately), starting with the great apes as ‘the first among beasts rather than the last of men’.⁹⁸ She appreciates that this will still be subject to hierarchical and scientific opinion.⁹⁹ Whilst this sounds like the *Universal Declaration of Animal Rights*, her difference is that in *that* instrument, the rights proposed for nonhuman animals mimic human rights, and are therefore another ‘utilitarian provocation’.¹⁰⁰ That instrument would elevate the beingness of some over others, perhaps offend humans, and strangely attempt to award natural rights to nonhuman animals, when that has not been properly considered.¹⁰¹ A particular concern, is that conceptions of natural rights as awarded to humans, exclude nonhuman animals from the social contract.¹⁰² To protect nonhuman animals in law, the problem of reciprocity of obligations and rights must be deconstructed and resolved.¹⁰³

5.7 Summary

There have been reverberating voices calling for compassion and greater protections for nonhuman animals. It is not a modern phenomenon. The prospect of duties toward nonhuman animals were sometimes couched on the familiar bases that they are necessary because nonhuman animals provide services to humans, or because nonhuman animals may not act with violence toward us. Nietzsche suggested that human thought and capacity for empathy and justice is constrained by our own economies of interests. More recently, an increasing volume of literature across disciplines continue the call for empathy and justice. There is recognition that solutions must come from beyond or perhaps, before law. Within the literature, there does appear to be a searching for a different grounding for ‘justice’ as something that is before rationality. Derrida recognised the absolute necessity for a pure arché.¹⁰⁴ That is, a grounding that is not infected by human animal self-interest. That *is* Derridean justice.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid 63.

¹⁰¹ Ibid.

¹⁰² Ibid 66. De Fontenay also criticises Cavalieri’s position as not addressing this legal problem. At 67, de Fontenay acknowledges the good in Anglo-Saxon arguments that recognise ‘moral patients’ and at 68, those that argue for the separation of rights-freedoms from rights-obligations.

¹⁰³ Ibid.

¹⁰⁴ See Chapter 2, sections 2.2.2 and 2.7 and Appendix 1, section A2.4 for discussion of ‘arché’.

De Fontenay is alive to new calls to 'justice' for nonhuman animals that run the risk of reinstituting violence and that undermine the lessons of the past. De Fontenay is brave enough, in the face of the hegemony of rationality, to actually say, that what is needed is a 'wisdom of love'. A love that is extendable to a greater range of animals, and one that begins by not excluding, or offending humans. I wonder if this 'love' could subdue human economies of interests, and offer a bridge to Derridean justice. This is further taken up in the concluding chapter of this research.

The following Part 4 of this research involves the examination of law and the development of the duties of care said to be owed to nonhuman animals. The next chapter, Chapter 6, begins with contextualising and tracing the history of nonhuman animal protections in law, and particularly how they developed in English and Australian law.

**PART 4: TRACING AND CHARACTERISING THE 'DUTY OF CARE' SAID
TO BE 'OWED' TO NONHUMAN ANIMALS**

CHAPTER 6: THE DEVELOPMENT OF ANIMAL PROTECTION DUTIES IN CONTEXT

6.1 Introduction

This chapter answers the thesis sub-question: *how has the duty of care 'owed' to nonhuman animals developed?* This chapter recounts that Australian law has inherited from English law, various forms of legal protections for nonhuman animals. That inheritance also includes various forms of defences and exemptions. They include excuses that negate the proving of the *actus reus* elements (the physical elements that must be proven to find guilt in law), and different forms of defences including compliance with codes of practice. This chapter traces the development of the relevant laws, and briefly recounts the key social pressures that led to their enactment. The primary offence has been a prohibition against positive acts of cruelty. Over time, the cruelty offence developed to incorporate prohibition of some forms of omissions that resulted in cruelty. More recently, a separate duty of care offence was enacted in some jurisdictions in Australia and in England and Wales. It imposes some positive obligations on animal carers to provide minimum standards of care. In common with the cruelty offences, the duties of care only apply for some nonhuman animals, in some circumstances. The legal definitions of 'animals' within Australian jurisdictions' animal protection statutes are extracted in Appendix 3, Table 9. This chapter has a greater focus on the development of omissions offences since the primary target of this research is the Queensland duty of care offence which is s 17 of the *Animal Care and Protection Act 2001* (Qld) ('ACPA').

6.2 The historical context of animal protections

This section briefly traces some of the interest in, and impetus toward, animal protections from ancient times to the 1800s in England. It serves as a background to the development of omissions offences. A further exploration of some of the historical perspectives on nonhuman animals can be found in Appendix 1, Part D.

6.2.1 Ancient calls for animal protections

According to Huffman, Pythagoras, who is said to have lived from 570 to 490 BCE, believed that nonhuman animals shared with human animals, 'the ability to feel emotions such as pleasure and pain', but not intellect.¹ As Pythagoras believed human animals have

¹ Carl Huffman, *Pythagoras* (summer 2014) Stanford Encyclopedia of Philosophy <<https://plato.stanford.edu/entries/pythagoras/#FatSou>> [4.1].

transmigrating souls,² he objected to cruelty toward nonhuman animals.³ Yet, it appears he did not object to the killing and eating of animals that suffered religious sacrifice.⁴

Jamieson found that nonhuman animal interests had been recognised in ancient⁵ and biblical⁶ texts. For example, the Institutes of Justinian were said to accord animals 'some degree of moral acknowledgment'⁷ since the *jus natural* was deemed a universal, divine law.⁸ Exodus proclaims that: '[i]f you see the donkey of someone who hates you fallen down under its load, do not leave it there; be sure you help them with it'.⁹ Jamieson surmised that through the ages, it was likely there were multiple motives for these directions and sentiments.¹⁰ Those included the protection of the animal as an economic consideration,¹¹ to avoid developing 'habits of cruelty',¹² and that any duty of care for animals only arises as an indirect way of caring for humans.¹³ The Stoics believed that animals were irrational, and therefore 'had neither moral nor legal rights nor were due the protection of law and justice'.¹⁴

6.2.2 Development of protections in England

In the 1500s and 1600s some municipalities in England instituted ordinances against cock-throwing and bear-baiting, perhaps largely on the basis that it was a disruption to orderly society.¹⁵ In 1635 in Ireland, the *Act Against Plowing by the Tayle, and Pulling the Wooll off Living Sheep* was enacted.¹⁶ According to Jamieson, recognition of non-legal interests of animals, gained some momentum in the 1700s in England.¹⁷

² Ibid citing Porphyry, *Life of Pythagoras*, VP 19.

³ Huffman, above n 1.

⁴ Ibid [4.3].

⁵ Philip M Jamieson, *Animals as Quasi-Legal Entities: A Legal Analysis from and Historical and Philosophical Perspective* (PhD Thesis, University of Queensland, 1990) 28-34.

⁶ Ibid 11-27, 34-41: Jamieson cites various passages from the Old Testament.

⁷ Ibid 33 quoting R Attfield, *The Ethics of Environmental Concern* (Blackwell, 1983) 35 n 8.

⁸ Jamieson, above n 5, 33 citing T Sandars (ed), *The Institutes of Justinian* (Longmans Green, 7th ed, 1922) xxiii.

⁹ Exodus 23:5.

¹⁰ Jamieson, above n 5, 19-27.

¹¹ Ibid 19.

¹² Ibid 25.

¹³ Ibid 27.

¹⁴ Ibid citing B Inwood, *Ethics and Human Action in Early Stoicism* (Clarendon Press, 1985). No page numbers cited by Jamieson.

¹⁵ Jamieson, above n 5, 87-88.

¹⁶ See, eg, Linda Kalof, *Looking at Animals in Human History* (Reaktion Books, 2007) 137, 189 n 123 citing Thomas Wentworth, 'Act against Plowing by the Tayle, and Pulling the Wooll Off Living Sheep, 1635', in *The Statutes at Large, Passed in the Parliaments Held in Ireland* (George Grierson, 1786) ix.

¹⁷ Jamieson, above n 5, 88-96: For example, Montaigne, the third Earl of Shaftesbury, Hume, Bentham, some poets and some theologians argued for the recognition of animals' interests.

In Jamieson's recounting of early legislation, he cites the *Driving of Cattle Metropolis Act 1781*¹⁸ that included in its preamble, concern for cattle being overdriven.¹⁹ However, in 1794, an English case rejected justification of the offence purely on the basis of protecting the interests of the animal, since 'to convict a man of barbarous treatment of a beast, it should appear that he had malice toward the prosecutor'.²⁰ The prosecutor here is the perpetrator of the barbarous treatment.

6.2.3 Attempts to introduce animal-focused cruelty laws

In the House of Commons in 1800, there was an attempt to introduce protective legislation, and the related debates in Parliament were more focussed on animals' interests.²¹ The Bill outlawed bull-baiting.²² However, Jamieson discerned from the debates that the impetus behind the Bill may not have purely been concern for the animals themselves, but rather concern about the distraction the activity posed to employment, and concern to protect class interests in other forms of entertainment.²³ Yet in that period there was growing concern for humane treatment of humans and nonhuman animals.²⁴ Attempts to introduce laws prohibiting cruelty continued to be met with opposition in the early 1800s.²⁵

6.2.4 Bentham's anthropocentric utilitarianism

In 1879, Bentham famously argued that in regard to nonhuman animals, 'the question is not, Can they *reason*? nor, Can they *talk*?, but, can they *suffer*?'.²⁶ He stated that 'animals, which on account of their interests having been neglected by the insensibility of the ancient jurists, stand degraded into the class of *things*'.²⁷ He also optimistically predicted that '[t]he day may come, when the rest of the animal creation may acquire those rights which never could have

¹⁸ 21 Geo 3, c 67.

¹⁹ Jamieson, above n 5, 103. See also A Gentlemen of the Inner Temple, *A Concise Abstract of the Most Important Clauses in the Following Interesting Acts of Parliament Passed in the Sessions of 1781* (John Fielding) 98.

²⁰ *R v Parker* (unreported judgement of Heath J, Common Pleas, July Sessions, 1794) Heath J quoted in John H Ingham, *The Law of Animals – A Treatise on Property in Animals Wild and Domestic and the Rights and Responsibilities Arising Therefrom* (T & JW Johnson & Co, 1900) 526. See also Jamieson, above n 5, 99.

²¹ Jamieson, above n 5, 104 citing *The Parliamentary History of England from the Earliest Period to the Year 1803*, vol XXXV, 202-214.

²² Jamieson, above n 5, 104. The Bill was presented by Sir William Pultney.

²³ *Ibid* 104-05.

²⁴ *Ibid* 105.

²⁵ *Ibid* 107-08.

²⁶ Jeremy Bentham, 'Penal Branch of Jurisprudence' in Jeremy Bentham *An Introduction to the Principles of Morals and Legislation* (1879) 311 n 1 ('*Introduction*') (italics and punctuation as it appears in the original). The preface notes that it is '*a New Edition, corrected by the Author*'.

²⁷ *Ibid* 310 (italics in original).

been withholden from them but by the hand of tyranny'.²⁸ Bentham was alive to the human animal's 'nature' of seeking reputational benefits through public displays of benevolence.²⁹ He called to legislators to harness that trait and to do so 'according to the Principle of Utility'.³⁰ He suggested that all acts that 'serve as an incitement to cruelty' should be forbidden.³¹ That included all cruelty to nonhuman animals, particularly for the sake of 'amusement' or 'gluttony'.³² He was concerned that those acts 'entail on sensitive beings the most lively suffering', yet, he suggested that man 'may be allowed ... to slaughter animals, but not to torture them'.³³ In confirming his anthropocentric utilitarianism, his desire was that the protection of the law would apply, particularly, to 'the animals that aid us in our daily tasks and minister to our necessities'.³⁴

6.2.5 Confirming property status and development of *mens rea*

Early English cases involving the mistreatment of nonhuman animals relied on statutes that protected them as property.³⁵ Those cases developed approaches to questions of *mens rea* (that is, the mental element or the requisite state of mind necessary to prove guilt in law). In 1840, it was held that 'malicious maiming' can be found, regardless of whether there was malice toward the owner, where it was committed 'wilfully and wantonly'.³⁶ In a Scotch case from 1881, character-based responsibility³⁷ was made clear where wanton cruelty was described as 'cruelty which proceeds from a wicked disposition, and where the acts practised are to gratify a cruel propensity'.³⁸ A 1908 English judicial dictionary lists the

²⁸ Ibid 311 n 1.

²⁹ Jeremy Bentham, *Bentham's Theory of Legislation: Being Principes de Législation and Traités de législation, civile et pénale Volume II Principes of the Penal Code* (Charles Milner Atkinson trans, Oxford University Press, 1914) 274-75 ('Theory').

³⁰ Ibid 275 (capitalization as it appears in the original).

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Ibid 276.

³⁵ For example, under *The Malicious Damage Act 1861* (24 & 25 Vict, c 97) s 40, it was an offence to kill, maim, or wound an animal. See also *R v Bullock* (1868) 64 LT 516; Halsbury et al, *The Laws of England Being A Complete Statement of The Whole Law of England* (Butterworth, 1907) 369 [807]: To '[u]nlawfully and maliciously to kill, maim, or wound any cattle is a felony punishable with fourteen years' penal servitude' under the *Larceny Act 1861* 24 & 25 Vict, c. 96) s 11. The entry also notes that it was a common law offence of larceny to '[u]nlawfully and maliciously to kill, maim, or wound' other domestic or confined animals punishable by imprisonment for a period not exceeding six months, or a fine of up to 20 pounds.

³⁶ *R v Weare* (1840) 4 JP 508 cited in Jamieson, above n 5, 102 n 12.

³⁷ See also Chapter 8, section 8.8.1 where I discuss Lacey's categorisations of criminal responsibility which assist in the characterisation of laws.

³⁸ *Anderson v Wood* (1881) 4 Coup 543, 549 (Lord Young) quoted in Mike Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (Oxford University Press, 2001) 225.

definition of ‘wanton’ as ‘not having a reasonable cause...’³⁹ Similarly, definitions of ‘wanton’ in relation to equivalent property-focussed laws in the United States, were applied in a number of cases to include acts without any ‘useful motive’ or acts that could be described as ‘malicious mischief’.⁴⁰ The property focussed statutes hence reflected a development of an anthropocentric and utilitarian perspective in determining economic harm. While that seems logical since they were property laws, those constructions of the *mens rea* elements and the anthropocentric focus were carried into cruelty statutes. The word ‘wanton’ was originally employed in the English animal protection statutes but then removed from 1849.⁴¹ The word ‘cruelly’ was retained under the *Cruelty to Animals Act 1849* s 2.⁴² In his article published in 1910, Stowe confirmed that at that time, ‘[j]udicial attempts at definitions have left the matter as obscure as the dictionaries’.⁴³ There were different interpretations that demanded the requirement for ‘intentional infliction’ arising from ‘moral perversion’, or the requirement for ‘unnecessary suffering’.⁴⁴ It appears there was a shifting from character-based responsibility to outcome-based responsibility that remained tainted by utilitarian interests.⁴⁵

6.2.6 Early animal-focussed statutes

In 1822, ‘Martin’s Act’ was enacted. It was ‘*The Act to prevent the cruel and improper Treatment of Cattle*’,⁴⁶ and included protections for equine, bovine and ovine animals only, and only against ‘wanton’ cruel beatings, abuse and ill-treatment.⁴⁷ It was later found not to protect bulls.⁴⁸ In 1824 the Society for the Protection of Animals was founded in England.⁴⁹ Jamieson recounts a number of further failed attempts to extend protections for animals in

³⁹ F Stroud, *The Judicial Dictionary of Words and Phrases Judicially Interpreted to which has been added Statutory Definitions Vol III* (Sweet and Maxwell, 2nd ed, 1908) 2210.

⁴⁰ Ingham, above n 20, 525.

⁴¹ Harold S Stowe, ‘Cruelty to Domestic Animals’ (1910) 4 *The Law Magazine and Review: A Quarterly Review of Jurisprudence* 437, 444. (Fifth series, vol 35, 1909-1910).

⁴² *Ibid* 442.

⁴³ *Ibid*.

⁴⁴ *Ibid*.

⁴⁵ See also Chapter 8, section 8.8 where I discuss Lacey’s characterisations of shifting focus in finding culpability.

⁴⁶ 3 Geo 4, c 71.

⁴⁷ Jamieson, above n 5, 109.

⁴⁸ *Ibid* 109.

⁴⁹ It was later to become the Royal Society for Protection of Cruelty to Animals. Its lobbying ‘was instrumental’ toward ‘numerous amendments’ to a number of animal protection statutes: Sophia Hepple and Nigel Gibbens, ‘Animal Ethics the Government’s Policy: “To Guard and Protect”’ in Christopher M Wathes et al (eds), *Veterinary & Animal Ethics: Proceedings of the First International Conference on Veterinary and Animal Ethics September 2011* (Wiley Blackwell, 2011) 229-244, 232.

that jurisdiction.⁵⁰ In 1835, Martin's Act was repealed and replaced with the *Cruelty to Animals Act 1835*⁵¹ that provided some greater protections for some animals, in some situations.⁵² It appears to have incorporated the first omissions offence in a positive duty that required the feeding of impounded horses and cattle awaiting slaughter.⁵³

In the *Cruelty to Animals Act 1854*⁵⁴ the definition of animal was extended to include:

any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, hog, pig, sow, goat, dog, cat, or any other domestic animal of any kind or species whatever, and whether a quadruped or not.⁵⁵

The definition of animal and the statute's provisions did not extend to animals *considered* wild, even if formerly-wild animals had been confined: such as for caged lions,⁵⁶ or rabbits kept for coursing.⁵⁷ Later, in the *Wild Animals in Captivity Protection Act 1900*,⁵⁸ its definition of 'animal'⁵⁹ was broader, and it incorporated the possibility of finding offences in cases of omissions. It made it an offence where an animal that is 'in captivity or close confinement' is:

maimed, pinioned, or subjected to any appliance or contrivance for the purpose of hindering or preventing its escape from such captivity or confinement, by wantonly or unreasonably doing or omitting any act, causes or permits to be caused any unnecessary suffering to such animal, or cruelly abuses, infuriates, teases, or terrifies it, or permits it to be so treated.⁶⁰

⁵⁰ Jamieson, above n 5, 109-10.

⁵¹ 5 & 6 Wm 4, c 59.

⁵² See also Jamieson, above n 5, 111.

⁵³ Ibid.

⁵⁴ 17 & 18 Vict, c 60. See Halsbury et al, above n 35, 409.

⁵⁵ *Cruelty to Animals Act 1854* 17 & 18 Vict, c 60 s 3.

⁵⁶ Halsbury et al, above n 35, 409 n (n) citing *Harper v Marcks* [1894] 2 QB 310. See also R Cunningham Glen (ed), *Reports of Cases in Criminal Law Argued and Determined in the Courts of England and Ireland Vol XVII 1890 to 1895* (Horace Cox, 1895). At 758 the case '*Harper v Marcks*' is reported, and at 761 Wright J made it clear in that 'an animal ought to be regarded as domestic which is of a kind ordinarily domesticated, and which is in fact domesticated'. Therefore, the cruelty provisions under the *Cruelty to Animals Act 1854* did not apply for these lions that were caged and allegedly subjected to whipping.

⁵⁷ Halsbury et al, above n 54, 409 n (o) citing *Aplin v Porritt* [1893] 2 QB 67.

⁵⁸ 63 & 64 Vict, c 33.

⁵⁹ It was extended to include 'practically any living thing, except insects, that cannot be classed as a domestic animal': Halsbury et al, above n 35, 410.

⁶⁰ *Wild Animals in Captivity Protection Act 1900* 63 & 64 Vict, c 33 s 2.

A broader cruelty statute was enacted in 1849. The *Cruelty to Animals Act 1849*⁶¹ did extend prohibitions to include:

that if any person shall from and after the passing of this act cruelly beat, ill-treat, over-drive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured, any animal, every such offender shall for every such offence forfeit and pay a penalty not exceeding five pounds.⁶²

It also made it an offence for any person to refuse to, or fail to through 'neglect', provide sufficient food and water to an animal that they had impounded or confined.⁶³

As described in the next section of this chapter, English courts did agitate toward the enactment of a broader omissions offence using s 2 of this statute as a basis. Stowe reported that in 1908, ten thousand people in England had been convicted of cruelty offences.⁶⁴

6.3 The development of omissions offences in England

Whilst the *Cruelty to Animals Act 1849*⁶⁵ did not include a broad offence prohibiting omissions or 'neglect' (for animals not confined), some courts did find that leaving an animal to suffer *could possibly* be the basis of an offence.⁶⁶ Three of those cases are examined below. Stowe confirmed that the 1849 statute did not include an offence against omissions,⁶⁷ and that justices in Scotch courts were also agitating toward an offence of omission.⁶⁸

⁶¹ 12 & 13 Vict, c 92. See, eg, Ward W Cox (ed), *Reports of Cases in Criminal Law Argued and Determined in all the Courts in England and Ireland Vol III* (John Crockford, 1850) lxvi-lxvii. Available within *Selden Society Publications and the History of Early English Law* at HeinOnline.

⁶² *Cruelty to Animals Act 1849* 12 & 13 Vict, c 92 s 2.

⁶³ *Ibid* s 5.

⁶⁴ Stowe, above n 41, 437.

⁶⁵ 12 & 13 Vict, c 92.

⁶⁶ See also Jamieson, above n 5, 112 n 57: Jamieson cites a number of cases where '[j]udges had been inclined to read into the Act omissions which led to substantial suffering', including *Everitt v Davies* (1878) 38 LT 360 (that I analyse below) *Hooker v Gray* [1907] 71 JP 337 and *Green v Cross* [1910] 103 LT 279 (which I also make reference to below). My analysis finds that these cases either did *not* find cruelty, or that they remitted the cases back for consideration by the referring courts. In *Hooker v Gray*, as reported in (1907) 28 LT 472, whilst Phillimore J on the King's Bench was reported as being 'not sure that if a person shot at an animal and hit it, and knew that the animal was lingering on in pain, it would not be his duty to put the animal out of pain', and that 'was not found [to be necessary] by the justices in this case' at 473. Lord Alverstone CJ, Phillimore and Darling JJ, unanimously followed *Powell v Knight* (1878) 38 LT 607 to find that there had been no cruelty despite the cat being shot through the spine, escaping with its wounds, and later having to be euthanased.

⁶⁷ Stowe, above n 41, 440-41.

⁶⁸ *Ibid* 441 citing *Wilson v Johnstone* (Vol. I. Just. Cas.16) (no year cited); *Anderson v Wood* [1881] (9 Ct. Sess., 4 th Series, Just. Cas. 6) where the court did convict on the basis of an omission.

6.3.1 *Everitt v Davies* in 1878: the possibility of ‘cruelty through omission’

In May 1878, *Everitt v Davies*⁶⁹ was heard by Kelly CB and Cleasby B in the Exchequer Division. It was an appeal from an inferior court to determine if cruelty under s 2 of the *Cruelty to Animals Act 1849*,⁷⁰ had been made out. A mare had been turned out into a paddock with an incurably diseased hoof, and left, in agony, to fend for herself.⁷¹ Kelly CB found that the respondent did cause the mare to be tortured by forcing her to suffer the pain of using her leg to survive.⁷² He found that *that* was a question that the magistrates in the inferior court had failed to consider, and that they should have found that every element of the cruelty offence could be made out.⁷³ The Court remitted the matter for reconsideration by the magistrates.⁷⁴

6.3.2 *Powell v Knight* in 1878: the possibility of ‘passive cruelty’

Also in 1878, *Powell v Knight*⁷⁵ was heard by the Queen’s Bench. The defendant lawfully shot his neighbour’s dog through the eye when the dog came to his kitchen door at around 9pm.⁷⁶ Seemingly in concurrence with Kelly CB’s reasoning in *Everitt v Davies*,⁷⁷ in a strict interpretation of the statute, Cockburn CJ found that whilst ‘any man of common humanity, and not made of the hardest materials’ would have ‘put an end to’ the dog, he found that under the *Cruelty to Animals Act 1849*,⁷⁸ such an act of ‘passive cruelty [was *not*] an offence provided for by the statute’.⁷⁹ Focussing on the intention of the defendant, he found that ‘[t]here was no intentional infliction of pain after firing the shot’.⁸⁰ However, Cockburn CJ did exclaim:

I do not see why such an act of passive cruelty should not be made an offence in the same way as active torture, but that can only be done by the legislature.⁸¹

⁶⁹ (1878) 38 LT 360.

⁷⁰ 12 & 13 Vict, c 92.

⁷¹ *Everitt v Davies* (1878) 38 LT 360, 360-61.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ (1878) 38 LT 607.

⁷⁶ *Ibid* 608.

⁷⁷ (1878) 38 LT 360.

⁷⁸ 12 & 13 Vict, c 92 s 2.

⁷⁹ *Powell v Knight* (1878) 38 LT 607, 608.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

6.3.3 Green v Cross in 1910: toward 'omission through commission'

In May 1910, in *Green v Cross*,⁸² on the King's Bench, Lord Alverstone CJ and Coleridge J ordered that the case be remitted back to the inferior court for reconsideration to determine if there was sufficient evidence to convict on the basis of whether the respondent had done 'his best to put the animal out of pain'.⁸³ That was because the respondent had lawfully set a trap to catch 'vermin', had inadvertently captured a domesticated dog, and knowing the dog was in great pain, took over two hours, while he attended to other unrelated matters, to eventually have the dog euthanised.⁸⁴ Finding that *Powell v Knight*⁸⁵ was distinguishable, the Chief Justice was reported as stating that he:

thought that there must come a point at which an act of omission became one of commission for the purposes of the section, and that there might be acts of omission which constituted a causing to be ill-treated.⁸⁶

The Chief Justice was also reported as stating that:

[i]t may be taken as a principle in these cases where the act was not a direct act of commission that if the respondent had caused pain by a lawful act and he alone could stop it the justices were entitled to consider whether he had done his best to stop it.⁸⁷

6.3.4 The cruelty offence is extended to some omissions in 1911

It appears that whilst the early English statutes did not protect animals against omissions directly, some judges in higher courts, as demonstrated above, were agitating for Parliament to enact such a provision. An additional, limited prohibition against omissions was subsequently introduced in the *Protection of Animals Act 1911*⁸⁸ as s 1(2) as follows:

For the purposes of this section, an owner shall be deemed to have permitted cruelty within the meaning of this Act if he shall have failed to exercise reasonable care and supervision in respect of the protection of the animal therefrom:

⁸² (1910) 26 LT 507.

⁸³ Ibid 509 (Lord Alverstone CJ).

⁸⁴ Ibid 509-10.

⁸⁵ (1878) 38 LT 607.

⁸⁶ (1910) 26 LT 507, 510.

⁸⁷ Ibid.

⁸⁸ 1 & 2 Geo 5, c 2. The statute was applicable for England and Ireland: see its s 17. The statute repealed a number of acts including the *Cruelty to Animals Act 1849*, the *Cruelty to Animals Act 1854*, and the *Wild Animals in Captivity Protection Act 1900*.

Provided that, where an owner is convicted of permitting cruelty within the meaning of this Act by reason only of his having failed to exercise such care and supervision, he shall not be liable to imprisonment without the option of a fine.

The offence only applied to 'cruel' acts where 'reasonable' care and supervision was not exercised by the animal owner. This would mean that the act itself would have to be deemed an unreasonable act to constitute cruelty, *and* where the efforts made to take care and supervise were also 'unreasonable'. It appears to impose a form of duty to exercise reasonable care or 'due diligence', which is an issue I take up in Chapter 8 in characterising omissions offences generally. Additionally, the testing of the reasonableness of the efforts bears a direct connection to the contemporary testing of breaches under *ACPA* s 17 which is the subject of this research. Further, under *ACPA* s 17, there appears to be a requirement for the prosecution to particularise 'reasonable steps' within the charges. That is explored in Chapter 10.

6.4 Adoption of the 'five freedoms' in Great Britain

Growing public concern for the treatment of nonhuman animals by the agriculture industry arose in England in the 1960s. Further impetus toward greater protections for nonhuman animals occurred as a result of the publication of Ruth Harrison's *Animal Machines*.⁸⁹ It exposed the terrible conditions and suffering of intensively farmed animals in England. In response, the Government called for an enquiry to review the current standards of animal welfare. That enquiry resulted in the *Brambell Report*⁹⁰ and subsequent development of animal welfare standards that are known as the 'five freedoms'. This section traces the development and limited implementation of the five freedoms in law as they are incorporated within cruelty and omissions offences.

6.4.1 The Brambell Report of 1965

The concept of animal 'welfare' has developed as a subject of scientific research.⁹¹ The science of welfare now influences the minimum legal standards of care for some animals in England and Wales under the *Animal Welfare Act 2006* c 45 ('AWA'), in Australian jurisdictions' animal protection statutes, and elsewhere. The welfare standards arose as a result of the 1965 *Brambell Report*.⁹² The Committee's terms of reference included

⁸⁹ Ruth Harrison, *Animal Machines* (Vincent Stuart, 1964). See also Radford, above n 38, 262.

⁹⁰ F W Rogers Brambell, *Report of the Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems* (Her Majesty's Stationery Office, 1965) ('*Brambell Report*').

⁹¹ Radford, above n 38, 262. See also Chapter 3, section 3.5.

⁹² *Brambell Report*, above n 90.

consideration of ‘the standards of “welfare” of domestic animals that should be regarded as acceptable under systems of intensive husbandry’⁹³ in Great Britain.⁹⁴ It found that it was ‘a valid criticism’ of the then current *Protection of Animals Act 1911* (‘PAA’) that it did not provide any ‘express safeguard for the welfare of animals which are kept on private premises’.⁹⁵ The *Brambell Report* also acknowledged that there were some minor protections under other statutes.⁹⁶ The Committee also complained that the PAA had limited deterrent effect because action could only be taken *after* an act of cruelty.⁹⁷ Further, it summarised what was required for a finding of liability. That was that the court had to find that ‘the accused knowingly caused or allowed cruelty to occur and that such cruelty was substantial’.⁹⁸ The Committee was additionally concerned that the burden was on the prosecution to prove that either mental or physical ‘suffering’ had occurred, and that was a difficulty given the limits of scientific knowledge at the time.⁹⁹

6.4.2 The Brambell Report’s calls for a new offence for omissions and directions powers

Among other recommendations, the *Brambell Report* called for ‘a new Act’ to include ‘a fuller definition of suffering and an enabling of Ministers to make regulations requiring conditions for particular animals’.¹⁰⁰ The Committee desired that a new offence would prohibit a person, in the context of farming, ‘to cause, or permit to continue, avoidable suffering so defined’.¹⁰¹ However, the recommendation was that prosecution would *only* be possible if a warning had been given to the person and disregarded.¹⁰²

6.4.3 The ‘five freedoms’

The *Brambell Report* was a catalyst in the development of the ‘five freedoms’. The freedoms emanated from the *Brambell Report*’s concerns with the nature, forms and durations of confinement of animals, their needs for social interactions, and provision to them of sufficient

⁹³ Ibid 9.

⁹⁴ Ibid 1.

⁹⁵ Ibid 8.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid 8.

¹⁰⁰ Ibid 63.

¹⁰¹ Ibid 61.

¹⁰² Ibid.

food and water.¹⁰³ The Farm Animal Welfare Council ('FAWC'), in 1993, articulated the 'five freedoms' as:

- (i) *Freedom from thirst, hunger and nutrition* - by ready access to fresh water and a diet to maintain full health and vigour.
- (ii) *Freedom from discomfort* - by providing a suitable environment including shelter and a comfortable resting area.
- (iii) *Freedom from pain, injury, and disease* - by prevention or rapid diagnosis and treatment.
- (iv) *Freedom to express normal behaviour* - by providing sufficient space, proper facilities, and company of the animal's own kind.
- (v) *Freedom from fear and distress* - by ensuring conditions and treatment which avoid mental suffering.¹⁰⁴

6.4.4 The FAWC calls for 'a life worth living'

The FAWC stated that animal welfare should 'be considered with reference' to the five freedoms, for animals 'on farm[s], in transit, at markets, or a place of slaughter'.¹⁰⁵ However it also stated that the freedoms define 'ideal states rather than standards for acceptable welfare'.¹⁰⁶ As such they were *not* intended as minimum legal standards, but rather as a 'framework for analysis of welfare'.¹⁰⁷ In 2011, in the FAWC's final report,¹⁰⁸ it noted that:

the minimum standard of farm animal welfare should be [sic] move beyond the Five Freedoms and be set at the test of whether an animal has a life worth living, from its point of view.¹⁰⁹

The FAWC's 2009 report¹¹⁰ had already posited that 'a life worth living' is *not* 'a good life' but one in which the animal experiences 'good husbandry, considerate handling and transport, humane slaughter and, above all else, skilled and conscientious stockmen'.¹¹¹ *That* was considered a view taken from nonhuman animals' perspectives. Whilst the policy goals of the FAWC were stated to include that the Government was to 'act as *the guardian* of farm

¹⁰³ See, eg, *ibid* 12-15. See also, Radford, above n 38, 263-64, 264: The *Agriculture (Miscellaneous Provisions) Act 1968* incorporated the term 'welfare' in its ss 2-4.

¹⁰⁴ Farm Animal Welfare Council, *Report on Priorities for Animal Welfare Research and Development*, (17 May 1993) 3-4 (*italics in original*). See also Radford, above n 38, 265.

¹⁰⁵ *Ibid* 3.

¹⁰⁶ *Ibid*.

¹⁰⁷ *Ibid*.

¹⁰⁸ Farm Animal Welfare Council, *Farm Animal Welfare Council Final Report* (March 2011) ('FAWC 2011').

¹⁰⁹ *Ibid* 3.

¹¹⁰ Farm Animal Welfare Council, *Farm Animal Welfare in Great Britain: Past, Present and Future* (October 2009) ('FAWC 2009').

¹¹¹ *Ibid* ii.

animal welfare', it also suggested that '[s]tandards for a good life' be set 'by an independent body'.¹¹² Another suggestion of the FAWC was to define an animal's quality of life over its lifetime rather than *merely* focussing on the 'suffering and needs' that are the focus of the five freedoms.¹¹³ It suggested that '[w]elfare assessment should record both the positive and negative experiences of farm animals'.¹¹⁴ It appears that the FAWC was suggesting that even if an animal suffered acutely at some points in his or her life, that could be acceptable as long as he or she, overall, experienced 'a life worth living'. The focus remained, consistent with the principles articulated in cruelty laws, that suffering is permissible providing it is not 'unnecessary' in that it is weighed from a human animal's utilitarian point of view. The suffering *can* therefore be 'justified' by a purported *balancing* of the 'benefits to humans, to the animals affected and to other animals'.¹¹⁵ Clearly, this is not 'balancing', but rather a forcing of dogmatic decision making in the face of an aporia of incommensurable interests. The FAWC acknowledged that farm animals are recognised as 'sentient beings', and that human animals have 'a duty to provide for domesticated animals that depend on man', but there, it referred to the *Animal Welfare Act 2006* that *excludes* farmed animals.¹¹⁶ In the context of its devastating qualifications, the FAWC declared that 'each farm animal should have a life that is worth living to the animal itself, and not just to its human keeper'.¹¹⁷

6.4.5 The FAWC limits the ethical through rationality

The FAWC then went on to cement what is 'ethical' by claiming that:

[o]ne can be most confident about an ethical conclusion if the arguments that lead to it are supported convincingly by facts, scientific deductions, reason and ethical argument, and arise from a process of genuine discussion and debate.¹¹⁸

It seems the FAWC was concurrently grasping at, and defining, strictly limited concepts of 'rationality' and 'truth'. At the same time, it appears the FAWC sought to limit the appreciation of animal suffering that the *Brambell Report* had suggested was possible. The *Brambell Report*, did seem to suggest that an animal's point of view *could* be directly ascertained through its behaviours and vocalisations.¹¹⁹ The FAWC's 2009 Report,

¹¹² Ibid iii (italics not in original).

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ See, eg, ibid ii-iii, 1.

¹¹⁶ Ibid 1.

¹¹⁷ Ibid 1.

¹¹⁸ Ibid 1.

¹¹⁹ *Brambell Report*, above n 90, 9: 'Animals show unmistakable signs of suffering and pain, exhaustion, fright, frustration, and so forth and the better we are acquainted with them the more readily we can detect these signs.'

promotes a form of ethical violence by subsuming perceptions of the experience of nonhuman animals by any means other than what *it* defines as facts, scientific deductions, reason and ethical argument.¹²⁰ There is also violence in its repressing of other possibilities of what is ethical by forcefully eliminating consideration of the inherent aporias in this mode of 'ethical' decision making. From a Derridean point of view, it appears that this 'ethics', that forces its own definitions of truth and rationality, is a means to ends, and a product of, and a reinstitution of, the culture of sacrifice.

6.4.6 Limited adoptions of the 'five freedoms' in law

The 'five freedoms' have not been adopted fully in any law, in Britain or Australia, for farmed animals.¹²¹ However, they have served as a basis for policy and development of laws¹²² including the positive duties as they are expressed in various ways in legislation applicable to domesticated animals. Under the AWA, which does *not* cover 'livestock', the five freedoms are reflected in a limited way through its wording that:

... an animal's needs shall be taken to include (a) its need for a suitable environment, (b) its need for a suitable diet, (c) its need to be able to exhibit normal behaviour patterns, (d) any need it has to be housed with, or apart from, other animals, and (e) its need to be protected from pain, suffering, injury and disease.¹²³

Those requirements are further limited in that the court will consider what is deemed to be 'reasonable' and in line with 'good practice',¹²⁴ and if, and how, the animal was kept and used for any 'lawful' purpose.¹²⁵ An extract of the relevant AWA provisions is provided in Appendix 3, Table 10. I review the development of the English provisions in the following section.

6.5 Contemporary prohibitions against cruelty and omissions in England and Wales

It is necessary to review the contemporary prohibitions against cruelty and omissions in England and Wales, and their development, as they are influential in interpretations of the equivalent laws in Australia. The current AWA that applies to England and Wales does not have a provision that is titled 'cruelty' or similar, but rather s 4 is titled '[u]nnecessary

¹²⁰ See above n 118 and accompanying text.

¹²¹ I review how they are implemented in Australian law in section 6.6 of this chapter.

¹²² See, eg, *FAWC 2011*, above n 108, 3; Radford, above n 38, 265-266.

¹²³ AWA s 9(2).

¹²⁴ *Ibid* s 9(1).

¹²⁵ *Ibid* s 9(3).

suffering’ as one provision under a heading in the *AWA* that has no effect: ‘*Prevention of harm*’. Other specific provisions related to cruel acts are also included under that heading. Subsections 4(1)-4(3) outline what can be described as a prohibition against cruelty that includes a prohibition against certain omissions. I outline those provisions below. Before that, I provide a brief description of the ‘welfare’ requirements for ‘livestock’ in United Kingdom legislation. Those requirements and prohibitions are stipulated under the *Agriculture (Miscellaneous Provisions) Act 1968* c 34 (‘*AMP Act*’) which applies to England, Scotland and Wales.

6.5.1 The separate ‘welfare’ protections for ‘livestock’ in England, Scotland and Wales

Provisions for the ‘welfare’ of farmed animals are found under the *AMP Act*. *AMP Act* s 8 defines ‘livestock’ as ‘any creature kept for the production of food, wool, skin or fur or for use in the farming of land or for such purpose as the Minister may by order specify’. *AMP Act* s 1 states:

Any person who causes unnecessary pain or unnecessary distress to any livestock for the time being situated on agricultural land and under his control or permits any such livestock to suffer any such pain or distress of which he knows or may reasonably be expected to know shall be guilty of an offence under this section.

AMP Act s 2 excludes its application to domesticated animals as it states that:

Nothing in the foregoing subsection shall apply to any act lawfully done under the Cruelty to Animals Act 1876 or to any thing done or omitted by or under the direction of any person in accordance with the terms of a licence issued by the Minister for the purpose of enabling that person to undertake scientific research.

Under the *AMP Act* s 7(1), a person liable under s 1, or s 2 which relates to breaches of regulations relevant to ‘welfare of livestock’, will face a maximum penalty on summary conviction not exceeding three months imprisonment or a fine not exceeding one hundred pounds for a first offence, or both. For any subsequent offence against these provisions, the maximum penalty is three months imprisonment or a fine not exceeding two hundred pounds (but not both).

6.5.2 ‘Welfare’ protections for ‘protected animals’ under the *AWA*

The key provisions of the *AWA* apply to ‘protected animals’. The *AWA* defines a ‘protected animal’ as either that: ‘of a kind which is commonly domesticated in the British Islands,’ or;

‘under the control of man whether on a permanent or temporary basis’, or; as ‘not living in a wild state’.¹²⁶

AWA s 4(1) creates offences for omissions to act but they are limited in their effect as they demand that the person would reasonably have known that the animal would suffer as a result, *and* that the animal suffered ‘unnecessarily’. Section 4(2) extends liability to persons responsible for an animal. In a similar vein to the 1911 statute, there is a test of reasonableness in regard to whether the person responsible for the animal took preventative action, and it reiterates that the suffering must have been unnecessary.¹²⁷ Under AWA s 4(3), a number of considerations are relevant to what constitutes ‘unnecessary’ suffering and they are *not* limited to whether the suffering was ‘proportionate’ or excused under a code of conduct. The court is also directed to have regard to whether or not the suffering was avoidable or reducible, whether the act was for a ‘legitimate purpose’, including whether its purpose was to benefit the animal or protect a person, property or another animal, and whether ‘the conduct concerned was in all the circumstances that of a reasonably competent and humane person’.¹²⁸

6.5.3 Section 9: an obligation, rather than a ‘duty’ to meet the ‘needs of an animal’

AWA s 9 has the heading ‘[d]uty of person responsible for animal to ensure welfare’. The section does not use the word ‘duty’ other than in that heading. The Explanatory Notes clarify that this section does not apply to farmed animals which are covered under a separate statute.¹²⁹ AWA s 9(1) states:

A person commits an offence if he does not take such steps as are reasonable in all the circumstances to ensure that the needs of an animal for which he is responsible are met to the extent required by good practice.

While ‘good practice’ remains undefined, in s 9(2), the needs of an animal are listed as including elements relatable to the ‘five freedoms’. They are the animal’s needs: ‘for a suitable environment’, ‘for a suitable diet’, ‘to be able to exhibit normal behaviour patterns’, ‘any need it has to be housed with, or apart from, other animals’, and its ‘need to be protected from pain, suffering, injury and disease’. Section 9(3) applies what might be termed a ‘reasonableness’ test in that it directs that the animal’s needs may be variable depending on the ‘lawful purpose for which the animal is kept’, and any ‘lawful activity

¹²⁶ AWA s 2.

¹²⁷ See section 6.3.4 above.

¹²⁸ AWA s 4(3).

¹²⁹ Ibid [48]: It refers to the *Agriculture (Miscellaneous Provisions) Act 1968*.

undertaken in relation to the animal'. Section 9(4) clarifies that s 9 does not apply to 'the destruction of an animal in an appropriate and humane manner'.

The Explanatory Notes reiterate that the requirements under s 9(2) only apply 'to the extent required by good practice'.¹³⁰ It also states that in regard to s 9(3)(b), such lawful activities 'may prevent or hinder a person from ensuring all of the welfare needs ... can be met', and that the court must 'take this into account when considering what is reasonable in the circumstances of the case',¹³¹ although that may not provide a full defence.¹³²

With the introduction of AWA s 9, this statute has further affirmed an offence against omissions. However, it appears that the prohibited omissions are only those relatable to the modified version of the five freedoms, despite the fact that the broader offence under s 4 indicates that mental suffering also constitutes 'suffering' and a basis on which *cruelty* could be found. Additionally, the lack of definition of 'good practice' whilst it sounds promising, is limited by the stipulation of what constitutes the 'animal's needs' under s 9(2), and it serves as an opening to bring evidence of acts that may be common place and deemed acceptable even though they may be at odds with what might more broadly be considered morally acceptable practice. It may also permit reference to a code of practice. Ultimately, s 9(3) mandates that the court has regard to *any* lawful utilitarian purpose that the defendant claims and *any* lawful activity in relation to the animal, and that consideration appears to have precedence over the stipulated and limited 'welfare' needs of the animal. Other than the specific 'needs' expressed in s 9(2) as minimum standards of care, it appears there is little to differentiate this offence from the cruelty offence.

6.6 Omissions and 'duties of care' offences in Australian law

This section traces the development of omissions offences in Australian jurisdictions. It also briefly mentions equivalent offences in the European Union, and New Zealand by way of comparison.

¹³⁰ Explanatory Notes, Animal Welfare Act 2006 [51]. See National Archives, *legislation.gov.uk*, *Animal Welfare Act 2006: Explanatory Notes Section 4* <<https://www.legislation.gov.uk/ukpga/2006/45/notes/division/7/2/1>>.

¹³¹ Ibid [52].

¹³² Ibid [53].

6.6.1 Early Australian Statutes

The earliest legislation for the protection of animals in Australia was enacted in Tasmania (Van Diemens' Land) in 1837.¹³³ The other Australian colonies, other than South Australia, adopted cruelty prohibitions by the 1850s.¹³⁴ Every State had adopted animal protection legislation by the 1920s.¹³⁵

In regard to offences that directly address omissions to care for animals, there has been, and continue to be, some basic levels of welfare standards that are mandated within animal protection legislation across Australian jurisdictions. The earliest animal protection statute in what was then the greater jurisdiction of New South Wales, was the *Act for the more effectual prevention of Cruelty to Animals 1850* ('*First Act of 1850*').¹³⁶ As enacted, it did not include any direct prohibition against omissions to care for an animal.¹³⁷ Neither did it include any obvious exemptions to the offences. The maximum penalty for each offence was five pounds.¹³⁸ That statute remained law in Victoria until 1864, and in Queensland until 1901.¹³⁹ Queensland then enacted the *Animals Protection Act 1901* (Qld).¹⁴⁰ Analysis of the Queensland statutes is included in the following subsection.

Victoria subsequently enacted the *Police Offences Statute 1864* (Vic).¹⁴¹ As enacted, that statute, in Part II, s 18 made it an offence:

(1) For any person who cruelly beats ill-treats overdrives overloads abuses or tortures or omits to supply with sufficient food or water any animal.

In comparison to the *First Act of 1850* provision, this offence was narrower in its listing of specific positive acts that were prohibited, and it was broader in that it included an offence to omit to provide sufficient food and water. It did not include any other direct prohibition

¹³³ *An Act for the Better Prevention of Cruelty to Animals* Wm 4, No 3 cited in Glenda Emmerson, 'Duty and the Beast: Animal Welfare Issues' (Background Information Brief No 25, Parliamentary Library Parliament of Queensland, 1993) 18.

¹³⁴ Emmerson, above n 133, 18.

¹³⁵ *Ibid.*

¹³⁶ 14 Vict, No 40 (NSW). Section 1 made it an offence to:

cruelly beat ill treat over-drive abuse or torture or cause or procure to be cruelly beaten ill treated over-driven abused or tortured any animal every such offender shall for every such offence forfeit and pay a penalty not exceeding five pounds.

¹³⁷ Section 2 prohibited using places for fighting of animals; s 3 provided for compensation in the case of damage to animals, property or persons; and s 4 placed a positive obligation on persons conveying and carrying animals to ensure that animals were not subjected to 'unnecessary pain or suffering'.

¹³⁸ *Ibid* s 1.

¹³⁹ Emmerson, above n 133, 19.

¹⁴⁰ 1 Edw 7, No 26.

¹⁴¹ 27 Vict, No 225.

against omissions to care for an animal where it was the animal's interest that was to be protected. The maximum penalty for a cruelty offence was twenty pounds or imprisonment for up to two months, with or without hard labour.¹⁴²

6.6.2 Omissions offences in early Queensland law

6.6.2.1 Animals Protection Act 1901

The *Animals Protection Act 1901* (Qld)¹⁴³ ('QLD 1901 Act') s 2 repealed the *First Act of 1850*¹⁴⁴ as it applied in Queensland. The *QLD 1901 Act* s 3 defined 'cruelty' as:

[t]he intentional or deliberate infliction upon any animal of pain that is in its kind or degree or its object or its circumstances is unreasonable or wanton or malicious.¹⁴⁵

Section 4 included an extended but not limited definition of cruelty to include particular acts including: over-riding, over-driving, over-working and over-loading; riding, driving, employing or conveying of an animal 'unfit for any such use or treatment'; ill-treating, injuring, tormenting or torturing; and '[d]oing in circumstances that amount to cruelty ... beating, wounding, mutilating, killing or causing unnecessary pain'. Section 5(1) stated that '[n]o person shall do any act or observe any forbearance towards any animal which act or forbearance involves cruelty'. This section created a broad offence against positive acts of cruelty. It appears obscure in its reference to forbearance in that *that* part of the offence requires both forbearance and an intended positive act that inflicts pain, as is required under the definition of cruelty. It may have been a combined form of offence to cover both positive acts and omissions. Section 5(2) prohibited acts that involved cruel treatment or handling of animals. Section 5(3) prohibited cruel driving, conveying and carrying and killing of animals, and it clarified that it would have to include 'unnecessary pain'. Section 6 prohibited use of places for the purposes of fighting, baiting or 'otherwise maltreating' animals.

Section 7 was an omissions offence in that:

[n]o person who has the possession or the custody of any animal which is confined or otherwise unable to provide for itself shall omit to provide such animal during so long as it remains so confined in his possession or custody with proper and sufficient food, drink and shelter.

¹⁴² Ibid s 4.

¹⁴³ 1 Edw 7, No 26.

¹⁴⁴ 14 Vict, No 40 (NSW).

¹⁴⁵ *QLD 1901 Act* s 3.

Obvious exemptions to the cruelty offence appeared. These included: killing or attempting killing of dogs 'causing danger or injury', even if the dog had merely rushed at, or barked at a person, animal or vehicle;¹⁴⁶ extermination of 'rabbits, marsupials, wild dogs or vermin'; extermination under other Acts; hunting and trapping of animals that were not domesticated, and; vivisection with anaesthetic.¹⁴⁷

The maximum penalty for any first offence under the statute was ten pounds, or imprisonment with or without hard labour for up to one month.¹⁴⁸ For a second offence the penalty was extended to twenty pounds, or imprisonment with or without hard labour for up to two months.¹⁴⁹ For each subsequent offence, the maximum penalty was fifty pounds, or imprisonment with or without hard labour for up to six months.¹⁵⁰

6.6.2.2 Animals Protection Act 1925: the original version in 1925

The *Animals Protection Act 1925* (Qld)¹⁵¹ ('QLD 1925 Act') was a more comprehensive statute that included provisions relating to additional specific acts that constituted offences,¹⁵² and it included a much broader range of exemptions to the cruelty offence. The penalty range for any offence was from ten shillings to twenty-five pounds, or imprisonment for up to six months.¹⁵³ All offences were classed as summary offences.¹⁵⁴

The Governor in Council was granted power to make regulations and the court had no power to question those regulations 'on any ground whatsoever'.¹⁵⁵ Under s 19, the court could also deprive an owner of an animal if the court felt the animal would be exposed to further cruelty.¹⁵⁶ Officers were also granted entry and inspection powers.¹⁵⁷ Under s 8 an officer or the court could issue a notice to suspend the right of a person to work an animal for a period not exceeding twenty-one days. If the person contravened the notice, then they would be liable under the cruelty offence.¹⁵⁸ The word 'cruelty' was not defined, and was only used

¹⁴⁶ Ibid s 4

¹⁴⁷ Ibid s 12.

¹⁴⁸ Ibid s 14.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ 16 Geo 5, No 25.

¹⁵² See, eg, ibid s 5 regarding homing pigeons, s 4(1)(g) regarding carrying mixed species of live poultry, s 4(1)(d) carrying an animal in a crate that is smaller than the animal itself, s 4(1)(h) regarding use of poisons and drugs in specific circumstances, or the use of 'galvanic or electric battery' devices or other appliances on animals in training or racing.

¹⁵³ Ibid s 4(1).

¹⁵⁴ Ibid s 22.

¹⁵⁵ Ibid s 23.

¹⁵⁶ Ibid s 19.

¹⁵⁷ Ibid s 9.

¹⁵⁸ Ibid s 8(5).

descriptively in regard to the offences. For example, s 4(1) stated that '[a]ny person guilty of an offence against this section shall be guilty of cruelty ...' The term 'ill-treat' described what constituted that cruelty. Section 3 defined 'ill-treat' as:

ill-treat, wound, mutilate, overdrive, override, overwork, abuse, worry, torment, torture and cause any animal unnecessary pain or suffering; also overload or drive when overloaded, and overcrowd, and unreasonably beat or kick.¹⁵⁹

Section 4(1) made it an offence to 'ill-treat or cause or procure to be ill-treated or be a party to ill-treating any animal'. That section also carried forward the same types of offences that were included in the *QLD Act 1901* in relation to places used for fighting animals, carrying and conveying animals, use of unfit animals,¹⁶⁰ and vivisection without anaesthetic.¹⁶¹ That list was not exclusive of what could be otherwise be found to be cruel acts.¹⁶²

In regard to offences relating to omissions, under s 4(1)(b) it was an offence to:

[n]eglect to supply any domestic animal or impounded or captive animal with sufficient suitable food or water or protection against hot or inclement weather.

Additionally, under s 4(1)(f) it was an offence to neglect to 'reasonably exercise or release or cause to be exercised or released at least once a day any dog habitually tied up'. Under s 17(2), an owner or person in possession, custody or control of an animal would be deemed 'to have permitted cruelty if he [had] failed to exercise reasonable care and supervision' in protecting the animal from cruelty or if he [or she] had 'failed to take reasonable steps to prevent the unnecessary suffering of the animal'.

6.6.2.3 Animals Protection Act 1925: toward the final version of 2002

The *QLD 1925 Act* was repealed on 1 March 2002. There had been nine amending Acts applied up until that time. Under the *Animals Protection Act Amendment Act 1971* (Qld),¹⁶³ s 3 had been updated to include a definition of 'cruelty' as meaning 'unreasonable, unnecessary or unjustifiable ill-treatment'. Hansard shows that the definition of cruelty and various specific offences were introduced to follow the law as it had developed in New South Wales.¹⁶⁴ The definition of 'ill-treatment' remained unchanged.¹⁶⁵

¹⁵⁹ Ibid s 3.

¹⁶⁰ Ibid. See also section 6.6.2.1 above, regarding the then newly introduced offences.

¹⁶¹ Ibid s 7(2).

¹⁶² Ibid s 4(2).

¹⁶³ No 29 of 1971 [2].

¹⁶⁴ Queensland, *Parliamentary Debates*, Legislative Assembly, 2 April 1971, 3509 (AM Hodges, Minister for Works and Housing).

In the final version of the *QLD 1925 Act*, under s 4(1), there were various ‘offences of cruelty’. A number of the subclauses retained offences relating to omissions to care for animals. Those offences included:

(b) being the owner of any animal—fail to provide that animal with sufficient suitable food or drink or, except where that animal is running at large or on a journey, shelter; or ...

(ba) being the owner of any animal—fail to provide treatment for injury, disease or illness with which that animal may at any time be afflicted; or ...

(f) being the owner of any dog habitually tied up or kept in close confinement—fail during every period of 24 hours either for a continuous period of at least 2 hours or for 2 separate periods of at least 1 hour each to exercise or to cause to be exercised that dog.

Additionally, s 4(2) clarified that the acts described within the sections were only examples, and did not ‘restrict in any way the generality of the any prohibition herein’. A greater number of specific prohibitions were included such as docking the tail of a horse, cropping the ears of a dog, debarking a dog,¹⁶⁶ using live animals for coursing,¹⁶⁷ abandoning domestic or captive animals,¹⁶⁸ and tethering of animals in certain circumstances.¹⁶⁹ The number of additional exemptions to cruelty was also extended.¹⁷⁰

In this final version of the *QLD 1925 Act*, the maximum penalty for a breach of s 4 was twenty penalty units or six months imprisonment, and the offences were continued to be defined as summary offences.¹⁷¹ Under s 9, powers were awarded to officers to enter and inspect premises. Animals could also be seized and dealt with under s 11. Under s 19 the court could order that a person be deprived of custody of animals for a period.

6.6.3 Contemporary Australian omissions offences in animal protection statutes

6.6.3.1 ACPA s 17: the Queensland ‘duty of care’ offence

ACPA s 17 provides that:

(1) A person in charge of an animal owes a duty of care to it.

(2) The person must not breach the duty of care.

Penalty: Maximum penalty—300 penalty units or 1 year’s imprisonment.

¹⁶⁵ *Animals Protection Act 1925* (Qld) s 3.

¹⁶⁶ *Ibid* s 4(1)(j).

¹⁶⁷ *Ibid* s 4(1)(k).

¹⁶⁸ *Ibid* s 4(1)(l).

¹⁶⁹ *Ibid* s 4(1)(m).

¹⁷⁰ *Ibid* ss 4(1)(h)-4(1)(j).

¹⁷¹ *Ibid* s 22(3).

(3) For subsection (2) a person breaches the duty only if the person does not take reasonable steps to—

(a) provide the animal's needs for the following in a way that is appropriate—

- (i) food and water;
- (ii) accommodation or living conditions for the animal;
- (iii) to display normal patterns of behaviour;
- (iv) the treatment of disease or injury; or

(b) ensure any handling of the animal by the person, or caused by the person, is appropriate.

(4) In deciding what is appropriate, regard must be had to—

- (a) the species, environment and circumstances of the animal; and
- (b) the steps a reasonable person in the circumstances of the person would reasonably be expected to have taken.

The offence does not make any reference to *mens rea*. Neither does it insist that the breach of the minimum standards in s 17(3) be constituted only by omission. Further, s 17(3) and s 17(4)(b) qualify that the *actus reus* elements would not be made out if, evaluated objectively, it could be shown that the accused undertook reasonable steps in the circumstances. This provision is examined further in Chapters 9 and 10.

6.6.3.2 Australian jurisdictions' offences indicating 'duties' of care

Some Australian jurisdictions' animal protection statutes create an additional 'duty', over and above the cruelty offences, in various terminology, for animal carers to provide minimum standards of care for nonhuman animals. The standards employ various terminology to describe those minimum standards which are limited forms of what was identified as 'ideal' under the five freedoms. As described in the following subsection, the stipulations of standards of care are not unique to the duty of care provisions. An extract of the provisions as they were at 1 July 2018, is included in Appendix 3, Table 6. The word 'duty' is used in each of the relevant provisions in Tasmania, ACT, Northern Territory and Queensland. In Northern Territory and Queensland, the 'duty' is stated as being 'owed' to the animal.¹⁷² In the ACT, '[a] person in charge of an animal has a duty to care for the animal'.¹⁷³ In Tasmania, '[a] person who has the care or charge of an animal has a duty to take all reasonable measures to ensure the welfare of the animal'.¹⁷⁴

¹⁷² ACPAs 17, *Animal Welfare Act* (NT) s 8.

¹⁷³ *Animal Welfare Act 1992* (ACT) s 6B(1).

¹⁷⁴ *Animal Welfare Act 1993* (Tas) s 6.

6.6.3.3 Australian jurisdictions' omissions offences *not* expressed as 'duties'

The provisions of the Australian animal protection statutes that prohibit omissions as part of the cruelty or related offences include: *Prevention of Cruelty to Animals Act 1979* (NSW) ss 5, 8, 9; *Animal Welfare Act 1985* (SA) ss 13(3)-13(3); *Prevention of Cruelty to Animals Act 1986* (Vic) s 9(1); and *Animal Welfare Act 2002* (WA) s 19(3). A further extraction of the omissions offences not expressed as duties are listed in Appendix 3, Table 6. In the jurisdictions that I mention in this paragraph, there is not a separate 'duty of care' or similarly worded provision in those respective statutes. These provisions are of interest however because some include the same or similarly worded minimum standards as the duty of care provisions in the other Australian jurisdictions. In this sense, it serves to demonstrate that the duty of care offences in this respect are not entirely new or unique in terms of what they prohibit. For example, the New South Wales cruelty offence that can be made out by omission requires that the animal receive appropriate treatment,¹⁷⁵ and s 8 requires that animals are provided with food, drink and shelter.¹⁷⁶ Section 9 additionally requires that some confined animals be provided with adequate exercise.¹⁷⁷ The South Australian statute also requires that an animal is provided with appropriate food, water, living conditions, exercise, and that 'reasonable steps [are taken] to mitigate harm to the animal'.¹⁷⁸ Similar prohibitions against omissions are provided under the Victorian cruelty provision.¹⁷⁹

Each of the duty of care, cruelty and similar provisions across the jurisdictions are also only made out where the defendant does not have an excuse of not causing 'unreasonable', 'unnecessary', 'unjustifiable' or other similarly expressed degrees of pain, suffering or similar. Each of the offences are also potentially negated if the defendant can show that they complied with a relevant code of practice.¹⁸⁰ Extracts of those excusing provisions are provided in Appendix 3, Table 5.

A point of interest is that the cruelty offence in Northern Territory is not a strict liability offence. It requires that the person intended to cause harm to the animal.¹⁸¹ In the ACT statute, whilst many of the other provisions specifically include the statement that that offence is strict liability, no such statement is included for either the duty of care or the

¹⁷⁵ *Prevention of Cruelty to Animals Act 1979* (NSW) s 5(3).

¹⁷⁶ *Ibid* s 8(1).

¹⁷⁷ *Ibid* s 9(1).

¹⁷⁸ *Animal Welfare Act 1985* (SA) s 13(3).

¹⁷⁹ *Prevention of Cruelty to Animals Act 1986* (Vic) s 9.

¹⁸⁰ See, eg, *Animal Welfare Act 1992* (ACT) s 20; *Prevention of Cruelty to Animals Act 1979* (NSW) ss 24, 34A; *Animal Welfare Act* (NT) s 79; *ACPA* s 16; *Animal Welfare Act 1985* (SA) s 42A; *Animal Welfare Act 1993* (Tas) s 50; *Prevention of Cruelty to Animals Act 1986* (Vic) s 11(2); *Animal Welfare Act 2002* (WA) ss 22-23.

¹⁸¹ *Animal Welfare Act* (NT) s 9(2)(b).

cruelty offence.¹⁸² There are also obvious due diligence excuses or defences available in regard to some of the omissions offences across the various jurisdictions.¹⁸³ Other than in Western Australia, the animal protection statutes in the Australian jurisdictions also provide powers for inspectors to issue directions to the animal carers or owners.¹⁸⁴

6.7 Contemporary omissions-specific offences in other jurisdictions

6.7.1 England and Wales

As described in section 6.5.3 above, and as extracted in Appendix 3, Table 10, under the AWA that applies to England and Wales, s 9 has the heading '[d]uty of person responsible for animal to ensure welfare'. While s 9 describes the minimum positive duties to care for 'protected animals', it does not use the word 'duty' other than in that heading.

6.7.2 European Union

In the European Union, Council Directive 98/58/EC concerns the 'protection of animals kept for farming purposes'.¹⁸⁵ Article 3 does not make reference to any 'duty'. It requires Member States to:

make provision to ensure that the owners or keepers take all reasonable steps to ensure the welfare of animals under their care and to ensure that those animals are not caused any unnecessary pain, suffering or injury.¹⁸⁶

Article 4 requires Member States to:

ensure that the conditions under which animals (other than fish, reptiles or amphibians) are bred or kept, having regard to their species and to their degree of development, adaptation and domestication, and to their physiological and ethological needs in accordance with established experience and scientific knowledge, comply with the provisions set out in the Annex.

¹⁸² *Animal Welfare Act 1992* (ACT) ss 6B, 7.

¹⁸³ See, eg, *Animal Welfare Act 1992* (ACT) s 6B(2)(a); *Prevention of Cruelty to Animals Act 1979* (NSW) s 5(3)(a); *Animal Welfare Act* (NT) ss 8; 9(3)(b); *ACPA* s 17; *Animal Welfare Act 1985* (SA) ss 13(3)(c); 13(5); *Animal Welfare Act 1993* (Tas) s 6; *Prevention of Cruelty to Animals Act 1986* (Vic) ss 9(1)(i), 11(1).

¹⁸⁴ *Animal Welfare Act 1992* (ACT) ss 24C, 85(5); *Prevention of Cruelty to Animals Act 1979* (NSW) s 24N; *Animal Welfare Act* (NT) s 67; *Animal Care and Protection Act 2001* (Qld) s 159; *Animal Welfare Act 1985* (SA) s 31B; *Animal Welfare Act 1993* (Tas) s 14; *Prevention of Cruelty to Animals Act 1986* (Vic) s 12 (but only by court order); *Animal Welfare Act 2002* (WA) s 40. See also Appendix 3, Table 8 for extracts of those provisions.

¹⁸⁵ *Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes* [1998] OJ L 221/23.

¹⁸⁶ *Ibid* art 3.

The Annex includes minimum standards of care relative to: provision of appropriate care to treat illness and injury; feed, water and other substances; ventilation; lighting; shelter; and a degree of freedom of movement, however that is limited. It states that:

[w]here an animal is continuously or regularly tethered or confined, it must be given the space appropriate to its physiological and ethological needs in accordance with established experience and scientific knowledge.¹⁸⁷

The *European Convention for the Protection of Pet Animals 1992*,¹⁸⁸ art 4(2) requires that pet animals are provided with ‘accommodation, care and attention which take account of the ethological needs of the animal in accordance with its species and breed’ and in particular: ‘suitable and sufficient food and water’ and ‘adequate opportunities for exercise’. It does not mention any duties.

6.7.3 New Zealand

In New Zealand, the *Animal Welfare Act 1999* s 10 has the heading ‘Obligation in relation to physical, health, and behavioural needs of animals’. Section 10 states

[t]he owner of an animal, and every person in charge of an animal, must ensure that the physical, health, and behavioural needs of the animal are met in a manner that is in accordance with both—(a) good practice; and (b) scientific knowledge.

Section 12 makes it an offence to fail to comply with s 10. The word ‘duty’ is not used in relation to that, or any other offences.

6.8 Chapter summary

It appears that from as early as Pythagoras’ time, some attitudes toward protections for nonhuman animals have been tainted by the interests of humans. Early interpretations of cruelty laws implied character-based responsibility, in that they focussed on the degree of cruelty to indicate fault in the perpetrator’s nature. The rise of motive in determining *mens rea* also confirmed a focus on utility and wastage rather than concern for the nonhuman animals as victims of harms. Early commentary confirmed problems in determining *mens rea* in interpretation of the early animal protection statutes in England. There began a change in focus toward outcome-based responsibility where ‘unnecessary suffering’ confirmed and reinstituted the utilitarian focus of the laws. That focus simultaneously provided some levels

¹⁸⁷ Ibid Annex [7].

¹⁸⁸ Opened for signature on 13 November 1987, CETS 125 (entered into force 1 May 1992).

of protections for nonhuman animals *and* confirmed the right to use and perpetrate some 'reasonable' harms on them.

It was not until 1911 that a limited omissions offence was enacted in England.¹⁸⁹ It imposed a form of a duty of due diligence on owners of nonhuman animals in that they could be found guilty of cruelty if they did not 'exercise reasonable care and supervision' in regard to the acts of *other* persons. The contemporary AWA of England and Wales that applies to non-farmed, 'protected animals', implements an omissions offence in addition to the cruelty offence which is described in its heading as a 'duty'.¹⁹⁰ It makes reference to minimum standards that have a relationship to the five freedoms.¹⁹¹ AWA s 9 qualifies breaches with reference to what is 'reasonable', with consideration of 'all the circumstances', with the limitations of what is considered 'good practice', and with the availability of defences through recourse to codes of practice.¹⁹²

As discussed in section 6.6 above, the earliest animal protection statutes in Australia, included some limited prohibitions for omissions within the cruelty offences. Under the first Queensland-specific statute, the *Qld 1901 Act*, the cruelty offence demanded that intention was the necessary form of *mens rea*. It also included a limited omissions offence that required that confined animals be provided with sufficient food, drink and shelter.¹⁹³

Analysis of the contemporary Australian animal protection statutes, even in jurisdictions that do *not* include a separate omissions offence that is described as a 'duty', shows that the cruelty and other offences *do* make reference to minimum standards of care that address some, if not most of the categories of the five freedoms.¹⁹⁴ All jurisdictions other than Western Australia also include powers for inspectors to issue directions notices to persons to improve particular conditions for particular nonhuman animals.¹⁹⁵ The omissions prohibitions under the cruelty and duty of care offences do also commonly include differently expressed due diligence excuses or defences.¹⁹⁶

The above analysis establishes that the offences identified as 'duty of care' offences in ACT, Northern Territory, Queensland and Tasmania are *not* unique in prohibiting omissions for failing to provide minimum standards of care. The provisions act as a supplement to the cruelty offences to affirm that offending can be made out by way of omission, and they

¹⁸⁹ *Protection of Animals Act 1911* 1 & 2 Geo 5, c 2 s 1(2). See section 6.3.4 above.

¹⁹⁰ AWA s 9.

¹⁹¹ See section 6.5.3 above.

¹⁹² See section 6.5.3 above.

¹⁹³ *Qld 1901 Act* s 7.

¹⁹⁴ See section 6.6.3.3 above.

¹⁹⁵ See above n 184 and accompanying text. In Victoria a court order is required.

¹⁹⁶ See above n 183 and accompanying text.

extend the minimum standards that had, in some jurisdictions, already been stipulated under the cruelty offences. Further, the duty of care offences implement the same qualifications as the cruelty offences in that only some harms to some nonhuman animals can be recognised as breaches. This analysis overall, opens the question to what degree the duty of care offences are substantially different to the cruelty offences.

The following chapter, Chapter 7, examines nonhuman animal ownership as it is limited in law, partially by the duties imposed under animal protection statutes. The chapter also clarifies that duties that arise under those statutes are owed to the state and not to nonhuman animals who are neither duties recipients in law, nor bearers of legal rights.

CHAPTER 7: CLARIFYING NONHUMAN ANIMAL OWNERSHIP IN LAW, AND DUTIES OWED TO THE STATE

7.1 Introduction

As declared within some historical legal discourse, persons in charge of animals have a qualified *moral* duty to care for them. For example, in *Ford v Wiley*,¹ Hawkins J explained that: '[i]t would be unreasonable to claim for domestic animals designed for man's use[,] absolute immunity from all suffering at the hand of man,'² and that at least for some animals, 'it is man's duty to protect [them] from abuse.'³ Similarly, Coleridge CJ declared that if the suffering inflicted is deemed 'unnecessary', then it is 'unnecessary abuse of the animal and we have neither the moral nor the legal right to inflict it.'⁴ In Australian law, it was declared by Napier J in *Backhouse v Judd*⁵ that the moral duty falls to those that 'have in some way accepted the responsibility for the care and keeping of the animal'.⁶

This chapter contributes toward a legal characterisation of omissions offences under the animal protection statutes, and particularly the 'duty of care' offences that are expressed that a duty is 'owed' to a nonhuman animal. I briefly examine social contract doctrine and presumptions regarding ownership of nonhuman animals in law. Then I provide an analysis of rights and duties that arise within that frame. I find that the duties of care are properly characterised as *public* legal duties that are owed to the state, rather than there being any legal duty being owed to any nonhuman animal. This chapter employs the analytical frames offered by Hohfeld and Feinberg. In applying the analysis to Australian law, I focus on the apposite case of *Backhouse v Judd*,⁷ where Napier J articulated the links between the social contract, rights and duties. While protective duties in criminal law can be owed to the State rather than another legal person, it has so far been demonstrated that arguments for legal rights for nonhuman animals are annihilated through the imposition in law of the social contract and its demand for reciprocity of rights and duties.⁸ However this should not take away from the fact that it is possible in criminal law, in structural terms, to implement greater protections for nonhuman animals.

¹ *Ford v Wiley* (1889) 23 QBD 203, 225.

² *Ibid* 219.

³ *Ibid* 225.

⁴ *Ibid* 215.

⁵ *Backhouse v Judd* (1925) 399 SASR 16, 21.

⁶ *Ibid* 21.

⁷ (1925) 399 SASR 16.

⁸ See also Chapter 3, section 3.3.2. It summarises the lack of success of the Nonhuman Rights Project in the United States courts.

7.2 Social contract giving rise to rights and duties

In this section, I briefly outline some of the background in the development of the notion of the social contract, with a focus on Kant's conception, and his related, relevant propositions.

7.2.1 Development of the 'social contract'

Bertrand Russell suggested that that the philosophy of Epicurus (341-270 BCE) was an influence in the development of the theory of the social contract.⁹ Konstan explains that Epicurus, in contrast to Plato, approached the question of society from the perspective of psychology rather than ethics.¹⁰ For Epicurus, the links between society, justice and law arose because society and justice require a compact not to harm others,¹¹ and without which, pleasure would not be attainable.¹² Law provides the motivation to live justly, by not harming others. Law delivers a fear of punishment, and a fear of mere detection, which through its psychological effects, curbs behaviour toward what is deemed just.¹³

Hobbes, Locke, Rousseau, Kant and Rawls are also recognised as major contributors to social contract thinking.¹⁴ For Hobbes, Locke and Rousseau, the sovereignty of the state, and the 'justice' of 'obligation' is justified through the consent of its subjects.¹⁵ For Kant and Rawls, consent was not a necessary element of societal obligations or duties.¹⁶ They contended that only rational, and therefore only human animal agents, can be subjects of the social contract and hence be recipients of moral or legal duties.¹⁷ It appears that the exclusion of nonhuman animals from the social contract developed from the Stoic proposition that 'only linguistic beings merit membership in the moral and political community' and without reason, animals lack 'inherent moral worth'.¹⁸ As a result of that inheritance, it has been accepted by Locke, Kant and others, that it is justifiable that

⁹ Bertrand Russell, *The History of Western Philosophy: And its Connection with Political and Social Circumstances from the Earliest Times to the Present Day* (Simon and Schuster, 1945) 244. See also Fred D'Agostino, Gerald Gaus and John Thrasher, *Contemporary Approaches to the Social Contract* Stanford Encyclopedia of Philosophy (Summer 2017)

<<https://plato.stanford.edu/entries/contractarianism-contemporary/>>.

¹⁰ David Konstan, *Epicurus* (Fall 2016) Stanford Encyclopedia of Philosophy

<<https://plato.stanford.edu/entries/epicurus/#Bib>> [5].

¹¹ Ibid.

¹² Ibid.

¹³ Martha Craven Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2006) 329.

¹⁴ See, eg, D'Agostino, Gaus and Thrasher, above n 9.

¹⁵ Ibid [6].

¹⁶ Ibid.

¹⁷ See, eg, Gary Steiner, *Animals and the Moral Community* (Columbia University Press, 2012) 117.

¹⁸ Ibid 91.

nonhuman animals are classified, in law, as mere property.¹⁹ Nussbaum confirms that the Stoic and Judeo-Christian inheritance ensured that nonhuman animals have been excluded from our conceptions of 'ethical community'.²⁰

7.2.2 Legal rights and duties regarding nonhuman animals in Derrida's texts

In *The Animal That Therefore I Am*,²¹ Derrida's discussion of the impotence of legal rights and duties in favour of nonhuman animals is largely framed within Kant's ideology. Essentially, Derrida interprets Kant's view as follows: as only the human has the faculty of the autonomous 'I', the ability to point to him or herself and declare themselves, and therefore to realise their own dignity, only the human can have responsibility, can answer for him or herself, and can therefore be a subject of the law.²² In *The Beast & The Sovereign Vol I*,²³ Derrida recounted Lacan's similar assertion. On the basis of Lacan's notion of human ipseity, law and crime were uniquely properties of the human animal, and in contrast, nonhuman animals are not free, responsible or culpable.²⁴ Derrida was empathic to, but critical of, arguments for nonhuman animal rights.²⁵ However, he suggested that they are doomed to fail because: they do not address the underlying Cartesian and Kantian prejudices that insist on the constructions and uniqueness of human ipseity;²⁶ they continue to espouse a sovereignty over animals;²⁷ they uphold the human right to put nonhuman animals to death,²⁸ and because; they only declare some forms of violence as cruelty.²⁹ Derrida argued that the fact that animal rights are conceptually based on human rights, is evidence of the insidious blindness of the rights arguments to deep associations of the

¹⁹ Ibid.

²⁰ Nussbaum, above n 13, 329.

²¹ Jacques Derrida in Marie-Louise Mallet (ed), *The Animal That Therefore I Am* (David Wills trans, Fordham University Press, 2008) [trans of: *L'animal que donc je suis* (first published 2006)] ('*The Animal That Therefore I Am*').

²² Derrida, *The Animal That Therefore I Am*, above n 21, 93.

²³ Jacques Derrida in Michel Lisse, Marie-Louise Mallet and Ginette Michaud (eds), *The Beast & the Sovereign Volume I* (Geoffrey Bennington trans, University of Chicago Press, 2009) 244 [trans of: *Seminaire: La bete et le souverain Volume I (2001-2002)* (first published 2008)] ('*The Beast & the Sovereign Vol I*').

²⁴ Derrida, *The Beast & The Sovereign Vol I*, above n 23, 102-03 citing Jacques Lacan, 'Introduction théorique aux fonctions de la psychanalyse en criminologie' in Jacques Lacan, *Ecrits* (Alan Sheridan trans, Norton, 1977) 125-30.

²⁵ Derrida, *The Animal That Therefore I Am*, above n 21, 87-89; Derrida, *The Beast & The Sovereign Vol I*, above n 23, 110-11.

²⁶ Derrida, *The Animal That Therefore I Am*, above n 21, 89;

²⁷ Ibid.

²⁸ Derrida, *The Beast & The Sovereign Vol I*, above n 23, 111.

²⁹ Ibid 110.

assumed ascendancy of man over nonhuman animals.³⁰ In particular, Derrida claimed that humans maintain sovereignty, that is, 'hegemonic domination' over nonhuman animals, through knowledge in terms of technology, ethics, politics and law.³¹

As I recounted in Chapter 3, section 3.3, it appears that Derrida's assertions about the insidious Western culture of sacrifice, rings true when considering contemporary United States' litigation for nonhuman animal freedoms. Derrida had already forecast the fortification that Kantianism represents in quarantining human animal rights, from what may be described as zoonotic threats. Unfortunately, Derrida did not take it up further, that he:

cannot tackle here the immense question of whether we can recognize the rights of subjects that are exempted from or incapable of duties. It is generally thought not, except in some exceptional cases. Such a possibility is not excluded in the history of the law, but it is a thorny problem ...³²

7.2.3 Kant's exclusionary social contract

For Kant, only rational beings, that is human animals, have capacity to reason from universal moral laws in order to direct the will.³³ Universal moral laws act as categorical imperatives, which are ends in themselves.³⁴ From those imperatives, moral duties arise.³⁵ Kant believed that nonhuman animals are without reason, and hence have no inherent worth.³⁶ They could only be '*things*', and as such, can be used as means to human ends.³⁷ He declared: '*[r]ational nature exists as an end in itself*'.³⁸ By determining rational beings as ends in themselves, he argued that human animals only have moral duties toward each other.³⁹ Those duties arise and can be exercised through the will, as they emanate from the categorical imperatives: the universal *moral* laws.⁴⁰ For other laws, that do not emanate from moral laws, they may require the 'stimulus or coercion', of punishment for example, in order for the will to be directed in accordance with an interest (to avoid punishment).⁴¹ Such laws

³⁰ Derrida, *The Animal That Therefore I Am*, above n 21, 88-89; Derrida, *The Beast & The Sovereign Vol I*, above n 23, 111.

³¹ Derrida, *The Animal That Therefore I Am*, above n 21, 89.

³² Ibid 88.

³³ Immanuel Kant, 'Groundwork for the Metaphysics of Morals' in Allen W Wood (ed), *Groundwork for the Metaphysics of Morals: Immanuel Kant* (Yale University Press, 2002) 1-79, 46 ('*Kant Groundwork*') [trans of: *Grundlegung zur Metaphysik der Sitten* (first published 1785)].

³⁴ Ibid 37-38, 45-46.

³⁵ Ibid 42.

³⁶ Ibid 46.

³⁷ Ibid.

³⁸ Ibid (italics in original).

³⁹ Ibid 47-49.

⁴⁰ Ibid 49-50.

⁴¹ Ibid 50-51.

may be a matter of practicality, and merely a 'duty',⁴² not associated with any moral duty. Such duties should apply to all equally, and are necessitated because of the relationship between rational beings.⁴³ Kant then resorted to metaphysics as the final 'reason' for duties, in that it is commanded by the '*dignity* of a rational being that obeys no law except that which at the same time it gives itself'.⁴⁴ Kant posited that human animals possess 'morality', 'humanity', and 'autonomy', and as such, they are awarded 'dignity', which ensures their unique worth.⁴⁵ Whereas other things, including nonhuman animals, are substitutable and always have a market price.⁴⁶ For Kant, any duty that we might feel we owe to nonhuman animals, could only be an indirect duty, for the reason that cruelty to a nonhuman animal would dull one's empathy with another human animal's suffering.⁴⁷

In *The Science of Right*,⁴⁸ Kant articulated what he proposed was the relationship between legal rights and duties. He suggested that there is a moral aspect to the relation between rights and duties under a 'universal law of freedom', where 'the voluntary actions of any one person can be harmonized in reality with the voluntary actions of every other person'.⁴⁹ In regard to legal rights, he suggested that they may not have any ethical component, but can still exist in accordance with freedom for all, where the legal right carries with it, a 'right and title to compel' which directs the will of others.⁵⁰ The 'universal law' or right, directs that we should only exercise our free will in such a way that it can 'co-exist with the free will of all others'.⁵¹ If that is the case, then, of course, our free will is limited by the rights of others.⁵² The universal law then, imposes obligations.⁵³ Kant further illuminated part of the social contract as it pertains to laws of property. He explained that a person could not be obliged to respect another's property unless all others guarantee that they will respect the property of *that* person.⁵⁴ This formal, legal arrangement of reciprocity he argues, can only exist 'in the

⁴² Ibid 52. See also Chapter 8, n 129 and accompanying text in relation to Clare DCJ's comments in relation to *ACPA s 17* in the case of *Jolley v Queensland Police* [2018] QDC 012 [29].

⁴³ Ibid.

⁴⁴ Ibid (*italics in original*).

⁴⁵ Ibid 52-54.

⁴⁶ Ibid 52-53.

⁴⁷ Immanuel Kant, 'The Doctrine of Virtue' in Mary Gregor (ed), *The Metaphysics of Morals* (Cambridge University Press, 1996) 192-93 cited in Steiner, above n 17, 93.

⁴⁸ Immanuel Kant, *The Science of Right* (W Hastie trans, Infomotions, 2000) ('*Kant Science of Right*') [(first published 1790)].

⁴⁹ Ibid 1-2.

⁵⁰ Ibid 3.

⁵¹ Ibid 2.

⁵² See, eg, *ibid* 3-4.

⁵³ Ibid.

⁵⁴ Ibid 16-17.

civil state of society'.⁵⁵ It is the civil state that also provides the power to compel conformance with law.⁵⁶

7.3 Doubting absolute ownership

This section illustrates connections between Western concepts of legal rights in property ownership as was developed in Roman times, and the possibility of rights of protection being awarded to human slaves on the basis of them being awarded the characteristic of 'dignity' that is metaphysically, and only, endowed on human animals. In the qualifying language used, there is a connection between what was the 'reasonableness' of harms to human slaves from Roman times and similar tests that are applied in Western law today, in justifying harms to nonhuman animals. This section also very briefly explores connections between the sovereignty of the state and citizens' limited rights of ownership.

7.3.1 Enduring legacies of Roman law

Roman law classified nonhuman animals as things, capable of being owned by a human person.⁵⁷ In Monro's translation, in the Justinian Institutes, Gaius declared:

a thing which is of human law is for the most part the property of some one or other; still it is possible that it should be no man's property ... [s]uch things as are subject of human law are either public or private. Things that are public are held to be no man's property, they are in fact regarded as belonging to the whole community; things are private that are the property of individuals.⁵⁸

Things that are public included for example, rivers, whereas private things were of economic value, classified as *res*.⁵⁹ With *res*, comes rights.⁶⁰ However, the Romans also considered that there were limited forms of ownership.⁶¹ According to Buckland, '[a]ll civilisations have found it necessary to lay down restrictions on what a man may do with his own'.⁶² As two

⁵⁵ Ibid 17.

⁵⁶ Ibid.

⁵⁷ Ibid 70-71. See also W W Buckland, *A Text-Book of Roman Law From Augustus to Justinian* (Cambridge University Press, 1921) 57-58.

⁵⁸ Gaius in 'First Book: VIII. On the Division of Things and Their Respective Natures' in *The Digest of Justinian: Volume 1* (Charles Henry Monro trans, Cambridge University Press, 1904) 39 [1] 'Institutes 2'.

⁵⁹ Buckland, above n 57, 183-84.

⁶⁰ Ibid 184.

⁶¹ Ibid 188.

⁶² Ibid.

examples, Buckland explained that the Roman State imposed restrictions on: ownership of real property,⁶³ and wild animals.⁶⁴

7.3.1.1 Limited ownership and slavery laws as precedents for cruelty laws

As human animal slaves were awarded 'the dignity of humanity' and 'mental and moral qualities', they were regarded as a special type of property with some rights, at some times, which included protections from some forms of harm.⁶⁵ Buckland explains that Roman law did not remain unchangeable in different times and in different places. In the Roman Republic, a slave was not protected from the acts of the master, but in the Roman Empire, limitations were imposed on masters' ownership rights.⁶⁶ For example, a master could force a slave to fight a nonhuman animal, or a master could kill their slaves if permission had been granted by a magistrate.⁶⁷ Buckland, writing in England in 1921, noted that these Roman 'provisions [were] analogous to modern laws against cruelty to animals'.⁶⁸ Of even greater relevance, in what seems analogous to our contemporary statutes that permit seizure of nonhuman animals by the State when cruelty is found, is that under Pius, slaves could escape to certain State nominated locations and the master could be investigated in regard to a claim by the slave of ill-treatment.⁶⁹ As a result, the master could lose his ownership rights.⁷⁰ Unfortunately for the slave however, he or she remained a slave and could be sold on.⁷¹ Astonishingly, later, a master could lawfully kill a slave through 'excessive punishment' providing that punishment was 'reasonable' and that punishment was not inflicted 'wilfully'.⁷² Under Justinian, a master could 'castigate' a slave, providing it was 'reasonable'.⁷³

7.3.2 Rights and Duties

Concepts of rights and correlative duties existed in Roman law.⁷⁴ Justinian was translated as describing an obligation as: 'a bond of law, by which we are tied down to the necessity of

⁶³ Ibid 189-192.

⁶⁴ Ibid 207-08.

⁶⁵ Ibid 63.

⁶⁶ Ibid 64-65. See also 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) 51-77, 71: Posner notes that in the United States, 'Negro slaves' had the 'right not to be gratuitously tortured, wounded or killed ... in the antebellum South'.

⁶⁷ Buckland, above n 57, 64-65

⁶⁸ Ibid 65.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid 403-09. Buckland mainly discusses rights and obligations as they arise under contract.

making some performance, according to the laws of our state.’⁷⁵ In Gaius’s classification of obligations, he included those that arose from a ‘delict’, that is a wrong doing.⁷⁶ The discussions of these obligations in Buckland’s analysis, seem to be mainly focussed on contractual or contractually-related relationships.⁷⁷ Although, as described in the previous paragraphs, it appears that at some point there was a form of duty imposed on a master not to harm their slaves beyond particular thresholds. From the time of Pius (138-161 AD) at least, whilst the actions of a slave, for example in escaping to a safe location, may have given rise to an action of the State, only the State could exercise a power to investigate a breach of that duty. Similar to the legal status awarded to nonhuman animals, the status of what was legally sanctioned human slavery, was a deprivation of rights, and ‘to a great extent’, a ‘dutile[ness]’, separate from any subjugation to ownership.⁷⁸ That changed in the time of Florentinus (395 – 397 AD) and later, where, as described above, a slave had a right to seek the protection of the State.⁷⁹ In contrast, it could be interpreted that citizens who were not slaves were granted a limited form of legal ‘liberty’ restricted by the law and force of the State.⁸⁰

It is clear that the Roman inheritance includes both the idea of state-imposed duties and obligations, and what seems to be relationships between rights and duties in the context of what would be deemed privately owned property. The privilege of ownership could be dissolved by the State, if a duty was breached. At the same time, whilst some slaves could appeal for protection, that slave did not have power to actually enliven legal action. These relationships of rights and duties and powers are explored in the context of Hohfeld’s and Feinberg’s schemas in section 7.4 below.

7.3.3 Modern concepts of property in animal ownership

Modern common law in Australia and Britain maintains that animals are the property of their owners.⁸¹ Blackstone claimed that the ownership right was absolute.⁸² However, it must be

⁷⁵ Peter Birks and Eric Descheemaeker, *The Roman Law of Obligations* (Oxford University Press, 2014) 2 citing Justinian Institutes, ‘J.3.13 pr.’

⁷⁶ Birks and Descheemaeker, above n 75, 17.

⁷⁷ Ibid 248-63.

⁷⁸ Buckland, above n 57, 62.

⁷⁹ Ibid 63.

⁸⁰ Ibid 62.

⁸¹ See, eg, LexisNexis, *Halsbury’s Laws of England* [703] cited in Deborah Cao, *Animal Law in Australia* (Lawbook Co, 2nd ed, 2015) 76; *Putt v Roster* (1682) 86 ER 1098 cited in Cao, above n 81, 79; *Saltoon v Lake* [1978] 1 NSWLR 52. See also Lexis Advance, *Halsbury’s Laws of England*, (at 9 September 2018) Animals, ‘2. Animals as the Subject of Property’ [6. Absolute property in domestic animals]; *Yanner v Eaton* [1999] HCA 53 [23]-[31] regarding wild animals. In *CJ Burland Pty Ltd v Metropolitan Meat Industry Board* [1968] HCA 77, the High Court considered implications under the *Meat Industry Act 1915-1965* (NSW), in that different body parts of individual animals could belong to

the case that the fetters put on ownership through legislation, including the animal protection provisions, demonstrates that ownership is constituted by less than absolute property rights.⁸³ Not only are owners and ‘persons in charge of’ animals limited in what they can do to, or with their animals under the cruelty and ‘duty of care’ provisions,⁸⁴ they are also, in Australia, subject to the possibility of confiscation by a prosecuting authority where a direction order is breached.⁸⁵ Ownership is subject to the sovereignty of the state. There are also growing global trends where animal ownership is becoming increasingly subject to the surveillance and regulatory powers of states. For example, local municipal laws track and provide licenses for particular animals and place limits on numbers that can be owned by a person.⁸⁶ In addition, international bodies such as the World Organisation for Animal Health ‘OIE’ work with governments to put in place policies and procedures to manage what they may deem are biohazards and zoonotic threats.⁸⁷

7.4 Hohfeld’s taxonomy

This section explores Hohfeld’s propositions about the structure of legal rights and duties, that includes what he described as jural opposites and jural correlatives. An understanding of this structure and these elements assists analysis of the duty of care offences, particularly those that are expressed as being ‘owed’ to nonhuman animals. In the following section, I explore Feinberg’s extension of Hohfeld’s taxonomy that also adds to the analysis of those laws.

different human animal owners; *Domestic Animals Act 1994* (Vic) s 3(1) defines an ‘owner’ of a dog or cat.

⁸² William Blackstone, *Commentaries on the Laws of England* (1765-1769, 1979 edition) bk II, ch 25, 390 cited in Mike Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (Oxford University Press, 2001) 100 (‘*Regulation*’). See also John H Ingham, *A Treatise on Property in Animals Wild and Domestic and the Rights and Responsibilities Arising Therefrom* (T & JW Johnson, 1900) 1, 42.

⁸³ See, eg, Radford, above n 82, 102-04.

⁸⁴ See, eg, Appendix 3, Table 6 and Table 7.

⁸⁵ See, eg, Appendix 3, Table 8.

⁸⁶ See, eg, *Domestic Animals Act 1994* (Vic) pts 2-3.

⁸⁷ World Organisation for Animal Health, *Our Missions: Transparency* <<http://www.oie.int/about-us/our-missions/>>:

Each Member Country undertakes to report the animal diseases that it detects on its territory. The OIE then disseminates the information to other countries, which can take the necessary preventive action. This information also includes diseases transmissible to humans and intentional introduction of pathogens.

7.4.1 The lowest common denominators of law

Hohfeld's aim was to unravel confusions and conflation in regard to: facts as they are used in law, and different types of legal relations.⁸⁸ A key contention was that not 'all legal relations may be reduced to "rights" and "duties"'.⁸⁹ While Hohfeld's discussion of his scheme mainly focusses on those that arise under private law, the examples that he uses of judges' commentary does include those concerning criminal law.⁹⁰ In any case, privileges or freedoms to act, and negations of freedoms - that is duties, and rights, only become rights, through the force and power of the law. Hohfeld also discusses the powers of public officers.⁹¹ He does not distinguish between private and public law and states: '... these eight conceptions ... seem to be what may be called "the lowest common denominators of the law"'.⁹² The schema is as follows:

Table 1: Hohfeld's taxonomy

Jural Opposites	rights	privilege	power	immunity
	no-rights	duty	disability	liability
Jural Correlatives	right	privilege	power	immunity
	duty	no-right	liability	disability

7.4.2 Facts, rights and duties

The table above was offered by Hohfeld.⁹³ As a first step, Hohfeld distinguishes between operative facts and evidential facts.⁹⁴ Operative facts are causative of legal relations,⁹⁵ and evidential facts are subsidiary in 'inferring some other fact'.⁹⁶ Operative facts may enliven a legal privilege or a legal duty.⁹⁷

⁸⁸ Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913-1914) 23 *Yale Law Journal* 16.

⁸⁹ Ibid 28.

⁹⁰ See eg, ibid 41.

⁹¹ Ibid 47.

⁹² Ibid 58. See also at 19 (italics not in original): 'the same points and the same examples seem valid in relation to *all* possible kinds of jural interests, legal as well as equitable, - and that too, whether we are concerned with "property," "contracts," "torts," or any other title of the law'.

⁹³ Ibid 30.

⁹⁴ Ibid 25-28.

⁹⁵ Ibid 26.

⁹⁶ Ibid 27.

⁹⁷ Ibid 26.

For Hohfeld, whilst a 'right' is often thought as something that gives rise to a correlative duty in another,⁹⁸ it is more accurately, something that gives rise to a legal claim⁹⁹ that would enable, or grant the power to change legal relation(s).¹⁰⁰ It is important to note that the duty implied by a right need not be specifically enunciated in the law, because what gives rise to an ability to invoke the law, to gain a remedy, is a violation of the corresponding duty (not to violate).¹⁰¹ Due to what he argued were necessary distinctions, Hohfeld objects to using the word 'right' in place of what he calls a 'privilege'. That is because a right, in more precise terminology can or should be called a 'claim', in that it can invoke the force of law.¹⁰² He also points out that privileges or 'liberties' can exist without concomitant rights.¹⁰³ The right or claim, is a different thing to, for example, my neighbour's permission or liberty, granted by the law, to ride her own horses, as that act of riding does not conflict with any legal prohibitions. There is no specific law that says my neighbour *can* ride her own horses, rather, within the law there is a privilege granted to her that she may. She is free to do so as no claim can be made against her by anyone else, regarding her riding (providing it is not an unlawful form of riding).¹⁰⁴ Concomitantly, that also means that my neighbour, unlike me, does *not* have a duty *not* to ride them. So, for Hohfeld, the opposite of a duty is privilege, *not* a right, which is a different thing altogether. However, a duty is *correlative* of a right (claim), as it comes about as a result of another's right (claim).¹⁰⁵ The opposite of a right (claim) is what Hohfeld calls a 'no-right' which means, in my example, that I, as the other person in the relation, have a 'no-right' to claim that my neighbour shall *not* ride her own horses.

7.4.3 Forms of exemptions from duties

Hohfeld then goes on to explain that things are not so simple. Whilst a 'privilege' may connote a general form of privilege that negates a *general* duty,¹⁰⁶ there are also *specific* laws or permissions that negate *specific* legal duties.¹⁰⁷ Those negations may also arise through the existence of specific operative facts.¹⁰⁸ For example, while he uses the example of the law of 'privilege against self-crimination',¹⁰⁹ the same schema can be said to apply to

⁹⁸ Ibid 31-32.

⁹⁹ Ibid 32-33.

¹⁰⁰ Ibid 45.

¹⁰¹ Ibid 32.

¹⁰² Ibid.

¹⁰³ Ibid 36.

¹⁰⁴ See, eg, ibid 55.

¹⁰⁵ Ibid 33.

¹⁰⁶ Ibid 39.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid 39-40.

¹⁰⁹ Ibid.

cruelty prohibitions, and in various circumstances and with various forms of negations. For example, what may in some circumstances be considered a cruel act toward an animal in law, and where there is a general legal duty *not* to perform that act, the prohibition itself may provide a general means to negate that duty. In general terms for a cruelty prohibition, that might be the case if either the court found that the act was ‘reasonably necessary’, and therefore does not constitute the *actus reus* element(s), or if the court found that it was relevant that the act was performed without the requisite *mens rea*. In addition, there may be specific laws, including regulations and codes of practice that negate the general duty. Another form of exemption from a duty may come in the form of a license. The term license may refer to the rights that it encapsulates, or, as Hohfeld prefers, as a set of operative facts that are required to give rise to a privilege,¹¹⁰ which include negations of other general duties.

7.4.4 Legal powers, liabilities, immunities and disabilities

Hohfeld distinguishes between a legal power, and physical and mental powers (that may be required to exercise the legal power),¹¹¹ and legal privileges.¹¹² Powers relate to the *ability* to effect or affect a legal relation.¹¹³ Sometimes legal relations arise purely as a result of operational facts, and other times they arise due to a change in facts by the person with the legal power to affect that change.¹¹⁴ It is not the same thing as a right, which as explained previously, relates to a claim enforceable by law. Powers include *ability* to modify one’s own property interests, or to create new property interests,¹¹⁵ to create contractual obligations,¹¹⁶ or agency interests.¹¹⁷ Powers to prosecute or perform specific acts may also be awarded by the state to public officers,¹¹⁸ or other agencies or persons. Hohfeld also carefully distinguishes between liabilities as correlative of powers, and duties. Liabilities as a result of a power of another, may befall a person, such as the *possibility* of having to perform a duty.¹¹⁹ Hohfeld gives the example of jury service. There is no duty to perform that act *until* the power to impose the duty is exercised.¹²⁰ Since a liability is the possibility of, and precedes, a duty, the opposite of a liability is an immunity - since it connotes an exemption

¹¹⁰ Ibid 44.

¹¹¹ Ibid 44, 52.

¹¹² Ibid 52.

¹¹³ Ibid 44-45.

¹¹⁴ Ibid 44.

¹¹⁵ Ibid 45.

¹¹⁶ Ibid 46

¹¹⁷ Ibid 47.

¹¹⁸ Ibid.

¹¹⁹ Ibid 53.

¹²⁰ Ibid.

from that liability.¹²¹ An immunity is also freedom from the power of others to negate the immunity.¹²² Hohfeld suggests that a liability, such as liability for debts, could be thought of as a responsibility to pay, but it is not the debt itself.¹²³ Following this, since an immunity is the opposite or negation of a liability, an immunity is also the correlative of a disability.¹²⁴ A disability is a lack of ability, that is, power to effect or affect a legal interest.¹²⁵ An example is that I cannot effect the property interests of my neighbour in her horses, and hence I have a legal disability in that regard. However, if there was a law or regulation that outlawed the use of spurs, and my neighbour used spurs on his horses, then he may be under a liability in regard to a prosecuting agency's powers to issue a direction notice for example. The agency may have the privilege to furnish an infringement notice or to bring charges against him, which would be the exercise of the relevant powers to impose the duties against him. If there was a code of practice that excused the use of spurs in his circumstance, then my neighbour would enjoy immunity from the liability. If there was a relevant code of practice or other form of exemption applicable to my neighbour's circumstance, then the prosecuting agency would also have a no-right, and therefore no privilege to act against him. My neighbour would enjoy the privilege and have no duty to ride without spurs.

7.5 Feinberg's extensions

7.5.1 Sources of legal duties

Feinberg argues that non-legal and legal duties may be perceived and acted upon even when they are not 'due' or owed to any other person.¹²⁶ The word 'duty', according to him, has moved from its earlier meaning that it signifies something 'owed to' another, to '*any* action understood to be *required*, whether by the rights of others, or by law' or other means.¹²⁷ It is merely now 'a term of moral modality' that signifies something we feel we must do.¹²⁸ It is possible that a legal duty arises under the law that requires action, 'under the pain of penalty'.¹²⁹ I take up these points in section 7.6 below, and in context to Napier J's discussion in *Backhouse v Judd*.¹³⁰

¹²¹ Ibid.

¹²² Ibid 55.

¹²³ Ibid 54.

¹²⁴ Ibid 55.

¹²⁵ Ibid.

¹²⁶ Joel Feinberg, 'The Nature and Value of Rights' in Joel Feinberg and Jules Coleman (eds), *Philosophy of Law* (Thomson Wadsworth, 7th ed, 2004) 304-312, 304-05.

¹²⁷ Ibid 305 (*italics in original*).

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ (1925) 399 SASR 16.

7.5.2 Correlations between duties and claim-rights

Feinberg also introduces the possibility that conceptually, actions between parties may give rise to moral or legal duties owed to a third party, or a higher power, for example sovereign power.¹³¹ He argues, that structurally, this is possible. He also recounts Hohfeld's schema and he qualifies that 'in the sense of [legal] claim-rights, it is true by definition that rights logically entail other people's duties'.¹³² However, Feinberg points out that personal 'claim-rights' must exist *prior to* the correlative duty that may fall upon the other party, and that the claim-right holder may exercise her power not to invoke the duty.¹³³ It is interesting to consider if this is true in the case of nonhuman animal ownership rights arguments. Due to the creation of duties under the criminal law, it seems that all citizens automatically have qualified and limited duties not to directly cause unnecessary pain or suffering (in general terms), to most nonhuman animals, most of the time. Those duties appear to be prior to, and independent of any legal claim rights of any nonhuman animal owners or other entities that have related powers. That relationship of prior duties exists under criminal protections for *human* animals, even though there are no questions of ownership or standing to limit the claim right of the human animal victim. This is reflected by Feinberg as he explains that there is also the type of relation where if the claim-right is one enforced by the law and penalty, then it may not be within the claim-right holder's powers to either invoke the duty owed to her, or to extinguish the duty owed.¹³⁴ A duty *to the law* would still be owed, concurrently with a duty owed to the claim-right holder.¹³⁵ Therefore duties are not always, and need not always be, correlative with claim-rights of another person.¹³⁶ This is what Napier J in *Backhouse v Judd*¹³⁷ called 'public duties' that are owed to the State. This is discussed in section 7.6 of this chapter.

7.5.3 Claims may be independent of rights

Feinberg also notes that there is 'well-established usage in international law' that a 'claim' can be used to signify something that is lacking for a person who is deprived, in the sense that the deprived person has an *entitlement* to a *good* rather than a claim against any particular person¹³⁸ (this might be considered a moral right). He explains that these basic needs for goods or the fulfilling of other types of deprivations can be associated with broader

¹³¹ Feinberg, above n 126, 306-08.

¹³² Ibid 308.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ (1925) 399 SASR 16.

¹³⁸ Feinberg, above n 126, 311.

conceptions of 'human rights'.¹³⁹ They may be morally justifiable claims, but they are not yet transmuted into legal claims or duties owed by others.¹⁴⁰ He states that such morally justified claims may represent possibilities for future valid, legal or duty-bound claims.¹⁴¹ An example in favour of nonhuman animals is the attempt of non-government nonhuman animal advocacy organisations to develop the Universal Declaration on Animal Welfare to be adopted by the United Nations General Assembly.¹⁴²

7.5.4 Duties owed to the state and other structural possibilities

In *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy*,¹⁴³ Feinberg provides a more detailed analysis of different types of duties and whether they are correlative of rights.¹⁴⁴ He found that some duties are correlated with another's *in personam* rights, and others are correlated with another's *in rem* rights.¹⁴⁵ He also identified a third group of duties in which he included 'duties of status, duties of obedience, and duties of compelling appropriateness [which] are not necessarily correlated with other people's rights'.¹⁴⁶ What appears most relevant to this research, that considers duties owed to the state, is that Feinberg claimed that:

many duties of obedience are "owed" to impersonal authority like "the law" ... [s]ome duties of obedience, then, seem to entail no correlative rights; and if my suspicion is correct, none of them do ... then the authority to whom one "owes" obedience is not a "claimant" ... but simply the one who may properly command performance of duty and apply sanctions in case of failure ... [and one can be] liable for failure to an authority.¹⁴⁷

This description obviously refers to sovereign power. It is also interesting because on another interpretation it shows that it *is* possible for a citizen to owe a duty to: an entity that may not be what we consider either a usual conception of a legal person, or another citizen that is not a holder of correlative rights. Neither does it seem necessary that the recipient of the duty would necessarily have to be the authority that imposes the duties. I think this is interesting because perhaps even if it does not open a possibility for nonhuman animals to

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² International Fund for Animal Welfare, *UDAW Universal Declaration for Animal Welfare* <<http://www.ifaw.org/australia/our-work/political-advocacy/udaw-universal-declaration-animal-welfare>>.

¹⁴³ Joel Feinberg, *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton University Press, 1980) ('*Rights*').

¹⁴⁴ Ibid 130-142.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid 139.

¹⁴⁷ Ibid 138-39.

be such a class of duties-recipients, because they may still be blocked by Kantian arguments that exclude them from the social contract, the possibility of this structure does show that: the imposition of duties on citizens need not involve the awarding of correlative rights to the duty recipients; and that enforcement need not result *only* from a claim-right. This demonstrates that at least in structural terms within the law, a different view of *effective* protections could function, in that it is *not* necessary for duties recipients to be participants in the social contract. Nonhuman animals would not need 'animal rights' as such.

7.6 Australian animal protections: duties owed to whom or what?

7.6.1 Martin v Carpenter

*Martin v Carpenter*¹⁴⁸ was an appeal heard in the South Australian Supreme Court in 1925. The respondent had initially and *lawfully* caused pain and suffering to a horse by inserting a catheter. He was found to have been negligent, in that he did not subsequently alert the owner to the ongoing painful effects of his failing to remove pieces of the catheter that had broken off inside the horse's urethra.¹⁴⁹ Poole ACJ explained that whilst this was not a case where the respondent was being tried for negligence, the duty to inform the owner arose as a result of the negligent act, and that the respondent *would have* been guilty of negligence by not informing the owner.¹⁵⁰ Poole ACJ stated this was 'a duty owed not merely to the owner, but to the State also'.¹⁵¹ It appears that here, Poole ACJ was combatting the respondent's argument that the duty was merely moral. Poole ACJ was also underscoring that in law, when legal duties arise, criminal or civil, then those duties, whilst they may be concurrently owed to another person, they are concurrently owed to the State.

Napier J also reiterated that a breach of the cruelty provision results in the defendant owing 'a duty to the public in relation to that animal to take such steps as may be reasonable to avert [the] consequence of his act, so far as it is anticipated, or ought to be anticipated'.¹⁵² When discussing whether the breach continued up until the time the catheter fragments were removed, Napier J explained:

I think that it would be wrong to act upon any analogy derived from civil cases. The duty we are dealing with is not the contractual duty owing to the owner as his right. It is a duty owed

¹⁴⁸ [1925] SASR 421.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid 424.

¹⁵¹ Ibid.

¹⁵² Ibid 431.

by the respondent to the public for the protection of the public interest, which is that unnecessary pain should not be wantonly or callously inflicted upon any animal.¹⁵³

It appears that Napier J indicated that the duty arises from the social contract and the function of the law within that compact. The public will is instituted through the law, and in the case of the cruelty provision, it imposes legal duties that are owed to the State, as a proxy of sorts, for the public.

7.6.2 Backhouse v Judd

In *Backhouse v Judd*,¹⁵⁴ also heard in the South Australian Supreme Court in 1925, in context to the *Prevention of Cruelty to Animals Act 1908* (SA), Napier J articulated the relationship between imposed penalties and public duties:

When a **penalty** is imposed for failure to supply, **it presupposes a public duty to supply**. In default of any duty otherwise expressed or defined in the Act itself, and in default of any pre-existing duty to which the intent may reasonably be referred, this imposition of **the penalty must be understood to create the duty**, leaving the Courts to define it as best they may, and to necessarily arise – On whom is the duty imposed? When does it arise? And how may it be discharged?¹⁵⁵

Napier went on to explain that in the context of the relevant provision, a failure to fulfil a *legal* duty will result in a violation of a *public* right:

If the duty had been voluntarily undertaken by contract, **or in any other case**, where it already exists as a *legal* obligation due to the owner, I see no reason why the section should not apply to punish the omission as a violation of the **public right**. **Apart from cases of this sort**, it seems to me that the only satisfactory basis for the duty is that of ownership. **There is nothing novel in the idea that property is a responsibility as well as a privilege. The law which confers and protects the right of property in any animal may well throw the burden of responsibility for its care upon the owner as a public duty incidental to the ownership.**¹⁵⁶

This statement highlights that property rights are granted by the state, and that those rights may not be absolute, and in the case of nonhuman animals which was the subject here, ownership rights import duties. A breach of a duty, therefore constitutes, (and even if it arises from private law), a 'violation of the public right'. The social contract filters through law to both fetter and protect property rights.

¹⁵³ Ibid 432.

¹⁵⁴ (1925) 399 SASR 16.

¹⁵⁵ Ibid 20 (highlighting not in original).

¹⁵⁶ Ibid 21.

Napier J's logic follows the legal and Kantian models of rights and duties, and here Napier J is careful to articulate that the state steps in as the recipient of the duty owed as a proxy for the public, under the social contract. I suggest that the judgement also unequivocally finds, and reinscribes, that as a result of the structure of the law, based on the social contract that excludes consideration of nonhuman animals within the moral community, that any nonhuman animal cannot be 'owed' any duty in criminal law. They may merely be the subject of the duty, as demanded by the state.

7.7 Conclusions

Ownership rights are subject to government oversight and limitation. The fettered rights of ownership in living beings is not something new. States' powers were imposed to protect and enforce ownership rights at least as early as some periods of Roman rule, in relation to human slaves.

In regard to legal protections for nonhuman animals, I suggest that Hohfeld's taxonomy highlights the following. Key operative facts in animal protection laws include whether a person is an owner or a person in charge of an animal. That status gives rise to legal duties under the cruelty and omissions prohibitions. Other key operative facts, supported by evidential facts will be the utilitarian use of an animal for a defendant. If a dog was being confined and being 'used' for breeding, (which could be proven through evidential facts), it would be lawful to severely limit that dog's freedoms if a code of practice permitted it, when otherwise it would be deemed an illegal and cruel act, for example in the case of a 'pet' dog. It may be that the act of confinement is specifically exempted through application of a regulation, code of practice or a form of licence that would provide an immunity to liability. That licence can arise because of operative facts that negate proving of the *actus reus* elements where the treatment or lack of treatment is not deemed 'unnecessary'.

Under animal protection statutes, nonhuman animals themselves of course, do not have any rights that serve to directly provide them with protections. Nonhuman animals themselves cannot bring a legal claim and neither do they have legal duties. However, an activist group recognised as having standing, or a prosecuting agency, may have rights to enliven a legal claim if an offending party has violated a duty. That duty, enlivened through the imposition of the penalty, if not also specified directly in law, is owed not to another person as a rights-holder, but rather the state, representing the community. A discretionary privilege of a prosecuting agency is that they are granted a legal power under animal protection statutes to prosecute, and to possibly bring a claim for compensation against a defendant. Since a nonhuman animal has no rights to bring a legal claim where a person inflicts 'unnecessary'

pain or suffering on them, which is a breach of the perpetrator's duties to the state, the relevant right(s) and claim(s) to bring a legal action is held, potentially, by various authorised persons and entities. A legal claim can also be enlivened *against* the owner of that 'property'.

As highlighted by Feinberg, and by Napier J in *Backhouse v Judd*,¹⁵⁷ duties arise under the criminal law as a consequence of the imposition of the penalty. As such, duties to not harm nonhuman animals are already affected in law without nonhuman animals requiring legal rights. It is also perhaps more possible today, for legislatures to enact laws that do *not* have direct connection to any *moral* duties. Kant had already recognised that legal duties can arise as a matter of practicality rather than in association with any particular moral duty. There seems to be no structural legal impediment from these perspectives at least to the implementation of stronger, more effective laws for the protection of nonhuman animals. In that legal sense, if one ignores the ever-present risks of political power undermining protections (to which both 'rights' and more effective prohibitions are subject), it does not seem necessary to have to implement 'animal rights' in law. As demonstrated by the Nonhuman Rights Project litigation in the United States,¹⁵⁸ rights arguments are currently impotent in the face of the Cartesian and Kantian dogmas that underpin law as an instrument of our carnophallogocentric¹⁵⁹ culture.

The following chapters of this research further explore how carnophallogocentrism and its rationality gets-to-work in law. They further excavate additional barriers to greater protections for nonhuman animals, with particular focus on the Queensland jurisdiction. Chapter 8 untangles definitions of 'negligence' and 'strict liability' in English and Australian law. The concept of negligence as inadvertence also reveals itself as a problem of presence that continues to haunt the law.

¹⁵⁷ (1925) 399 SASR 16.

¹⁵⁸ See Chapter 3, section 3.3.2.

¹⁵⁹ See Appendix 1, section D2.2.

CHAPTER 8: TOWARD A LEGAL CHARACTERISATION OF ACPA SECTION 17

8.1 Introduction

This chapter addresses the thesis sub-question: *what legal characterisation(s) can be developed for Animal Care and Protection Act 2001 (Qld) s 17 (prior to a broader jurisdictional analysis)?* The approach I have taken includes: starting with what other commentators have articulated about the offence; building on the analyses in the previous chapters of this research; reviewing and contrasting the definitions of 'negligence' and 'strict liability' in English¹ and Australian law; identifying the duty of diligence that is imposed through omissions offences; developing a frame of reference through the perspective of the law reform commissions of England and Wales, and Australia, and; examining the contexts that Lacey and Ashworth each provide on the shifting justifications of criminality.

A key objective of this chapter is to unravel cross-contaminating confusions and complications in interpretations of omissions offences in animal protection statutes across the English and Australian jurisdictions. To clarify definitions and to assist with characterisation more broadly, I suggest there are two cleavages that must be recognised. The first is the differences in the conceptions of 'negligence' and 'strict liability' in English and Australian law. As evidence of the need for clarity on this point, there has been confusion within commentary, within arguments from counsel, and within judgments, in both England and Australia, in interpreting 'negligence' in the context of animal protection omissions offences. As demonstrated within this chapter, it has been erroneously assumed in the Australian context, that the duty of care offences in particular, import either civil or criminal doctrines of negligence and that the duty of care offences are significantly different to the cruelty offences as regulatory offences. Some of that confusion may stem from mistaken interpretations of the term 'negligence' as it is employed in the influential English texts of Professor² Smith³ and Radford⁴ and in some English animal law judgments.⁵ The

¹ In this chapter, when I refer to contemporary 'English' law, I also incorporate the law of Wales since the relevant commentary, statutes and law are applicable to both jurisdictions.

² See the last paragraph of this Introduction where I explain why I refer to J C Smith as Professor Smith.

³ J C Smith, 'The Guilty Mind in the Criminal Law' (1960) 76 *Law Quarterly Review* 78 ('*Guilty Mind*'); J C Smith, 'Protection of Animals Act 1911, s.1(1) - causing any unnecessary suffering to an animal by wantonly or unreasonably doing any act' (1993) Nov *Criminal Law Review* 852 ('*Peterssen*') which is also cited as *Peterssen v RSPCA* [1993] Crim L R 852 ('*Peterssen*') as it is this case report that includes his commentary; J C Smith 'Merchant Shipping Act 1988, s.31 - failure to take reasonable steps to ensure that ship operated in safe manner - whether liability absolute - limit of shipowner's vicarious liability' (1993) Aug *Criminal Law Review* 611 ('*Seaboard*').

⁴ Mike Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (Oxford University Press, 2001).

term 'negligence' as it used within those English texts is not equivalent to any usual Australian definition. I clarify the definitions as they are employed across the jurisdictions.

The differences in definitions of 'strict liability' in English and Australian law must similarly be appreciated as it can also lead to confusion when interpreting English texts in an Australian context. Unhelpfully, in English law, equivocal categorisations of strict liability offences are also entwined with equivocal categorisations of 'negligence' offences. I clarify that the differences between the jurisdictions, are in relation to the strictness of the *mens rea* test, and the availability of the defences of due diligence and mistake.

In building a characterisation of omissions offences under animal protections statutes, it is also helpful to recognise the controversies in both England and Australia related to 'negligence'. They include questions on the 'principle' of determining *mens rea*, and whether it is just to find fault of the basis of omissions. Other controversies are related to what defences are, and should be made available, for omissions offences. For that reason, it is helpful to discuss the defence or excuse of due diligence⁶ and how it is perceived as a partial solution to some of the controversies and other practical issues and pressures in law, which are highlighted within this chapter. I suggest that the defence or excuse of due diligence, as it is expressed in various terminology,⁷ is important in the characterisation of omissions offences generally. I highlight that omissions offences logically import a *duty* of diligence. I suggest it is helpful to identify this *duty*, to distinguish offences that can be made out through omissions, from concepts of 'negligence' in its various definitions. This helps in arriving at a clearer characterisation of the omissions offences in animal protection statutes (at least). All of the above points need to be unravelled to develop a clearer characterisation of the omissions offences under Australian animal protection statutes, and ACPA s 17 which is the focus of this research.

I suggest that the second necessary cleavage, is recognition of the different conceptualisations of criminal and regulatory offences. The survey of the purported differences within this chapter assists in developing a deeper contextualisation of the cruelty and duty of care offences under animal protection statutes. It brings into focus: the

⁵ See, eg, *Peterssen* [1993] Crim L R 852; *R (on the application of Grey) v Crown Court at Aylesbury* [2013] EWHC 500 (Admin) ('R'). Both cases are discussed in section 8.3.1.2 below.

⁶ I use the term 'due diligence' following an English usage and a common use of it in Australian law, to indicate the legal obligation to take appropriate action, and that includes, rather than primarily connotes, the specific form of due diligence that is included in some statutes where a person has a duty to take appropriate action in relation to *another* person's actions: such as for directors' duties and employers' duties.

⁷ For example, under ACPA s 17(3) there is a requirement that a person 'take reasonable steps ...' See section 8.4 below.

procedural context of the offences, the perceived seriousness of breaches of those laws, and other non-law factors and pressures bearing on prosecutions and prosecuting agencies.

As a further note, in this, and subsequent chapters of this research, I refer to the esteemed J C Smith CBE QC FBA as Professor Smith. The main reasons I do so are because: this is how he is referenced in other texts, *and* because it serves to avoid confusion between his own particular texts that are most relevant to this research,⁸ and what I cite from *Smith and Hogan's Criminal Law*⁹ to which I also make extensive reference. Whilst Professor Smith was an original author of that title, the current authors are Professor David Ormerod QC, a current Law Commissioner of the Law Commission of England and Wales¹⁰ (which is a point also relevant to this research), and Karl Laird. To avoid further confusion, I refer to those authors directly by name where possible in the body of this chapter, rather than by the name of their text.

8.2 Existing descriptions of the Australian duties of care

There is no rich, legal characterisation of the duty of care offences under the Australian animal protection statutes. This research addresses that gap. Some commentators have provided very brief descriptions of those offences. An association between the 'duty of care' offences, and different legal concepts of 'negligence' and 'guardianship', have been offered.

8.2.1 Whitfort

Whitfort explains that the Tasmanian and Queensland duty of care provisions¹¹ include a 'general duty of care'.¹² Whitfort 'reflect[s] on the historical development of a criminally-punishable duty of care towards animals' which she describes as prohibiting 'negligence'.¹³ She cites a number of offences that prohibit negligent conduct including both regulatory

⁸ See above n 3.

⁹ David Ormerod and Karl Laird, *Smith and Hogan's Criminal Law* (Oxford University Press, 14th ed, 2015) ('*Smith and Hogan*').

¹⁰ Law Commission, *Who we are* <<https://www.lawcom.gov.uk/about/who-we-are/>>.

¹¹ *Animal Care and Protection Act 2001* (Qld) s 17; *Animal Welfare Act 1993* (Tas) s 6.

¹² Amanda Whitfort, 'Evaluating China's Draft Animal Protection Law' (2012) 34 *Sydney Law Review* 347, 358 n 72. See also Steven White, 'Standards and Standard-Setting in Companion Animal Protection' (2016) 38(4) *Sydney Law Review* 463, 465: White argues that the standards imposed by the *ACPA* duty of care and cruelty offences 'operate as principle-based standards, describing duties to be performed, but not specifying how they are to be achieved', and that the content requires elucidation; at 481: that the interpretation of s 17 is a 'matter for institutions other than the courts' and that the standards require supplementation; at 485: the lack of specificity in the scope of the standards reduces their transparency' with their reference to 'reasonableness', 'necessity' and 'justification'.

¹³ Whitfort, above n 12, 359.

offences that are expressed as duties of care relative to other *persons*, and serious crimes that import the high standard *mens rea* test of criminal negligence.¹⁴ I note that Whitfort does not claim that these offences that she mentions as examples, were of a common genus of 'negligence'. Neither does she clearly state that any of the examples that she quoted share the same genus of 'negligence' as she appears to make relevant to the 'duties of care' within the animal protection statutes.

Whitfort refers to Napier J's judgment in *Backhouse v Judd*,¹⁵ in regard to his identification of the 'moral duty' to care for animals in one's care,¹⁶ rather than his ignoring of counsel's claim that the criminal doctrine of negligence was relevant.¹⁷ I examined that judgment within Chapter 7 and revisit it again in this chapter. Whitfort also refers to the English commentary of Radford,¹⁸ but not in regard to his use of the term 'negligence'. Her references to the commentary of Professor Smith are in regard to his analysis of the application of the relevant *mens rea* tests in the English case of *Peterssen*.¹⁹ She quotes his conclusion: 'The offence is one of negligence. Talk of *mens rea* and guilty knowledge is confusing and misleading'.²⁰ Whitfort does not elaborate as to what definition of 'negligence' she believed Professor Smith employed. I follow Professor Smith's logic within this chapter to clarify that his use of the term is not equivalent to an Australian legal definition. It does not import the doctrines of either criminal or civil negligence.

8.2.2 McEwan

McEwan's thesis does not focus on omissions or duty of care offences and she makes only brief references to the related provisions within Australian statutes.²¹ She describes Australian animal protection statutes as promoting animal welfare²² 'rather than mere cruelty'.²³ Additionally, she states that the legislation in Queensland and Tasmania 'include a duty of care provision, which shifts the jurisprudential basis of the animal cruelty offence

¹⁴ Ibid 359 nn 73-78: Whitfort cited for example, *Road Transport (Safety and Traffic Management) Act 1999* (NSW) s 70; *R v Miller* [1983] 2 AC 161; *R v Stone*; *R v Dobinson* [1977] QB 354; *R v Instan* [1893] 1 QB 450.

¹⁵ (1925) 399 SASR 16, 20-21. Note: I do not employ a short name for this case as there is another Australian animal law case that includes the name 'Backhouse' which may lead to confusion.

¹⁶ Whitfort, above n 12, 362.

¹⁷ See section 8.3.2.1 below.

¹⁸ See, eg, Whitfort, above n 12, 358 n 69 citing Radford, above n 4.

¹⁹ [1993] Crim L R 852 cited in Whitfort, above n 12, 364.

²⁰ *Peterssen* [1993] Crim L R 852, 853 quoted in Whitfort, above n 12, 364.

²¹ Alexandra Broughton McEwan, *The Concept of Violence: A Proposed Framework for the Study of Animal Protection Law and Policy* (PhD Thesis, The Australian National University, 2016) 48-50.

²² Ibid 47-48.

²³ Ibid 48.

toward civil concepts of negligence'.²⁴ McEwan does not clarify if her use of the term 'civil' is to connote the doctrine of civil negligence, or whether she means that the offence employs the model of civil penalty offences.

McEwan also states that '[a]nimal welfare appears to promise more than "animal cruelty", in that it suggests positive obligations in the form of a duty of care'.²⁵ This seems to intimate that she considers that there is a significant difference between the two types of offences. This is an issue I address in Chapter 9.

8.2.3 Abate and Crowe's 'Guardianship'

Abate and Crowe claim that *ACPA* s 17 has the potential to develop into a guardianship model for animal protections,²⁶ and that the *ACPA* as a whole, represents a 'guardianship model'.²⁷ They intimate that it offers *more* than the cruelty provisions by 'designating particular people as responsible for ensuring animal welfare ... [and that it] puts the custodians on notice of their positive responsibilities'.²⁸ Optimistically they assert that '[t]he focus is on the animal's welfare rather than the intentions or actions of the custodian'.²⁹ They claim that the combination of possible improvements in legal mechanisms such as standing, habeas corpus and guardianship models, 'hold significant promise in giving animals a voice and ensuring that those with control over them can be held legally accountable'.³⁰ I discuss whether *ACPA* s 17 is a potential guardianship model in Chapter 9.

8.3 'Negligence' in English and Australian law

8.3.1 'Negligence'

There is a longstanding claim that all serious crimes at least, should require proof of *mens rea*.³¹ There is a long history of controversy regarding whether 'negligence' is form of *mens*

²⁴ Ibid.

²⁵ Ibid 127.

²⁶ Randall S Abate and Jonathan Crowe, 'From Inside the Cage to Outside the Box: Natural Resources as a Platform for Nonhuman Animal Personhood in the US and Australia' (2017) 5(1) *Global Journal of Animal Law* 54, 69.

²⁷ Ibid 70.

²⁸ Ibid.

²⁹ Ibid 69.

³⁰ Ibid 71.

³¹ The principle and presumption that *mens rea* is required is reflected in the maxim *actus non fit reus nisis mens sit rea*. It was mentioned in English law for example as early as 1641 in Coke, *Third Institute* (1641) 6, 107. The desire to *find* that principle in law has of course persisted. See, eg, Glanville Williams, *Criminal Law: The General Part* (Stevens & Sons, 2nd ed, 1961) 252: Williams noted a number of cases from the 1920s to the late 1940s where Chief Justices had expressed their concern that *mens rea* was required to be found even for summary offences. The House of Lords

rea. Animal law commentary is embroiled in that controversy.³² In English law, there have been arguments about whether ‘negligence’ includes a test of state of mind at all, or whether it merely requires an objective test of *conduct*.³³ That is, whether ‘negligence’ is limited to a test of *actus reus* elements in order to find ‘fault’. A related issue in regard to offences of ‘negligence’ is whether it is justified to find criminality through omission at all.³⁴ Another related issue is why ‘negligence’ is deemed an ‘exceptional’ basis for liability.³⁵

confirmed the maxim in *Sweet v Parsley* [1970] AC 132, 148 (Reid L), at 153 (Morris L), at 162-3 (Diplock L). An authoritative contemporary case that carries this maxim in English law in context to serious crimes is *G* [2004] 1 AC 1034 (Bingham L):

it is a salutary principle that conviction of serious crime should depend on proof not simply that the defendant caused (by act or omission) an injurious result to another but that his state of mind when so acting was culpable.

But see section 8.8.1.3 below, where I recount Lacey’s analysis. She argues that *mens rea* as we currently understand it today, was not always applied.

³² See, eg, Smith, *Pettersen*, above n 3, 852-53. See also sections 8.3.1.2, 8.3.2.1 below.

³³ See, eg, John William Salmond, *Jurisprudence* (7th ed, 1924) 408-10, 421: In regard to his definitions of negligence in law, Salmond insisted that it connoted prohibited conduct *and* a concurrent form of *mens rea*, and that all forms of culpable negligence were a result of carelessness; Williams, above n 31, 102-03, at 103 n 9: Williams rejected that negligence was a form of *mens rea*, and the ‘older notion’ that carelessness, could correctly, in law, connote a state of mind. The arguments are fuelled no doubt by comments of the courts. For example, in *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 at 199, Lord Diplock held the view that due diligence is the ‘converse of negligence and negligence connotes a reprehensible state of mind — a lack of due care for the consequences of his physical acts on the part of the person doing them’. That view quoted by Abadee J in *The Criminal Court of Appeal of New South Wales in Australian Iron and Steel Pty Ltd v Environment Protection Authority* (1992) 29 NSWLR 497, 504. Current English texts still describe ‘negligence’ as a form of *mens rea*. See, eg, C T Walton et al (eds), *Charlesworth & Percy On Negligence* (Sweet & Maxwell, 13th ed, 2014) [1-02]: ‘Negligence’ is a term used in English law to describe: a state of mind that stands in contrast with intention; conduct of a careless type, and; in a [civil or criminal] doctrinal sense - where there has been a breach of a legal duty of care, and the meanings can overlap, at [1-07]: negligent or careless conduct does not always connote a breach of a duty of care and therefore constitute the tort of negligence; Denis Keenan, *Smith and Keenan’s English Law: Texts and Cases* (Pearson Longman, 15th ed, 2007) 679; Phil Harris, *An Introduction to Law* (Cambridge University Press, 7th ed, 2007) 311.

³⁴ See, eg, Ormerod and Laird, *Smith and Hogan*, above n 9, 169-70 citing (among others) *B (A minor) v DPP* [2000] 1 All ER 833, 837 (Lord Nicholls); H L A Hart, ‘Negligence, *Mens Rea* and Criminal Responsibility’ in Anthony Gordon Guest (ed), *Oxford Essays in Jurisprudence: A Collaborative Work* (Oxford University Press, 1961) 29-49; Jerome Hall, ‘Negligent Behaviour Should be Excluded from Criminal Liability’ (1963) 63 *Columbia Law Review* 632 (‘*Negligent Behaviour*’); A Liepold, ‘A Case for Criminal Negligence’ (2010) 29 *Law & Philosophy* 455. See also Andrew Simester, ‘Can Negligence be Culpable?’ in Jeremy Horder (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, 2000) 85 (‘*Can Negligence*’).

³⁵ See, eg, W J Byrne and A D Gibb (eds), Thomas Beven, *Negligence in Law Volume 1* (Sweet & Maxwell, 4th ed, 1928) 3-5: In review of Beven’s logic who provides a broader set of reasons for the ‘exceptional’ status of negligence, it would not be entirely correct to state that the criminal law ‘exceptionally’, or only, applied sanctions for negligent acts on the basis of the purported necessary justification of a high standard of criminal mental fault (*mens rea*). There were also the issues of: necessity, since the civil law also provided means of punishment, and; the seriousness of the crime

8.3.1.1 'Negligence' in English Law as 'fault' but not *mens rea*

Ormerod and Laird describe 'negligence' in various ways including: 'failures by the defendant to comply with a prescribed standard of conduct *irrespective* of his personal state of mind',³⁶ 'the inadvertent taking of an unjustifiable risk',³⁷ 'conduct that falls below the standard to be expected of a reasonable person in those circumstances'.³⁸ They also describe it as follows which clarifies that there is not always a lack of advertence:

[w]here D did consider whether or not there was a risk and concluded, wrongly and unreasonably, either that there was no risk, or the risk was so small that it would have been justifiable to take it.³⁹

Ormerod and Laird also clarify that an accused may be found to be negligent not only in regard to consequences, but also in regard to circumstance(s) where: 'a reasonable person would know that it exists or will exist and D fails to appreciate that it exists, whether he has given thought to the question or not'.⁴⁰

Ormerod and Laird confirm that the controversy of whether the test of negligence 'can properly be described as *mens rea*' has persisted.⁴¹ In support of that contention, they cite Glanville Williams;⁴² other commentators,⁴³ and Professor Smith.⁴⁴ Helpfully, Ormerod and Laird clearly differentiate between actual fault and *mens rea* as culpable fault in law:

defined in relation to the degree of wrong to society. It seems it was a question of necessity in regard to convenience in order for the State to protect peace, and not merely justification as a basis of principle. It was not *just* the case, at all, that the crime had to be so serious that *it* merited criminal punishment. The question of 'merit' as Beven articulated it, was also based on the other factors, determined as a matter of practicality and as declared by sovereign power. See also Andreas Schloenhardt, *Queensland Criminal Law* (Oxford University Press, 4th ed, 2015) 67 citing David Ormerod, *Smith and Hogan's Criminal Law* (Oxford University Press 13th ed, 2011) 65: Ormerod explained that one reason that negligence is seen as 'exceptional', is that liability: 'for failing to act ... would infringe the autonomy of the citizen in a qualitatively different manner' than it would for liability for positive acts, and that there is a question of legality in finding culpability where the law cannot 'impose liability with sufficient clarity, specificity and certainty to respect adequately the principles of fair warning, fair labelling, maximum certainty, coherence with civil law etc', and 'because there is the suggestion that failing to act cannot be regarded as a cause of harm, so that there should be no general liability for omission in result crimes'.

³⁶ Ormerod and Laird, *Smith and Hogan*, above n 9, 114 (highlighting not in original).

³⁷ Ibid 141.

³⁸ Ibid 161.

³⁹ Ibid 141. See also ibid 134, at 161-62: The authors explain that in English law *Caldwell* recklessness, which is now 'discredited' was recognised as a state of mind where an accused did consider his or her negligent conduct and erroneously decided there was no risk.

⁴⁰ Ibid 141.

⁴¹ Ibid 162.

⁴² Ibid 162 n 11 citing G Williams, *Salmond on Jurisprudence* (Sweet & Maxwell, 11th ed, 1957) 329.

⁴³ See, eg, Ormerod and Laird, *Smith and Hogan*, above n 9, 169 citing Hall, *Negligent Behaviour*, above n 34; Larry Alexander, Kimberly Kessler Ferzan and Stephen Morse, *Crime and Culpability*

Writers differ as to whether negligence can properly be described as *mens rea*. If *mens rea* is used simply as a compendious expression for the varieties of fault that may give rise to criminal liability, then it does, of course, include negligence. If it is taken in its more literal sense of 'guilty mind', the usage is inappropriate.⁴⁵

8.3.1.2 'Negligence' in English animal law

Professor Smith's commentary on RSPCA v Peterssen

In 1993, in regard to the judgment in *Peterssen v RSPCA*,⁴⁶ Professor Smith commented directly on the interpretation of the *Protection of Animals Act 1911*⁴⁷ s 1(1), which he described as an offence of 'negligence'.⁴⁸ Professor Smith remonstrated that:

This is another case which demonstrates the inconsistency in the use of terminology by the courts ... Here the term "mens rea" is used by Evans LJ to include the "unreasonable conduct and act" of the appellant. The term is more properly limited to states of mind.⁴⁹

Within the 'official transcript', Evans LJ did not use the term *mens rea*. However, it was reported there that Morland J did state:

the mens rea in this case was in the unreasonable conduct and act of this appellant with the knowledge and foresight he had of the consequences ...⁵⁰

Professor Smith asserted that the use of the terminology *mens rea* and guilty knowledge was 'confusing and misleading'.⁵¹ He argued that foresight was not an element that needed to be proven because the act in question was judged objectively, in that negligence would be found if a 'prudent man' would have had awareness of that consequences,⁵² and that the relevant provision, 'required proof only that, by unreasonably omitting to do any act, the appellant caused unnecessary suffering'.⁵³ Professor Smith's final assertion was that the

(Cambridge University Press, 2009); J W C Turner, 'The Mental Element in Crimes at Common Law' (1936) 6 *Cambridge Law Journal* 31.

⁴⁴ Ormerod and Laird, *Smith and Hogan*, above n 9, 114 n 4 citing Smith, *Peterssen*, above n 3; Smith, *Seaboard*, above n 3.

⁴⁵ Ormerod and Laird, *Smith and Hogan*, above n 9, 162.

⁴⁶ Smith, *Peterssen*, above n 3.

⁴⁷ 1 & 2 Geo 5, c 2.

⁴⁸ Smith, *Peterssen*, above n 3, 853.

⁴⁹ *Ibid* 853.

⁵⁰ *Peterssen v RSPCA* (Unreported, Queens Bench, Evans LJ and Morland J, 23 March 1993) 853 reported in 1993 WL 963811 [1993] *Criminal Law Review* 852.

⁵¹ Smith, *Peterssen*, above n 3, 853.

⁵² *Ibid*.

⁵³ *Ibid*.

appellant's 'failure to take the usual precautions seems a clear case of an unreasonable omission. The offence is one of negligence'.⁵⁴

Professor Smith's view has been influential in animal law.⁵⁵ His view has also been referenced by Ormerod and Laird.⁵⁶

Radford

In the context of English law, Radford discusses the application of the objective test for *mens rea* more generally as it relevant to cruelty offences, and not just in relation to cruelty being made out through omission.⁵⁷ Radford agrees with Professor Smith's view that the offence can be a result of 'negligence' and he employs that term in the same manner as Professor Smith.⁵⁸ That is, that an objective test of the *conduct* is the correct test, without reference to *mens rea*.⁵⁹ As I describe in section 8.5 below, in English law, 'negligence' as it was employed here by Professor Smith and by Radford, also implies the availability of the defences of mistake and due diligence for all *actus reus* elements. Whereas, strict liability offences in English law do not permit those defences for *critical actus reus* elements unless the statute provides for them.

R v Crown Court at Aylesbury

Ormerod and Laird cite a recent English animal welfare case, *R*,⁶⁰ where the High Court had to decide whether Parliament had intended that the offence of 'causing unnecessary suffering' to an animal could be committed negligently.⁶¹ That is, if it could be proven on an objective test of conduct, and hence dispel the accused's argument that *mens rea* was relevant.⁶² The relevant provision was s 4(1)(b) of the *Animal Welfare Act 2006* c 45 ('AWA')

⁵⁴ Ibid.

⁵⁵ See, eg, Radford, above n 4, 230-31; Whitfort, above n 12, 364.

⁵⁶ Ormerod and Laird, *Smith and Hogan*, above n 9, 114, at 114 n 5: Ormerod and Laird describe Professor Smith, and Glanville Williams as each holding a 'subjectivist' view in relation to 'serious crimes' that requires that a defendant 'has personal awareness of his actions and is cognizant of the relevant circumstances and consequences comprising the *actus reus*'. That is not the case for Professor Smith in his analysis of *Peterssen*, but that is because the cruelty offence was not viewed as 'serious': Smith, *Peterssen*, above n 3, 853: 'Talk of *mens rea* and "guilty knowledge" is confusing and misleading'. See also Smith, *Guilty Mind*, above n 3, 98: he argued that that for serious crimes, 'other than manslaughter', *mens rea* should apply, and that negligence was 'a lesser degree of *moral* blameworthiness', that did merit criminal punishment, but only where the 'consequences are likely to be very serious for the other members of the community'.

⁵⁷ Radford, above n 4, 227-31.

⁵⁸ Ibid 230-31 citing Smith, *Peterssen*, above n 3.

⁵⁹ Radford, above n 4, 230-31.

⁶⁰ [2013] EWHC 500 (Admin).

⁶¹ Ormerod and Laird, *Smith and Hogan*, above n 9, 161 n 3.

⁶² Ibid.

which requires that the accused ‘knew, or ought reasonably to have known, that the act, or failure to act, would have that effect or be likely to do so’, (to cause unnecessary suffering). Toulson LJ rejected the accused’s submission that the provision could *not* be made out merely on ‘negligence’, and he explained that it was erroneous to claim that it requires:

either proof of knowledge that the animal was in a condition causing it unnecessary suffering or proof that it was showing signs of suffering which could not be missed by a reasonable, caring owner.⁶³

Toulson LJ explained that the provision does *not* require either ‘actual knowledge or a form of constructive knowledge that the animal was showing signs of unnecessary suffering’.⁶⁴ He confirmed that the offence can be found through negligence on an objective test, which was clear in the Act itself and its supporting materials.⁶⁵ In the same way, Toulson LJ also confirmed that ‘the welfare offence’ under AWA s 9(1) which according to its heading, is the ‘[d]uty of person responsible for animal to ensure welfare’, that sets minimum standards of care, is to be construed as ‘setting a purely objective standard of care which a person responsible for an animal is required to provide’.⁶⁶ Hence, in English law and terminology, AWA s 9 also creates an offence of ‘negligence’ (as that term is used in English law), where a person ‘does not take such steps as are reasonable in all the circumstances’. It creates a duty of due diligence, as I elaborate that in the following section, and has no requirement to prove the state of mind of the accused.

8.3.2 ‘Negligence’ in Australian law commentary

In Australian criminal law texts it seems common to, confusingly, associate ‘negligence’ with a category or form of *mens rea*, and to differentiate it as an ‘objective standard’ relative to the *actus reus* elements.⁶⁷ Some texts explain that ‘negligence’ is a ‘fault’ element, since it

⁶³ R [2013] EWHC 500 (Admin) [25].

⁶⁴ Ibid [25]-[26].

⁶⁵ Ibid [26]-[30].

⁶⁶ Ibid [31].

⁶⁷ See, eg, Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 2017) 219; Kenneth J Arenson, Mirko Bagaric and Peter Gillies, *Criminal Law in the Common Law Jurisdictions: Cases and Materials* (Oxford University Press, revised 4th ed, 2016) 25 (italics in original): whilst the authors clarify that ‘ordinary negligence is not a mental state, but merely conduct that falls below an objective standard of care ...’, and they state that (italics not in original): ‘ordinary negligence [is] where the defendant *should* have been aware of the risk but did not actually *advert* to it’, at 26 they claim that ‘recklessness ... is in effect an aggravated form of negligence in which the defendant actually *advert*s to a known risk ...’; Lorraine Finlay and Tyrone Kirchengast, *Criminal Law in Australia* (LexisNexis, 2015) 18: the authors state that whilst the fault in negligence is determined through an objective test, and that ‘it is not necessary to look into the mind of the accused’, they also claim that ‘inadvertence is sufficient to constitute the fault element’, which seems redundant if the objective test is actually applied only in context to the *actus reus* elements (there is no test involving

justifies criminalisation, and that it sits uncomfortably as a category of *mens rea*.⁶⁸ In the High Court of Australia, Gibbs CJ recognised the difficulty in *He Kaw Teh v R*.⁶⁹ He raised the question ‘whether negligence can amount to *mens rea*’.⁷⁰ His discussion is important in this analysis since it also considers defences to omissions offences in the context of strict liability, as that category is understood in Australian law. I recount his discussion in section 8.5.2.

8.3.2.1 ‘Negligence’ in Australian animal law

In Australian law, ‘negligence’ is also sometimes used to connote either a civil standard or criminal standard of care, or what might be described as either the civil or criminal doctrines of negligence.⁷¹ Incorrect associations between these forms of ‘negligence’ are sometimes

inadvertence). See also Penny Crofts et al, *Waller & Williams Criminal Law: Text and Cases* (LexisNexis, 13th ed, 2016) 40 (italics not in original): the authors propose that the objective test of *mens rea* involves asking ‘what would have been the supposed *mental state* of a hypothetical reasonable person’, which also seems a redundant test given that what is judged are the *actus reus* elements, and more clearly at 37 they state that: ‘[n]egligence may be defined as a failure to comply, in a given activity, with a standard of care that a reasonable person engaging in that activity would adopt’, and at 66: ‘[c]ertain limited offences use the term “negligence” to define a holding to account even where the accused lacks any positive state of mind to commit an act’. I suggest that this lack of clarity generally, is not assisted by some comments of courts. In *Podrebersek v Australian Iron & Steel Pty Ltd* [1985] HCA 34 in the High Court of Australia for example, in the joint decision of Gibbs CJ, Mason, Wilson, Brennan and Dean JJ, at [5] (highlighting not in original) the justices stated:

It was correctly submitted that the issue of contributory negligence had to be approached on the footing that the respondent had failed to discharge its obligation to take reasonable care, and that in considering whether there was contributory negligence on the part of the appellant, the circumstances and conditions in which he had to do his work had to be taken into account. The question was whether in those circumstances and under those conditions **the appellant's conduct amounted to mere inadvertence, inattention or misjudgment, or to negligence.**

With due respect, it is not the ‘conduct’ that may ‘[amount] to’ but rather that the conduct may be assumed to be **caused by** a lack of advertence, attention or good judgment, when examined through an objective test (in that a reasonable person would not have been inadvertent, inattentive or have exercised that ‘misjudgment’).

⁶⁸ See, eg, Bronitt and McSherry, above n 67, 219; but see Crofts et al, above n 67, 37: ‘[n]egligent behaviour increasingly forms an element of the *mens rea* of criminal offences in Australian common law jurisdictions’.

⁶⁹ (1985) 60 ALR 448 (*‘He Kaw Teh’*).

⁷⁰ *Ibid* 454.

⁷¹ See, eg, Crofts et al, above n x, 67: ‘notions of negligence in criminal law are often phrased as “criminal negligence” in order to distinguish the term from its use in tort’; LexisNexis, *Halsbury’s Laws of Australia* (at 28 September 2016) 130 Criminal Law, I Principles of Criminal Liability [130-95] citing Criminal Code 5.5 (Cth); *Callaghan v R* (1952) 87 CLR 115; *Nydam v R* [1977] VR 430 (among other cases): In Australian law, criminal ‘negligence’ in the context of *mens rea*:

May be defined as the wrongful failure to comply in a given activity with the standard of care that an ordinary reasonable person engaging in that activity would adopt in circumstances that the conduct merits criminal punishment.

made in Australian animal law commentary as recounted in section 8.2 of this chapter, and in arguments put to Australian courts by advocates, as I describe below.

Backhouse v Judd and Martin v Carpenter

In the Supreme Court of South Australia in 1924 in *Backhouse v Judd*,⁷² counsel for the prosecution suggested that the moral duty to care for an animal was related to the doctrine of criminal negligence in that he cited *R v Instan*.⁷³ Napier J did not advert to that definition of 'negligence' in his judgment. In the following year, in *Martin v Carpenter*,⁷⁴ when he was considering to what point in time the legal duty persisted under the cruelty offence, Napier J clarified that the provision held no relationship to civil negligence.⁷⁵

Mitchell v Marshall

In *Mitchell v Marshall*⁷⁶ which was a sentencing appeal heard in the Tasmanian Supreme Court in 2014, Blow CJ clarified that the animal welfare offences did *not* involve the doctrines of criminal or civil negligence.⁷⁷ Blow CJ recounted that Mitchell's counsel had argued that the *mens rea* elements for each of the offences were analogous to that which is required for common law manslaughter committed by negligence.⁷⁸ Counsel argued that the negligence had to be 'so wicked as to merit criminal punishment'.⁷⁹ In response to that argument, Blow CJ rejected the analogy on the bases of: the less serious nature of the charge where the maximum penalty for the breach of the duty was twelve months;⁸⁰ and that the provision makes no reference to the doctrines of either criminal or civil negligence.⁸¹ To support this second point, Blow CJ made reference to *Fehlberg v Gallahar*,⁸² also heard in the Supreme Court of Tasmania. His Honour explained that Burbury CJ had in that case held that in relation to a 'negligent driving' offence, that 'negligently' in that context only meant 'without due care' and had no reference to either 'criminal or civil concepts of negligence'.⁸³ To further support this view, Blow CJ declared that an interpretation that imported concepts of

⁷² (1924) 399 SASR 16, 19.

⁷³ [1893] 1 QB 450.

⁷⁴ [1925] SASR 421.

⁷⁵ *Ibid* 432:

I think that it would be wrong to act upon any analogy derived from civil cases. The duty we are dealing with is not the contractual duty owing to the owner as his right. It is a duty owed by the respondent to the public for the protection of the public interest, which is that unnecessary pain should not be wantonly or callously inflicted upon any animal.

⁷⁶ [2014] TASSC 43.

⁷⁷ *Ibid* [27]-[28].

⁷⁸ *Ibid* [23]-[24].

⁷⁹ *Ibid* [24].

⁸⁰ *Ibid* [27].

⁸¹ *Ibid* [27]-[28].

⁸² [1957] Tas SR 286.

⁸³ *Mitchell v Marshall* [2014] TASSC 43 [29].

negligence would limit the possibility of prosecutions to ‘the most horrendous cases’ and ‘[t]hat would not promote the purpose or object’ of the statute.⁸⁴

Jolley v Queensland Police

In 2018, Clare QC DJC in the District Court of Queensland, confirmed that the duty of care under *ACPA* s 17 was not to be interpreted as civil negligence where harm needed to be proven.⁸⁵ Her Honour also explained that:

Parliament did not intend to limit the offence to cases of injury or suffering. Firstly, the offence is styled as “breach of duty of care”. It is not called negligence. Secondly, the Act has 2 limbs: the responsible care of animals and their protection from pain. The interpretation pressed by the appellant [that harm was required] would tend to dilute the duty of care, the central mechanism established by Parliament to ensure the responsible care of animals.⁸⁶

8.4 Omissions offences and the ‘duty’ of diligence

In English and Australian law, and within law reform perspectives, it is recognised that regulatory and criminal omissions offences commonly employ an excuse or defence of due diligence.⁸⁷ In *He Kaw Teh*,⁸⁸ Gibbs CJ in the High Court of Australia, considered that the words ‘without reasonable excuse’ within a statutory offence, could open the possibility of defences, and potentially show that the offence was one of strict liability, which as described below, in Australian law, usually imports the defences of due diligence and honest and

⁸⁴ Ibid [30].

⁸⁵ *Jolley v Queensland Police* [2018] QDC 012 [16] (*‘Jolley’*).

⁸⁶ Ibid [16].

⁸⁷ In relation to animal protection statutes see section 8.4.2 below. See also Mirko Bagaric, *Ross on Crime* (Thomson Reuters, 7th ed, 2016) [14.720]: ‘[i]t may be in a public welfare offence the person charged can avoid conviction by proving no negligence’; Australian Law Reform Commission, *Principled Regulation Report: Federal Civil & Administrative Penalties in Australia*, Report No 95 (2002) (*‘Principled Regulation Report’*) [4.4]: Statutory criminal offences that are strict liability may include a defence of due diligence; *Corporations Act 2001* (Cth) s 180(1) (*‘CA’*): ‘A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise ...’; *CA* s 188(3):

A person does not contravene subsection (1) or (2) in relation to a company’s contravention of a corporate responsibility provision if the person shows that he or she took reasonable steps to ensure that the company complied with the provision.

Under the Australian model work, health and safety laws persons conducting a business or undertaking have duties not to expose individuals to risks of death or serious injury, and they ‘must exercise due diligence ...’: Model Work Health and Safety Bill s 27 available at Safe Work Australia, *Model Work Health and Safety Act* (25 May 2017) <<https://www.safeworkaustralia.gov.au/doc/model-work-health-and-safety-act>>. That duty of diligence is reflected in the various work health and safety statutes of Australian jurisdictions who have adopted the harmonised model laws. See, eg, *Work Health and Safety Act 2011* (QLD) s 27(1); *Work Health and Safety Act 2011* (NSW) s 27(1). See also Chapter 9 in relation to analysis of these statutes.

⁸⁸ (1985) 60 ALR 448.

reasonable mistake.⁸⁹ Before examining that in Australian law, I examine the duty of diligence in English law in that it connotes that offences can be made out by omission.

8.4.1 The duty of diligence in English law

In his 1960 paper which spoke more generally on negligence in English law, Professor Smith agreed with Glanville Williams' view that 'negligence is not *mens rea*'.⁹⁰ Professor Smith described 'negligence' as *liability for* 'unforeseen circumstances that ought to have been foreseen',⁹¹ as would be found on an objective test of *conduct*.⁹² Whilst insisting that crimes of negligence should not involve a test of *mens rea*, Professor Smith argued that negligence was appropriate, for punishing 'thoughtlessness and inefficiency', where the accused is 'careless' rather than 'careful', and where the 'consequences are likely to be very serious for the other members of the community'.⁹³ He also suggested that various defences or excuses including those of due diligence and mistake should be available for crimes of negligence.⁹⁴ Whilst Professor Smith wanted to limit crimes of negligence to more serious crimes, his comment in relation to a lack of care identifies a commonality between offences more easily identified as offences of 'negligence' (as that term is used in English law), and modern statutory offences that may, and perhaps less obviously, incorporate prohibitions for omissions. That common element is the *duty* of diligence as I describe below.

Statutory offences may not specifically state that an omission is a possible form of breach,⁹⁵ they may, or may not use the term 'negligence',⁹⁶ and they may not use the term 'due

⁸⁹ Ibid 453. See section 8.5.2 below. See also Bronitt and McSherry, above n 67, 233: They deny that there is a common law defence of due diligence, although they suggest that 'there may be scope for developing a defence of due diligence at common law, independent of a defence of honest and reasonable mistake'. See also n 163 below; *Leichhardt Municipal Council v Hunter* (2013) 83 NSWLR 637 [27] (Latham, Fullerton and Adamson JJ): 'There remains the question whether a defence of "due diligence" arises, that is, whether it is a defence to the charge under s 49 to have taken all reasonable steps to comply with the order.' The justices accepted that reasonable steps under that statutory provision constituted due diligence.

⁹⁰ Smith, *Guilty Mind*, above n 3, 90, 98. I use italics to highlight that he was not insinuating that there was any actual test of foreseeability of the defendant, but rather the foreseeability was relevant to the derivation of the objective test, in relation to what a reasonable person would have foreseen and therefore done (as conduct), as a result, on that objective test.

⁹¹ Ibid 80.

⁹² Ibid 90.

⁹³ Ibid 98.

⁹⁴ Ibid 96-99.

⁹⁵ As explained in Chapter 6, in *Everitt v Davies* (1878) 38 LT 360, Kelly CB found that failure to euthanase the mare was 'wanton cruelty', and in *Green v Cross* (1910) 26 LT 507, 510 Lord Alverstone argued that 'that there might be acts of omission which constituted a causing to be ill-treated'. The earlier cruelty offences did not specifically state that the offence could be made out by omission.

diligence' in the available defences or excuses.⁹⁷ The Law Commission of England and Wales noted for example, that in that jurisdiction, some defences may include the terminology such that it was necessary to undertake 'reasonable precautions' or 'reasonable steps'.⁹⁸ Under the animal protection statute of England and Wales, AWA s 9 uses the terminology 'take such steps as are reasonable'. What the statutory omissions offences and the 'negligence' offences commonly require, is a lack of due diligence, even if it is expressed in variable terminology.⁹⁹ That due diligence may either negate proof of the *actus reus* element(s), or it may be available as a defence.¹⁰⁰ It is therefore a possibility that the defendant can escape liability if they can prove on the balance of probabilities, that they did apply appropriate due diligence, judged objectively.¹⁰¹ It becomes clear that in English law, 'negligence' is used (in part), particularly in relation to statutory offences, to connote liability arising through an omission, where the defendant did not apply due diligence.¹⁰²

⁹⁶ See, eg, Law Commission, *Criminal Liability in Regulatory Contexts: A Consultation Paper*, Consultation Paper No 195 (2010) [6.29]-[6.34] ('LCEW Report'): The Law Commission mentions a number of statutory offences that prohibit particular acts without reference to negligence, yet they allow for variously expressed defences of due diligence.

⁹⁷ See, eg, *ibid* [6.27]: '... not all due diligence defences come in exactly the same form. There may be subtle linguistic differences that can, on the face of it, make some such defences appear tougher to comply with than others'.

⁹⁸ *Ibid* [6.34].

⁹⁹ That is if, in England and Wales, they are not also strict liability or absolute liability offences that disallow due diligence as a defence or excuse: see section 8.5.1 below. See also Chapter 6, section 6.3.4 where an early animal protection provision in England and Ireland, under the *Protection of Animals Act 1911* 1 & 2 Geo 5, c 2 s 1(2) required that 'reasonable care and supervision' be exercised by owners of nonhuman animals. It extended the cruelty offence to include culpability for omissions.

¹⁰⁰ See also Williams, above n 31, 262: the *actus reus* could be negated by proving due diligence; Ormerod and Laird, *Smith and Hogan*, above n 9, 200-04.

¹⁰¹ In relation to English law, see, eg, *LCEW Report*, above n 96, [6.24]:

There are a number of areas where Parliament has introduced offences that do not require proof of fault ... [i]n some instances, the statute instead provides for affirmative defences, such as all due diligence shown, which the defendant must prove on the balance of probabilities.

¹⁰² Ormerod and Laird explain that the due diligence defence has been employed in English law in regard to some statutory offences and rarely in regard to common law offences: Ormerod and Laird, *Smith and Hogan*, above n 9, 200-03, at 203 citing *Sweet v Parsley* [1969] 1 All ER 347, 351 (Reid L), at 357 (Pearce L), at 363 (Diplock L). The Law Commission stated that in English law there was no defence of diligence at common law: *LCEW Report*, above n 96, [1.76]. See also Salmond, above n 33, 410-11: For Salmond, negligence was justifiably a form of culpable *mens rea* since it would serve to deter undesirable behaviours and demand the taking of due care. From a historical perspective, see also John Austin, 'Lecture XXI' in Robert Campbell (ed), *Lectures on Jurisprudence or the Philosophy of Positive Law by the late John Austin Volume 1* (John Murray, 5th ed, 1885) 425-34, 432: Austin highlighted the Roman connection between negligence and a duty of due diligence in that *negligentia* was opposed to *diligentia*, in that a party that had an obligation was obliged to employ care in relation to the interests of another. At the same time, *neglentia* could encompass intention, usually where there was a breach of the *obligatio*, and *diligentia* was applicable to all forms of *negligentia*.

8.4.2 The duty of diligence in Australian animal law

What the *defence* or excuse of due diligence logically implies in any offence, is that there is a related *duty* of due diligence. Of course, to say that it is 'due' implies the duty. As such, where a breach of the law can be found on the basis of an omission, or other mode of offending, the duty to act, is highlighted by way of availability of the defence or excuse of diligence even if the offence itself (or related provisions) does not specifically create an obvious duty, or may not mention 'negligence' or 'due diligence'. That seems to be the case in Australian animal law at least, particularly in jurisdictions that have not implemented a Criminal Code where the duty is likely to be made plain.¹⁰³ I examine three relevant cases below.

8.4.2.1 Backhouse v Judd

In *Backhouse v Judd*¹⁰⁴ in the Supreme Court of South Australia, the offence did include the terminology 'negligently failing to supply',¹⁰⁵ but it was directed to '[a]ny person'.¹⁰⁶ In the statute there was no mention of any duty and there was no mention of due diligence. Yet Napier J found that:

If, using due diligence, the appellant might reasonably believe, and did believe, that he had ensured that the horses would be fed and watered by Jaffrey, I see no reason why he should be held liable to this penalty.¹⁰⁷

Napier J's logic reasoned a duty of diligence arising as a result of the penalty. He also had to determine who was the duty bearer in this case. As a justification, he reconstructed a less-than-absolute moral duty to care for nonhuman animals, to find the owner liable in this case.

In *Backhouse v Judd*¹⁰⁸ Napier J explained that: '[i]n default of any duty otherwise expressed or defined in the Act itself ... this imposition of *penalty* must be understood to create the

¹⁰³ It is now made plain in the Code jurisdictions of Queensland, Western Australia, Northern Territory, Australian Capital Territory and Tasmania: see, eg, *Animal Welfare Act 1993* (Tas) s 6 where the duty to 'take all reasonable measures to ensure the welfare of the animal' applies to the cruelty offence under s 8; *ACPA* s 17. Further examples outside of animal law include *Criminal Code* (Qld) s 289 and *Criminal Code Act 1913* (WA) Sch 'The Criminal Code' s 266 that use the same articulation of the 'duty of persons in charge of dangerous things', in which it states 'in the absence of care and precaution in its use or management ... to use reasonable care to take reasonable precautions ...'. See also section 8.4.3 below.

¹⁰⁴ (1924) 399 SASR 16.

¹⁰⁵ *Prevention of Cruelty to Animals Act 1908* (SA) s 4(1)(b).

¹⁰⁶ *Ibid* s 4(1). In contemporary animal protection statutes generally, this problem no longer arises since the person to whom the provisions apply is expressed as including an owner or a person in charge of animal (in various terminology), which works as an operative fact (in Hohfeldian terms), which gives rise to duties as applicable to that particular person in particular circumstances.

¹⁰⁷ *Backhouse v Judd* (1924) 399 SASR 16, 22.

duty'.¹⁰⁹ Further, he described that a breach of the statutory duty gave rise to a 'public right'.¹¹⁰ Whilst the penalty appeared to be sufficient to confirm the *existence* of the duty, Napier J suggested it was underpinned by a *moral* duty 'already accepted as social duties'.¹¹¹ That moral duty, which he also described as a 'public duty', was 'incidental to ownership' of a nonhuman animal.¹¹² It seems that this step of articulating the moral duty was required, since the statute, that did not enunciate any duty, did not clarify the scope and limits of the duty, particularly, that is, by *whom* the duty was owed, in this particular circumstance.¹¹³ The duty, that he reasoned arose not only through the penalty, but *also* through ownership, resolved the question of scope since:

the proper view of the section is that the owner of the animal is the person who is primarily charged with the duty to supplying it with proper and sufficient food and water.¹¹⁴

It appears that because Napier J could not rely merely on the statute to determine *who* was responsible in this case, he had to resort to *justifying* the imposition of the duty, with reference to an assumed, socially accepted, moral duty. He found the duty was concomitant with ownership, but only if it had not been otherwise discharged.¹¹⁵ Additionally, he explained that the moral duty could be ameliorated by circumstances which would also be judged as acceptable, or not, in relation to community views.¹¹⁶ In this, he was merely reflecting what the cruelty provision already enforced (in that cruelty was only determined in relation to the utility of the animal to the defendant), rather than insisting that the so-called moral duty was absolute. An example he offered, was that it might be accepted by the community, that stock may be kept during a drought where a:

pastoralist ... may be under a real inability to supply his stock with food or water, and at the same time under a real inability to get rid of them. An extreme case of moral duty might require the whole enterprise to be abandoned, without respect to consequences; but it is quite clear that this view is not generally held in this community.¹¹⁷

¹⁰⁸ (1924) 399 SASR 16.

¹⁰⁹ Ibid 20 (*italics* not in original).

¹¹⁰ Ibid 21.

¹¹¹ Ibid 20.

¹¹² Ibid 21.

¹¹³ Ibid 20. In this particular case, where a third party agistor was involved, Napier J had to determine if the appellant's obligations under the duty had been discharged as a result of the contract between the agistor and the appellant. His Honour found that it had not.

¹¹⁴ Ibid 21.

¹¹⁵ Ibid 22.

¹¹⁶ Ibid 21-22.

¹¹⁷ Ibid 22.

By this, Napier J differentiated between an absolute 'moral duty' and one that is ameliorated by what the community believes. In this particular case, Napier J insisted that the appellant could not be excused just because feed was scarce for his horses at agistment, and that fact did not negate his duty 'to ensure they would be fed and watered by someone else'.¹¹⁸ Yet, he also explained that in a more rural context, and he used the example of a sheep station, that '[i]f the expense is greater than the owner is prepared to incur, the animal can be disposed of, or, as a last resort, destroyed'.¹¹⁹ As such, in those types of circumstances, human economic interests would trump the 'moral' or legal duty to individual animals. He was articulating that what constitutes 'due diligence' as an excuse, would depend on the circumstances of the case.

8.4.2.2 RSPCA v Harrison

In the 1999 South Australian Supreme Court case, *RSPCA v Harrison*,¹²⁰ Martin J considered a case of neglect under the *Prevention of Cruelty to Animals Act 1985* (SA) s 13. That statute does not use the term 'due diligence', rather, under s 13(2), a person 'ill treats an animal if that person - ... (ii) fails to take reasonable steps ...' In this particular case, Gypsy the dog suffered pain in the form of suffering and distress as a result of being left with a fly larval infection.¹²¹ Even though it was not necessary to prove the defendant's knowledge of the situation,¹²² the question of knowledge was argued in the trial.¹²³ Martin J found that '[n]otwithstanding that knowledge, the defendant failed to examine the dog or to seek appropriate assistance,¹²⁴ and that 'the respondent failed to take reasonable steps to alleviate the pain suffered ...'¹²⁵ In that statute, no test of *mens rea* was required in cases of neglect, and 'reasonable steps' indicated that an excuse of due diligence was available.

8.4.2.3 Jolley v Queensland Police

As it was reported in the appeal, Darren Lee Jolley had been convicted in the Local Court, of a breach of *ACPA* s 17(3)(b), in relation to handling of the puppy whom he had trained to participate in various sexual acts.¹²⁶ On appeal in the District Court, Jolley argued that there was no evidence of harm to the puppy. Clare SC DCJ rejected the argument and in doing so

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ [1999] SASC 363.

¹²¹ Ibid [35].

¹²² Under *Prevention of Cruelty to Animals Act 1985* (SA) s 13(2)(a), the provision covers deliberate causing of pain or, at s 13(2)(ii), 'failure to take reasonable steps ...'

¹²³ See, eg, *RSPCA v Harrison* [1999] SASC 363 [20]-[22].

¹²⁴ Ibid [31].

¹²⁵ Ibid [35].

¹²⁶ *Jolley* [2018] QDC 012 [1] (Clare SC DCJ).

also clarified that the duty of care does not involve negligence and that there *is* a ‘duty to take reasonable steps’:

[Section] 17 sets out the duty of care owed by a person in charge of an animal. It is a duty to take reasonable steps to appropriately provide for the animal’s needs and to ensure appropriate handling of the animal. A failure to take reasonable steps is made an offence ... Firstly, the offence is styled as “breach of duty of care”. It is not called negligence.¹²⁷

Her Honour made reference to community standards in determining the breach and stated that:

this dog was handled in a way that would be repugnant to the vast majority of our community. The appellant’s actions and omissions violated a strong and long standing taboo.¹²⁸

... [Jolley] was properly convicted of the offence, not because his conduct was immoral but because he failed to “*take reasonable steps to ... ensure*” his handling of the dog was “*appropriate*” within the meaning of s 17 (3)(b) of the Act.¹²⁹

Clare SC DCJ, as such, confirmed the duty of diligence, since there was a clearly defined duty to take reasonable steps.

8.4.3 Duties in Criminal Code jurisdictions

There are also further considerations regarding duties as they are created, and assumed to be needed to be created, in Criminal Code jurisdictions. Schloenhardt, citing *DPP (Cth) v Poniatowska*,¹³⁰ claims that ‘[w]ithout a special duty to act, there can be no liability for an omission’.¹³¹ However, he accepts that there are a small number of omissions offences that do not rely on a specific duty.¹³² He explains that for Queensland, as a Criminal Code jurisdiction, the duties ‘by and large’ mirror the common law duties.¹³³ Finlay and Kirchengast also highlight that in Australian law, where: ‘the law imposes a duty to act, the accused may be criminally responsible for failing to act *reasonably* in accordance with that

¹²⁷ Ibid [16].

¹²⁸ Ibid [28].

¹²⁹ Ibid [29].

¹³⁰ (2011) 244 CLR 408, 421 (French CJ, Gummow, Kiefel and Bell JJ).

¹³¹ Schloenhardt, above n 35, 68.

¹³² Ibid. He mentions the offence of failing to lodge a tax return. According to Napier J’s logic, the duty arises because of the penalty: see above n 109 and accompanying text. I also note that the tax return offence, under the *Taxation Administration Act 1953* (Cth) s 286-75(1A) includes excuses if particular (what seems like reasonable) steps had been undertaken.

¹³³ Schloenhardt, above n 35, 68-69: Some of the categories of duties that Schloenhardt lists includes those related to human relationships, contractual or assumed responsibility duties, and duties arising from control or ownership of a thing that may give rise to a dangerous situation. He does not mention duties of care or diligence arising from ownership as it may apply in the case of ownership or responsibilities arising otherwise in regard to nonhuman animals.

duty'.¹³⁴ They also explain that in Criminal Code jurisdictions, 'an accused will generally *only* be liable for an omission to act where the Code imposes special duties to act and establishes liability for failure to observe these duties'.¹³⁵ This may help explain why, Tasmania, Queensland, Northern Territory and ACT as Criminal Code jurisdictions, have been the first to implement the animal focussed duties of care in order to confirm that the offence can be made out through omission. The duty under *ACPA* s 17(1) is only breached through the means stipulated under s 17(3), that is, through the failure to 'take reasonable steps' to meet the stipulated minimum standards of care. As such, it both creates a *duty* of diligence and includes a due diligence defence or excuse.

8.5 Strict liability in English and Australian law

8.5.1 Strict liability in English law

In English law there is no settled definition of strict liability.¹³⁶ According to Ormerod and Laird, strict liability offences are those that 'do not require *mens rea* or even negligence as to one or more elements in the *actus reus*'.¹³⁷ This interpretation is in concert with Professor Smith's view. He argued that it should not be thought: that negligence is the same thing as strict liability merely because both do not require *mens rea*, or; that there is no form of liability between *mens rea* and strict or absolute liability.¹³⁸ That is because 'negligence', in English law, as described by Ormerod and Laird,¹³⁹ Professor Smith¹⁴⁰ and Glanville Williams,¹⁴¹ includes the defence or excuse of due diligence and the defence of mistake.¹⁴² Ormerod and Laird suggest that in English law, a strict liability offence is one where the

¹³⁴ Finlay and Kirchengast, above n 67, 13 (italics not in original).

¹³⁵ Ibid (italics not in original).

¹³⁶ Ormerod and Laird, *Smith and Hogan*, above n 9, 174.

¹³⁷ Ibid 171.

¹³⁸ Smith, *Seaboard*, above n 3, 612. In that commentary he was also concerned that without recognition of the difference between negligence that allows for the taking of reasonable steps to avoid liability, and strict liability, then vicarious liability would be imposed on employers even where they had taken reasonable steps (that is, where they were not negligent).

¹³⁹ Ormerod and Laird, *Smith and Hogan*, above n 9, 200-04.

¹⁴⁰ Smith, *Guilty Mind*, above n 3, 96-99: various defences or excuses including those of due diligence and mistake should be available for crimes of negligence.

¹⁴¹ See, eg, Williams, above n 31, 116-21, 262-63: he describes various statutory offences that permit an excuse or defence of due diligence and, or, mistake.

¹⁴² See, eg, Ormerod and Laird, *Smith and Hogan*, above n 9, 167, 201-03: on reading their descriptions, it appears that a defence of mistake may be subsumed into the defence or excuse of due diligence, at 202:

The statutory due diligence defences usually impose on D a burden of proving both that he had no *mens rea* and that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence. The effect of such provisions is that the prosecution need do no more than prove that the accused did the prohibited act and it is then for him to establish, if he can, that he did it innocently.

prosecution does not have to prove *mens rea* for at least one *actus reus* element, and usually one that is significant.¹⁴³ In contrast with Australian law of strict liability, in English law, a defence of reasonable mistake, or another defence, may also be available for a particular fact element(s) or 'circumstances of the *actus reus*', but *not* for those fact(s) where strict liability is imposed.¹⁴⁴ In English law, strict liability offences do not preclude the possibility of other defences (such as automatism or lack of capacity).¹⁴⁵ Additionally, the prosecution *must not* tender evidence as to the defendant's state of mind as it is irrelevant and deemed prejudicial to the defendant.¹⁴⁶

Relevant to law reform controversies that have persisted, Glanville Williams objected to the increasing number of crimes, in his time, that excluded tests of *mens rea*.¹⁴⁷ His compromise was 'a half-way house between *mens rea* and strict responsibility', which was, 'responsibility for negligence',¹⁴⁸ (which included the defences of due diligence and mistake of fact). Today, Ormerod and Laird also build the argument that with the contemporary growth of regulatory offences in English law that cover such a wide variety of conduct, in some cases it would be inappropriate for those offences to be treated as strict liability offences¹⁴⁹ (which in English law do not provide for the defences of due diligence and mistake of fact). They explain that offences that seek to encourage or enforce standards of conduct, that is those that may be described as negligence offences, should not exclude a defence that the accused had 'taken all reasonable precautions',¹⁵⁰ as they articulate it in one example. The authors are attempting to offer some clarity as to the definitions, to ensure that offences of negligence are excluded from the definition of strict liability given the risk that they could be interpreted as *excluding* defences of due diligence and mistake, even where it may be impossible or unreasonable for the accused to ascertain the true state of affairs in order to avoid breach.¹⁵¹

¹⁴³ Ormerod and Laird, *Smith and Hogan*, above n 9, 173-74, 195-96, at 174: It may still be necessary to prove that the defendant had *mens rea*, for example, intention, in regard to one or more elements of the conduct or circumstances but not another significant element.

¹⁴⁴ Ormerod and Laird, *Smith and Hogan*, above n 9, 196.

¹⁴⁵ *Ibid*; Williams, above n 31, 236: some strict liability regulatory offences may provide a specific 'excuse', at 215: other defences such as 'infancy and duress' would be available.

¹⁴⁶ Ormerod and Laird, *Smith and Hogan*, above n 9, 173.

¹⁴⁷ Williams, above n 31, 252-65.

¹⁴⁸ *Ibid* 262.

¹⁴⁹ Ormerod and Laird, *Smith and Hogan*, above n 9, 196-97.

¹⁵⁰ *Ibid* 197.

¹⁵¹ *Ibid* 172-73, at 199:

The case against strict liability then is, first, that it is unnecessary. It results in the conviction of persons who have behaved impeccably and who should not be required to alter their conduct in any way. Secondly, that it is unjust.

8.5.2 Strict liability in Australian law enforcing a duty of diligence

In *He Kaw Teh v R*,¹⁵² in the High Court of Australia, Gibbs CJ and Brennan J needed to decide if omissions offences could be strict liability in Australian law. That is where there is no test of *mens rea*, and the offence could be proven only through the *actus reus* elements. To start his analysis, Gibbs CJ explained that the determination of an offence as strict liability must also take into account whether “strict liability will assist in the enforcement of the regulations”.¹⁵³ He recalled that in *Lim Chin Aik v R*,¹⁵⁴ the Privy Council in applying Singaporean law, declared that the imposition of strict liability indicates that the accused *could* do something ‘directly or indirectly ... which will promote the observance of the regulations’.¹⁵⁵ Gibbs CJ suggested that if that was the case, then it indicated that the Parliament *had* intended to punish careless conduct.¹⁵⁶ It does seem logical that any offence that punishes ‘negligent’ or careless conduct must be one where there is a presumption that an accused *can* take action to avoid that negligent or careless conduct and thereby avoid breaching the provision. Brennan J also referred to Lord Scarman’s judgment, also in the Privy Council, in *Gammon Ltd v A-G of Hong Kong*¹⁵⁷ where it was stated that:

the presumption of *mens rea* stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging **greater vigilance** to prevent the commission of the prohibited act.¹⁵⁸

Brennan J elaborated that in regard to offences where *mens rea* is excluded:

[i]t requires clear language before it can be said that a statute provides for a person to do or to abstain from doing something at his peril and to make him criminally liable if his conduct turns out to be prohibited because of circumstances that that person did not know or because of results that he could not foresee. However grave the mischief at which a statute is aimed may be, the presumption is that the statute does not impose criminal liability without *mens rea* **unless** the purpose of the statute is not merely to deter a person from engaging in prohibited conduct **but to compel him to take preventive measures** to avoid the possibility that, without deliberate conduct on his part, the external elements of the offence might occur. A statute is not so **construed unless effective precautions can be taken** to avoid the possibility of the occurrence of the external elements of the offence.¹⁵⁹

¹⁵² (1985) 60 ALR 448.

¹⁵³ Ibid 453 quoting *Lim Chin Aik v R* [1963] AC 160, 174.

¹⁵⁴ [1963] AC 160.

¹⁵⁵ Ibid 174 quoted in *He Kaw Teh* (1985) 60 ALR 448, 453 (Gibbs CJ).

¹⁵⁶ *He Kaw Teh* (1985) 60 ALR 448, 453.

¹⁵⁷ [1985] 1 AC 1.

¹⁵⁸ Ibid 14 quoted in *He Kaw Teh* (1985) 60 ALR 448, 480 (highlighting not in original).

¹⁵⁹ *He Kaw Teh* (1985) 60 ALR 448, 481 (highlighting not in original).

It appears clear that both Gibbs CJ and Brennan J articulated that strict and absolute liability offences in Australian law may include a purpose of effectively implementing what I describe as a duty of diligence, to avoid offending through omission, and to take precautions to avoid mistaken beliefs. Any offence (of absolute liability, strict liability, or with any test of *mens rea*) that prohibits neglectful conduct, logically, must connote that a person has a duty to take avoiding action, that is, to apply appropriate due diligence. That must be the case whether it states there is a 'duty' of care, or not. As indicated by the justices, in *He Kaw Teh v R*,¹⁶⁰ it is a matter of justice, that for strict liability offences, that the defences of due diligence and honest and reasonable mistake are made available. It is fair that the defendant could prove that they *did* undertake appropriate due diligence or were reasonably mistaken as to the relevant facts. For absolute liability offences, the consequences are perhaps so grave that it is assumed in law, that it is not unjust to disallow those defences.

8.5.3 Deciphering the 'middle' courses

Another potential source of confusion around definitions of strict liability across jurisdictions may be the oft-quoted references to 'middle' courses relevant to what are suggested as necessary defences. As described above, in *He Kaw Teh v R*,¹⁶¹ Gibbs CJ differentiated strict liability offences from absolute liability offences through the availability of the defence of honest and reasonable mistake:

A middle course, between imposing absolute liability and requiring proof of guilty knowledge or intention, is to hold that an accused will not be guilty if he acted under an honest and reasonable mistake as to the existence of facts, which, if true, would have made his act innocent.¹⁶²

Here, the 'middle course', in Australian law, describes strict liability offences where the defence of honest and reasonable mistake, *incorporating* the defence of due diligence, is *usually* made available.¹⁶³ The defence of due diligence may also be available separately in

¹⁶⁰ (1985) 60 ALR 448.

¹⁶¹ (1985) 60 ALR 448 ('*He Kaw Teh*').

¹⁶² *Ibid* 455.

¹⁶³ Mistake of fact (the defence of honest and reasonable mistake) does not *always* involve any test of a lack of due diligence: Paul A Fairall and Malcolm Barrett, *Criminal Defences in Australia* (LexisNexis Butterworths, 5th ed, 2017) 73. See also Bronitt and McSherry, above n 67, 233: They deny that there is a common law defence of due diligence, although they suggest that 'there may be scope for developing a defence of due diligence at common law, independent of a defence of honest and reasonable mistake' and they cite *Australian Iron and Steel Pty Ltd v Environment Protection Authority* (1992) 29 NSWLR 497, 498-99. In that case, it was held that a defence of due diligence was not available in regard to the strict liability offence, in the State of New South Wales, under the specific statute in question, and that a defence of due diligence is not an extension of the defence of honest and reasonable mistake (that was available in that case), and that a defence of due diligence

statutory offences as described above. Fairall and Barrett claim that the defence of due diligence may rarely be recognised as available separately if it is *not* clearly expressed as available in the statute.¹⁶⁴ As I suggested above, if the statute allows for ‘reasonable steps’ or other similar excuses, then **it seems that there would be little to separate those excuses from a defence of due diligence.** Additionally, in summary, the possibility of employing due diligence to ameliorate the harshness of strict liability, and other omissions offences (which are not absolute liability), is recognised internationally as a feature of Australian law.¹⁶⁵

As described above,¹⁶⁶ in English law, Glanville Williams used the term ‘halfway house’ to describe ‘negligence’ as those offences that *do* permit the defences or excuses of due diligence and mistake.¹⁶⁷ Ormerod and Laird complain that in English law, ‘[t]he judges have generally proceeded on the basis that there is no such “middle way”: where the presumption of *mens rea* is rebutted[,] liability is strict’.¹⁶⁸ That is, as I described above, in English law

would ordinarily be available as an *express* statutory provision: at 504 (Abadee J with whom Carruthers and Badgery-Parker JJ agreed). See also Crofts et al, above n 67, [13.23]: The authors explain that in that same case, ‘[t]he Court of Criminal Appeal was concerned that if a defence of due diligence was introduced into strict liability offences, the burden would be on the prosecution to prove a lack of due diligence, and often only the defendant would have all the information about diligence’ and that ‘if the parliament wished to create a defence of due diligence, it could do so expressly in the legislation and the burden of proof would usually be placed on the defendant’. Crofts et al also mentioned *Leichhardt Municipal Council v Hunter* (2013) 83 NSWLR 637 as another example of where they claim that the defence of due diligence in the context of a strict liability offence was **rejected** by the Court. That summary of the case is not correct. In that case, at [27] (Latham, Fullerton and Adamson JJ): The Court of Criminal Appeal of New South Wales did confirm that the defence **was** available, as it interpreted the relevant statutory provision:

It follows that the owner relevantly complies with the order if he/she ensures that the dog is under the control of a competent person and he/she takes all reasonable steps to communicate with and direct such a person with respect to the terms of the order. Whether the relevant third party is a competent person and whether the steps taken by an owner to communicate the terms of the order are sufficiently comprehensive and reasonable in all the circumstances are matters of fact in each case.

But see *Allen v United Carpet Mills Pty Ltd* [1989] VR 232, 237 (Nathan J) in the Supreme Court of Victoria: ‘I consider that a defence of taking all reasonable care and diligence is within the scope of the concept of honest and reasonable mistake and should be available to offences carrying strict liability’; *Mounsey v Lafayette* [2002] VSC 342 [50] (Nettle J): ‘the defence of honest and reasonable mistake has also been said in some of the authorities to embrace a defence of due diligence ... such a defence is in some sense sometimes available’. Bronitt and McSherry, above n 67, 233: The authors also recognise that ‘statutory provisions may recognise such a defence’.

¹⁶⁴ Fairall and Barrett, above n 163, 73.

¹⁶⁵ Ormerod and Laird, *Smith and Hogan*, above n 9, 202: ‘The lead first came from Australia’; Williams, above n 31, 263: ‘The High Court of Australia has utilised the concept of negligence more frequently’, and here he is using the term ‘negligence’ in his English definition of it as providing the defences or excuses of due diligence and mistake. See also below n 169 and accompanying text in relation to the recognition in Canadian law.

¹⁶⁶ See above n 149 and accompanying text.

¹⁶⁷ Williams, above n 31, 262.

¹⁶⁸ Ormerod and Laird, *Smith and Hogan*, above n 9, 199.

‘strict liability’ connotes that the defences of mistake and due diligence are *not* permitted for critical *actus reus* elements.

In Canadian law, in *R v Sault Ste Marie*,¹⁶⁹ Dickson J suggested that a ‘middle position’ was taken in ‘Australia, many Canadian courts, and indeed in England’ where, that for ‘public welfare offences’, that do not require ‘full *mens rea*’, it was ‘a good defence for the defendant to prove that he was not negligent’.¹⁷⁰ In reading that portion of the text, it is important to recognise that whilst what was stated was correct of course, it should not be interpreted that the so-called ‘middle position[s]’ across the jurisdictions *is* ‘strict liability’, since that category is employed differently across the jurisdictions. What that statement and this analysis clarifies, is that a defence of due diligence is available for ‘negligence’ but *not* ‘strict liability’ or absolute liability offences in English law, and that it *is* available for omissions offences, *including* ‘strict liability’ offences in Australian and Canadian law, but not for absolute liability offences.

As another point of interest, in Canadian law, the defence of due diligence may be recognised as something *separate* to the defence of mistake of fact. Gibbs CJ quoted Dickson J in relation to Canadian law, in *He Kaw The v R*:¹⁷¹

there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused **to avoid liability by proving that he took all reasonable care**. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, **or**, if he **took all reasonable steps to avoid the particular event**. These offences may properly be called offences of strict liability.¹⁷²

8.6 Impacts of the classifications

8.6.1 Characterisation of strict liability ‘public welfare’ offences as not truly ‘criminal’

The issue of whether an offence may be characterised as truly ‘criminal’, usually arises when deciding whether a particular statutory provision is one of strict liability, where the

¹⁶⁹ [1978] 2 SCR 1299 SCC 1312-13 (Dickson J): in that Canadian Supreme Court, Australian law was referenced to explain that a defence of due diligence was an ameliorating factor against the harshness of strict or absolute liability offences.

¹⁷⁰ Ibid 1313.

¹⁷¹ (1985) 60 ALR 448.

¹⁷² Ibid 456 (Gibbs CJ) quoting *R v Sault Ste Marie* [1978] 2 SCR 1299, 1325-26 (Dickson J) (highlighting not in original).

presumption of *mens rea* is displaced.¹⁷³ In *Sherras v De Rutzen*,¹⁷⁴ the Queen's Bench decided that public interest offences, that are used to regulate behaviour, were *not* considered 'criminal in any real sense'.¹⁷⁵ That seems somewhat of a circular and dogmatic logic, in that criminality, as such, is not found or assumed, where the *basis* of criminality, that is, the finding of *mens rea*, is not necessary. Glanville Williams complained that the distinguishing of 'public welfare offences' or 'regulatory offences' as 'not criminal in any real sense' and 'quasi-criminal', was 'objectionable because except in the absence of the requirement of *mens rea* there is no legal distinction between them and traditional crimes'.¹⁷⁶ He suggested that '[a]ll crimes are, in a sense, public welfare offences'.¹⁷⁷ Ormerod and Laird also clarify that distinguishing between 'real' or 'quasi' crimes is unhelpful.¹⁷⁸ They recall that the Law Commission rejected a categorisation of strict liability 'administrative' offences as merely 'violations'.¹⁷⁹ They recount that in England, Parliament does not make distinctions between 'true' and 'real' crimes and 'quasi-crimes'.¹⁸⁰ However, they do make the statement that:

[i]f Parliament prohibits the causing of results because it deems them in some measure harmful, the intentional causing of the harm in question probably deserves some measure of moral condemnation.¹⁸¹

The above highlights the direct connection between what is perceived as criminal or morally wrong, and the 'harm' that results. Ormerod and Laird also suggest, that for strict liability offences where the degree of mental fault is not adjudicated:

a conviction fixes the offender with whatever stigma might attach to the offence and that is the same stigma as would attach to an intentional offender convicted of that offence.¹⁸²

Despite the above, it may be that offences that are perceived as merely 'regulatory', are perceived differently to 'criminal' offences.¹⁸³ This connection between a perceived lesser

¹⁷³ See, eg, Bronitt and McSherry, above n 67, 226.

¹⁷⁴ [1895] 1 QB 918.

¹⁷⁵ Ibid 922 quoted in Bronitt and McSherry, above n 67, 226.

¹⁷⁶ Williams, above n 31, 234 n 1.

¹⁷⁷ Ibid 235.

¹⁷⁸ Ormerod and Laird, *Smith and Hogan*, above n 9, 188.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ By definition in law at least, regulatory crimes are not 'serious' crimes and that is reflected in the penalties which also has an impact on how regulatory crimes are perceived. See also section 8.7 below. See, eg, Crofts et al, above n 67, [13.3]: Statutory strict liability offences do not have any requirement to prove *mens rea*, are usually statutory offences and offences that are 'less serious'.

degree of harm and regulatory offences is relevant to animal protection offences as I elaborate in subsequent sections of this chapter.

8.6.2 Residual problems of lack of proof of *mens rea*: sentencing

As recounted by Ormerod and Laird, another problem in English law, in not isolating offences of negligence from strict liability offences, is that evidence of *mens rea* would not be admissible at trial and therefore sentencing would not be able to take into account differences in culpability between intentional breaches, merely negligent breaches, and cases where it may have been highly impractical or impossible to ascertain the true state of affairs.¹⁸⁴ Whilst the authors appear more concerned with injustice to a defendant, they do state that a '[s]entence cannot properly be imposed without deciding into which category the convicted person falls.'¹⁸⁵ This is an important issue, in animal protection law cases at least, where sentencing for strict liability offences needs to take into account culpability regardless of whether it was determined at the adjudication stage. This issue is taken up in the context of Australian law in Chapters 9 and 10.

8.7 Law reform commissions' perspectives on criminal versus regulatory offences

8.7.1 England and Wales

A window into contemporary thought behind law reform and the practical pressures that shape development of laws is provided by the 2010 *Criminal Liability in Regulatory Contexts* Consultation Paper of The Law Commission of England and Wales.¹⁸⁶ It is useful for this analysis because it contextualises in that jurisdiction, the distinguishing between what are deemed criminal offences and regulatory offences.

Importantly, the report makes general statements as to what the Commission believes justifies *criminal* punishment. What is further revealed in the report, I believe, is that the principles in justification of crimes and punishment point toward deep structural inadequacies in the law that make it difficult, if not impossible to recognise nonhuman animal interests. These problems are elaborated in the remaining chapters of this research. I tackle my review of the report with regard to five issues. They are in relation to: the principles stemming from Hart's 'harm principle' as a pillar of the social contract; the perception that crimes are

¹⁸⁴ Ormerod and Laird, *Smith and Hogan*, above n 9, 198, at 173: the prosecution must not tender evidence as to the defendant's state of mind as it is irrelevant and deemed prejudicial to the defendant.

¹⁸⁵ *Ibid.*

¹⁸⁶ *LCEW Report*, above n 96.

constituted by moral wrongdoing as something which involves harm to human animals only; that the report intimates that the *AWA* offences may be constituted by something less than ‘negligence’; that there is trend toward defining other forms of offending as something less than truly criminal; and that regulatory offences are developed to address practical issues that reflect pressures on the functioning of the system of criminal law.

I provide a similar review of an Australian law reform report in the following subsection. Both of these law reform reports are useful in then taking on the analyses of Lacey and of Ashworth that further assist to contextualise how the duty of care and cruelty laws may be situated within the overall Australian criminal law regimes.

8.7.1.1 The ‘harm principle’ reinstituted as a pillar of the social contract

According to the *LCEW Report*, justification for criminal sanction is limited by the ‘harm principle’¹⁸⁷ and then further diluted by economic or social utility.¹⁸⁸ The Commission also suggested that there must be ‘moral wrongdoing’.¹⁸⁹ It also confirmed that unacceptable risk-taking was also a target of criminal law.¹⁹⁰ The Commission explained that the taking of unjustified risks, through application of less than due care and attention, can also justify the making of such acts criminal, even when the risk of harm is lower, and where that risk is only *possible*.¹⁹¹ The Commission also stated that the ‘harm principle’ should also ‘apply with full force to the creation of civil penalties’.¹⁹²

The Commission suggested that negligence, as a lower degree of fault (than intention for example), should only be employed in marking out crimes as ‘genuinely criminal’ when ‘*great harm is involved*’.¹⁹³ It appears the requirement for grossness is linked to the extent of the moral wrongdoing.¹⁹⁴ In a somewhat circular logic, it was stated that negligence *should be*

¹⁸⁷ Ibid [4.19].

¹⁸⁸ Ibid [4.24]:

even if conduct causes harm, or a risk of harm, that will not normally in itself provide a sufficient reason for any kind of prohibition, if there is social or economic utility in permitting people to cause the harm or take the risk that it will occur.

¹⁸⁹ Ibid [4.25], [4.33]-[4.36], [4.8]. See also the relevant provisional proposals at [1.28]-[1.29]:

Proposal 1: The criminal law should only be employed to deal with wrongdoers who deserve the stigma associated with criminal conviction because they have engaged in seriously reprehensible conduct. It should not be used as the primary means of promoting regulatory objectives.

Proposal 2: Harm done or risked should be regarded as serious enough to warrant criminalisation only if, (a) in some circumstances (not just extreme circumstances), an individual could justifiably be sent to prison for a first offence, or (b) an unlimited fine is necessary to address the seriousness of the wrongdoing in issue, and its consequences.

¹⁹⁰ Ibid [4.33]-[4.36].

¹⁹¹ Ibid [4.59].

¹⁹² Ibid [4.19].

¹⁹³ Ibid [4.58] (*italics not in original*). See also *ibid* [4.59].

¹⁹⁴ Ibid [4.57]-[4.58].

employed as a fault element, but *only where* it '[does] enough to mark the *conduct* in question out as criminal wrongdoing [depending] on the nature of the harm or risk of harm at issue'.¹⁹⁵ The Commission was clarifying that 'great' harm is what constitutes *criminal* and *gross negligence* 'as a species of fault'. That was contrasted to lower level crimes where a person does not apply due care and attention that may result in harm or unacceptable risk.¹⁹⁶ These types of offences, where there was less than the necessary 'moral shortcoming',¹⁹⁷ and where the risk was 'too remote from posing a direct risk of harm, and even more remote from causing harm itself',¹⁹⁸ were set up as a possibility of something other than genuinely criminal, that is, offences that could be dealt with through 'civil penalty or equivalent non-criminal form of action'.¹⁹⁹ The civil penalties in the context of the consultation paper were 'those penalties, orders and remedies that can be applied to someone without that application necessarily having to be decided through a hearing in a criminal court'.²⁰⁰

8.7.1.2 Recognising the possibility of a hierarchy of offences to reflect culpability

The Commission supported the making of a distinction between 'regulatory non-compliance', and the use of the criminal law for 'the most serious cases of non-compliance with the law'.²⁰¹ The Government's commitment to the employment of civil, rather than criminal penalties for 'less serious kinds of wrongdoing' was acknowledged.²⁰² As such, a 'hierarchy of offences' was highlighted in that civil penalties, through regulations that *excluded* 'stigmatising [a] fault element', could be 'underpinned by a more serious [criminal] offence involving dishonesty, intention, knowledge or recklessness', *only where* it was deemed 'really necessary for adequate retribution and deterrence, with a sentence of imprisonment'.²⁰³

8.7.2 Australia

The only law reform report in Australia that seems to address similar issues to the *LCEW Report*, that I could locate, was the Australian Law Reform Commission's *Principled*

¹⁹⁵ Ibid [4.58] (italics not in original).

¹⁹⁶ Ibid [4.58].

¹⁹⁷ Ibid [4.59].

¹⁹⁸ Ibid [4.60].

¹⁹⁹ Ibid.

²⁰⁰ Ibid [3.51].

²⁰¹ Ibid [1.5].

²⁰² Ibid [1.15]. See also [1.35]-[1.36]: the *Regulatory Enforcement and Sanctions Act 2008* (UK) c 13, empowered regulatory authorities to propose non-criminal sanctions including fines as either a 'low-level criminal offence' or as a civil sanction, and 'stop notices' can also be imposed.

²⁰³ *LCEW Report*, above n 96, [3.10].

*Regulation Report*²⁰⁴ of 2002. Whilst it of course only applied to Commonwealth laws and not specifically any law to do with regulations about nonhuman animals, it articulated the ALRC's attitude, at that time, to the application of regulation. Among other things, it considered the differences between civil and criminal penalties, and the differences between criminal and non-criminal offences.

The ALRC *Principled Regulation Report* characterises what makes an offence 'criminal':

[i]n criminal law, wrongful acts are punished because they violate some kind of collective interest, and will apply even if no individual suffered a direct injury. Civil remedies, on the other hand, apply to conduct that has directly harmed an individual's interest.²⁰⁵

Generally speaking, regulatory contraventions lack the violence or violation that characterises traditional crimes. The decision to call some regulatory offences 'criminal' is often one of policy rather than one of principle, or may be based on the presence of an intention to commit the act or other mental element to distinguish it from a similar non-criminal act that lacks that intent.²⁰⁶

The report finally suggested that 'the most serious sanctions', such as imprisonment, as a *criminal* penalty, are likely to be applied where 'the court or Parliament seeks to focus on the immorality of the offence'.²⁰⁷ Additionally, criminal sanctions in the regulatory context 'may serve as last-resort punishment after repeated or wilful violations'.²⁰⁸ In contrast, *civil* penalty provisions have the function of 'preventing or punishing public harm', where the procedural aspects are based on civil court processes.²⁰⁹ The ALRC held the view that imprisonment

²⁰⁴ *Principled Regulation Report*, above n 87. There are other law reform-related materials that discuss regulation principles, but they do not address the issues canvassed in the *LCEW Report* including the differences between criminal and regulatory offences. See, eg, Queensland Productivity Commission, *Red Tape Reduction Advisory Council Recommendations*, Regulatory Advice (28 February 2017); Australian Government, *Best Practice Regulation Handbook July 2013* (July 2013); Australian Government, *The Australian Government Guide to Regulation* (2014). Other Australian studies have reviewed the animal welfare regime in context to different regulatory theories and regulatory capture, but not specifically in relation to law reform departments' own perspectives of how to employ different levels of regulation. See, eg, Jed Goodfellow, *Animal Welfare Regulation in the Australian Agricultural Sector: A Legitimacy Maximising Analysis* (PhD Thesis, Macquarie University, 2015); Jed Goodfellow, 'Animal Welfare Law Enforcement: To Punish or Persuade?' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law In Australasia* (Federation Press, 2nd ed, 2013) 183-207; Rebekah Evers, *A Regulatory Study of the Australian Animal Welfare Framework for Queensland Saleyard Animals* (PhD Thesis, Griffith University, 2016).

²⁰⁵ *Principled Regulation Report*, above n 87, [2.15].

²⁰⁶ *Ibid* [2.19].

²⁰⁷ *Ibid* [2.40].

²⁰⁸ *Ibid* [2.41].

²⁰⁹ *Ibid* [2.47].

should not be a civil penalty.²¹⁰ Additionally, the lack of criminality associated with a civil penalty should not undermine its deterrent effect.²¹¹ One category of civil penalties that the ALRC identified at the time, were that they may:

sit alongside criminal penalties in legislation as additional or alternative enforcement options, often when the necessary fault element to prove a criminal offence (usually intention or knowledge) is not present.²¹²

The report identified characteristics of civil penalty procedure, discussed in context to statutes including the *Corporations Act 2001* (Cth) that included: ability for the regulator to bring proceedings,²¹³ a variable standard of proof at or above the balance of probabilities accompanied by a loss of other procedural protections of an accused,²¹⁴ a range of different types of penalties²¹⁵ (and improvement notices or similar were not listed although undertakings were), that a judge could order the civil penalty,²¹⁶ and other procedural differences to criminal proceedings.²¹⁷

Issues of determining levels of fault in relation to non-criminal offences also arose in the report. The report made reference to the Attorney-General's submission that used harm to nonhuman animals as an example.²¹⁸ The submission explained that it is more likely that the community would view an intentional act that caused the death of an animal as criminal, whereas an unintentional act causing the same result would not be viewed so harshly.²¹⁹ There were similar views reported where it was suggested that breaches of non-criminal conduct should be determined only by reference to *actus reus* elements.²²⁰ The ALRC did not need to make any decision on whether non-criminal offences should or should not require proof of *mens rea*,²²¹ rather it recommended that it be clearly stated.²²² The ALRC also considered, but did not recommend at that time, that a general defence of due diligence be made available in any general statute, although it could be appropriate in specific

²¹⁰ Ibid [2.50].

²¹¹ Ibid [2.55].

²¹² Ibid [2.63].

²¹³ Ibid [2.77].

²¹⁴ Ibid [2.78], [2.81]-[2.82].

²¹⁵ Ibid [2.79].

²¹⁶ Ibid.

²¹⁷ Ibid [2.80].

²¹⁸ Ibid [4.60].

²¹⁹ Ibid quoting Attorney-General's Department, Submission No Submission CAP 14 to Australian Law Reform Commission, *Principled Regulation*, 9 September 2002.

²²⁰ *Principled Regulation Report*, above n 87, [4.61]-[4.62].

²²¹ Ibid [4.65].

²²² Ibid [4.68].

statutes, and particularly within 'complex regulatory schemes'.²²³ It did not consider that a defence of due diligence would be appropriate where 'significant harm had been caused to others'.²²⁴

8.8 Lacey and Ashworth assisting characterisations

8.8.1 Lacey

8.8.1.1 Constructing criminal responsibility

Lacey's recent book²²⁵ provides another lens through which to propose characterisations of different laws as they develop in concert with what is thought to justify criminality, and as different influences are brought to bear. She also discusses legal doctrines and ideas forcing a closure of legal reasoning.²²⁶ Lacey's perspective is interesting in contrast to the Derridean view of a less-than-full human animal autonomy, in that she highlights that social institutions including law, are based on a foundational assumption of responsibility that incorporates notions of 'identity, freedom, voluntariness, choice, agency, [and] self-control'.²²⁷ Lacey does allude to the possibility that we *might* find that we are perhaps not as autonomous as we like to believe. She explains that we:

may be encouraged by new technologies, notably the emerging genetic revolution, which may have the capacity utterly to disrupt the perceived robustness of the mechanisms of responsibility-attribution which have dominated in the Western world over the last 250 years.²²⁸

In recounting a growing body of literature about criminal responsibility, Lacey confirms there is debate about, 'responsibility as the key legitimating device of the criminal law'.²²⁹ For Lacey, criminal responsibility is constructed through 'an underlying set of normative ideas' that serve to justify the power of the state, through rules, doctrines and practices.²³⁰ She suggests, that from the 1950s, normative ideas have been manifest through doctrines and legal rules, including the 'principles' of *mens rea*, defences, and criminal capacity.²³¹ For

²²³ Ibid [4.89].

²²⁴ Ibid [4.92].

²²⁵ Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests and Institutions* (Oxford University Press, 2016).

²²⁶ Ibid 135.

²²⁷ Ibid 4-5.

²²⁸ Ibid 169.

²²⁹ Ibid 12.

²³⁰ Ibid 2.

²³¹ Ibid 2.

Lacey, the conceptualisation of criminal responsibility serves the roles of ‘legitimation and coordination’, and specification of what must be proved to determine guilt and therefore criminality.²³²

Lacey explains that elements in the construction of criminal responsibility include ‘prevailing social narratives, knowledges and understandings’ that constitute the ‘relevant [normative] *ideas*’.²³³ They can be further divided into ideas relevant to: ‘character’ which involves how criminality is attributed to a person; ‘capacity’ as ‘concern with agency, choice, and personal autonomy’ and; ‘outcome’ that is relative to the social harms and risks that an agent may cause.²³⁴ The development of criminal responsibility must also take into account ‘interests’ that reflect the power structures in play that influence criminal law.²³⁵ The interests ‘form the dominant explanatory frame in economic, political and some legal history’.²³⁶ They are ‘filtered through and shaped by institutions and ideas’.²³⁷ Overall, Lacey is appreciative of, as I suggest in Derridean terms, the archés and traces in law, in that legal concepts develop over time and are subject to the influences of different economies of interests.

8.8.1.2 Citizens as gatekeepers

Lacey is critical of analyses of criminalisation that accept that it operates in a ‘primarily hierarchical regulatory mode’.²³⁸ Her arguments here are related to her identification of the role of normative ideas in the constitution of criminality. I suggest it is also highly relevant to what are perceived to be criminal acts involving nonhuman animals. As the Australian Law Reform Commission recounted in the *Principled Regulation Report*, a citizen may not perceive that harm inflicted on a nonhuman animal was ‘criminal’ unless it was intentional.²³⁹ Lacey highlights that it is a misconception to view regulations as actually operating in a ‘command and control’ model.²⁴⁰ The reality is that the public performs a role that Lacey describes as a ‘primary gatekeeper’²⁴¹ in the process of regulation. That is because it is ordinary citizens that choose to report alleged breaches of animal protections laws to the relevant authorities. It is prevailing community standards that are a catalyst triggering the

²³² Ibid.

²³³ Ibid (*italics in original*).

²³⁴ Ibid 2.

²³⁵ Ibid 2.

²³⁶ Ibid 2-3.

²³⁷ Ibid 3.

²³⁸ Ibid 17.

²³⁹ *Principled Regulation Report*, above n 87, [4.60] quoting Attorney-General’s Department, Submission No Submission CAP 14 to Australian Law Reform Commission, *Principled Regulation*, 9 September 2002. See above n 219 and accompanying text.

²⁴⁰ Lacey, above n 225, 17-18.

²⁴¹ Ibid 18. For clarity, Lacey does not discuss animal protection laws.

investigative process, particularly in the domestic animal sphere. Lacey explains that ‘wider social norms themselves regulate formal criminalization’.²⁴² Lacey also refers to regulatory theory and Braithwaite’s propositions²⁴³ specifically, to highlight that internalisation of norms is a critical aspect of regulation, and that ‘ideas of responsibility play a crucial legitimating and coordinating role’.²⁴⁴

8.8.1.3 The resurgence of character responsibility

Ultimately, Lacey argues that what has emerged is ‘a new, hybrid practice of character responsibility’ that ‘discloses a shift in the modality of criminal responsabilization’.²⁴⁵ The hybrid practice is made up of a ‘resurgence of character and the (re)emergence of risk-based responsibility-attribution’.²⁴⁶ From an historical perspective, she suggests that in the eighteenth century, assumptions were allowed of bad character thought to be relevant to criminal responsibility as demonstrated in the ‘malice principle’.²⁴⁷ As discussed in Chapter 6 of this research, ‘malice’ was an element in early English cruelty offences.²⁴⁸ More broadly, Lacey explains that in that earlier time, capacity was also an element in emerging defences and some serious offences.²⁴⁹ Outcome responsibility was also an emerging factor where responsibility was found in relation to particular outlawed circumstances.²⁵⁰ These forms of criminal responsibility did not require application of responsibility-attribution where it was necessary that the offender was, at the time of the offence, capable of understanding the illegality of the act and were capable of self-control.²⁵¹ According to Lacey, it was unlikely that tests of *mens rea* as we currently understand them, were applied at that time in English law, and she suggests there was an assumption of guilt rather than innocence.²⁵²

²⁴² Ibid.

²⁴³ Ibid 18-19 citing John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2001) ch 2.

²⁴⁴ Lacey, above n 225, 19.

²⁴⁵ Ibid 191.

²⁴⁶ Ibid 135.

²⁴⁷ Ibid 136.

²⁴⁸ See Chapter 6, sections 6.2.2, 6.2.5.

²⁴⁹ Lacey, above n 225, 136.

²⁵⁰ Ibid.

²⁵¹ Ibid 137.

²⁵² Ibid. Farmer notes that Sir James Fitzjames Stephen, a judge of the High Court in England, explained that *mens rea* was not applied as a principle of law in his time, in the 1880s: Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford University Press, 2016) 171 citing J F Stephen, *History of the Criminal Law II* (Macmillan, 1883) 94–95.

Lacey explains that ‘the more extreme forms’ of character responsibility waned from the mid 1800s.²⁵³ The necessity to find the requisite state of mind became more prevalent and something separate to proving the wrongdoing.²⁵⁴ She explains that:

states of responsibility, such as intention, knowledge, or foresight—was increasingly elaborated in factual, psychological terms, even though it did not become a full object of proof in the trial until the 1930s.²⁵⁵

With the necessity to find *mens rea* at the time of the offending, with a focus on the act rather than the person, the application of character responsibility became less possible and prevalent,²⁵⁶ and more problematic from an evidence perspective.²⁵⁷ The idea that we are responsible agents was solidified in law to assist civil order.²⁵⁸ The idea that law *can* shape and direct character remained, and was accepted, as a function of regulatory institutions.²⁵⁹ The number of regulatory, summary and outcome-based offences also increased.²⁶⁰ Professionalisation within the system of law as well as the influence of sciences that embraced ideas of human capacities and autonomy, further strengthened the legitimisation of culpability through state of mind.²⁶¹ Democratization also created pressure toward legitimization of state power in finding culpability.²⁶²

Lacey suggests that from the early twentieth century, criminal law developed more of a focus on capacity, and an increased dependency on outcome responsibility in regulatory crimes.²⁶³ Character-based responsibility was still applied in particular regulatory regimes for persons seen to be suffering particular disabilities such as for drunkenness, the ‘fallen woman’ and the ‘feeble-minded’ characterisations.²⁶⁴ What Lacey described as the ‘character/risk hybrid pattern of responsibility’ emerged in the late twentieth century.²⁶⁵ Application of the *mens rea* principle grew as did a belief in the possibility of reform of character.²⁶⁶ With the proliferation of both regulatory outcome-based offences, and capacity-based offences, Lacey explains

²⁵³ Lacey, above n 225, 138.

²⁵⁴ Ibid 139 (italics not in original).

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ Ibid 140-42.

²⁵⁸ Ibid.

²⁵⁹ Ibid 143.

²⁶⁰ Ibid.

²⁶¹ Ibid 143-44.

²⁶² Ibid 144.

²⁶³ Ibid 145.

²⁶⁴ Ibid 146.

²⁶⁵ Ibid.

²⁶⁶ Ibid.

that there had never been a clean delineation between them.²⁶⁷ She cites drug and traffic offences as examples.²⁶⁸ However, these two different forms of offences remained connected in relation to crimes committed through omissions, through the core criminal offences of negligence, and regulatory offences that averted to a lack of due diligence.²⁶⁹ As explored generally within this chapter, the availability of due diligence excuses and defences, and the imposition of the related duty of diligence, indicates that there is growing number of crimes that are justified through risk-based responsibility.

Lacey explains that there may also be a greater acknowledgement in law that it is not possible to determine actual intention or knowledge, and therefore there is 'a renewal of confidence in the law's authority to make quasi-moral, evaluative judgements, combined with a willingness to be up-front' about it.²⁷⁰ What this reverts to however, are metaphysical, logocentric notions, or as Lacey puts it: a renewal of 'of good and evil' and reorientation toward character evaluations.²⁷¹ In Derridean terms, this indicates belief that a fault in human animal character, and therefore faultiness in autonomy can get-to-work, at particular times. This may be a masking of a more realistic characterisation of the reality of the material workings of the human animal in that we are *not* always (or perhaps ever, in strict terms), thinking or acting with autonomy and full consciousness.

Lacey suggests that:

The existence of both groups of offences [regulatory outcome-based offences, and capacity-based offences] has moreover implied a struggle between objective and subjective forms of capacity-based *mens rea*, finding significant expression in appellate cases in the last third of the twentieth century.²⁷²

Lacey also explains that from the 1950s threats to security and fears of terrorism, and the effects of new technologies for example, also saw a growth in risk-based offences that 'promoted a hybrid pattern and practice of responsibility based on a combination of putative outcome and a new sense of bad character'.²⁷³ They reflect concerns about danger.²⁷⁴ There was also a focus on prevention and a growth in inchoate offences.²⁷⁵ Procedural issues also had an effect with greater discretionary powers being awarded to prosecuting

²⁶⁷ Ibid.

²⁶⁸ Ibid 146-47.

²⁶⁹ Ibid 147.

²⁷⁰ Ibid 171.

²⁷¹ Ibid.

²⁷² Ibid 147.

²⁷³ Ibid 147.

²⁷⁴ Ibid.

²⁷⁵ Ibid 148.

agencies and police, which also extended to functions such ‘plea bargaining’, and rendered some economic benefits in the justice system.²⁷⁶ Lacey argues that this is evidence of a revival of sorts, of character-based responsibility attribution, that emerges through prosecution and sentencing practices.²⁷⁷

Lacey discusses the role of motive in determining guilt in terrorism offences.²⁷⁸ She states that:

normalized terrorism legislation introduces a motive-based differentiating principle into the heart of an allegedly universal criminal law, and does so in terms of an inference about criminality drawn from that particular motivation. A natural (though not a necessary) implication of such an inference is a judgment of bad character.²⁷⁹

Whilst motive is not generally considered at the adjudication stage in Australian law, as discussed in Chapter 10, Part One, it can be relevant at sentencing time, particularly in the case of strict liability offences where *mens rea* has not been determined, or rather, decided. Additionally, the Australian animal protection statutes implement regulations based on outcome-based offences that only involve tests of *mens rea*. However, as examined in Chapter 10, Part Two, a court may be creative in its approach to excusing what may be assumed to be inadvertence where capacity is posited as effected by external elements. It demonstrates that there remains, in metaphysical thinking at least, reference to beliefs about character-based responsibility. That can arise when a court adopts a position that a person may, or may not, have intended to ‘be’ cruel.

8.8.2 Ashworth

Ashworth follows Lacey’s analysis of criminal responsibility and he further explores the uptake of risk-responsibility as he finds it in ‘a new generation of omissions offences’ in English law.²⁸⁰ He divides these offences into three categories: ‘failure to report, failure to prevent, and failure to protect’.²⁸¹ He does not refer to any offences to do with nonhuman animals, however his reasoning is of relevance.

²⁷⁶ Ibid.

²⁷⁷ Ibid.

²⁷⁸ Ibid 151-54.

²⁷⁹ Ibid 153.

²⁸⁰ Andrew Ashworth, ‘A New Generation of Omissions Offences’ (2018) 5 *Criminal Law Review* 354, 354.

²⁸¹ Ibid 357.

Ashworth recounts the liberal principles that go against the making of crimes of omissions. Citing Simester et al,²⁸² he recounts 'what amounts to a presumption against omission offences', in that they 'intrude on individual autonomy', and that 'individuals are entitled to give priority to their own interests over those of others'.²⁸³ Ashworth also notes exceptions to these 'reasons' in crimes of omissions, in that a duty may arise if another's 'vital interests are at stake', and that a 'particular role or trade' may come with particular duties and requirements.²⁸⁴ These articulations, reasons and exceptions, are all obviously, and not surprisingly, only concerned with human animals' interests.

In his classification of 'failure to protect', duties in regard to omissions offences appear to apply where the law *does already* recognise the potential for 'harm' to the subject to be protected. Ashworth mentions those offences that require adults to take action to protect children from harms.²⁸⁵ It is of interest that these rationally-thought duties do get-to-work in law, without reference to the subject needing to be able to bear legal duties themselves.

Ashworth also argues that the proliferation of new omissions offences appears to undermine the presumptions against omissions as articulated by Simester et al.²⁸⁶ However, his particular argument turns on whether persons or organisations should be liable for *another's* actions. That is, to be responsible for what they fail to prevent in regard to the actions of another (by performing that form of 'due diligence'). In that sense, his classification of crimes of prevention do not fit the model of *ACPA* s 17. However, some Australian animal protection statutes do include offences that make an executive officer of a corporation liable if they did not, as it is phrased in the *ACPA*, for example: 'take all reasonable steps to ensure the corporation did not engage in the conduct constitutive of the offence'.²⁸⁷

In regard to omissions offences that Ashworth describes as being based on Lacey's characterisation of 'risk-responsibility', he includes the laws related to preventative orders. He discusses what is described in English law as 'anti-social behaviour orders'.²⁸⁸ They were developed to prevent '*further* anti-social acts, [to specify] prohibited behaviour ... [and are] reinforced by a criminal offence of failing to comply with the specified conditions'.²⁸⁹ This

²⁸² A P Simester et al, *Simester and Sullivan's Criminal Law Theory and Doctrine* (Bloomsbury, 6th ed, 2016) 72.

²⁸³ Ashworth, above n 280, 357.

²⁸⁴ Ibid.

²⁸⁵ Ibid 358.

²⁸⁶ Ibid 362.

²⁸⁷ See, eg, *ACPA* s 209. See also *Animal Welfare Act 1992* (ACT) s 48A; *Prevention of Cruelty to Animals Act 1979* (NSW) s 33A; *Animal Welfare Act 1985* (SA) s 38; *Animal Welfare Act 1993* (Tas) s 48A; *Prevention of Cruelty to Animals Act 1958* (Vic) s 41AA; *Animal Welfare Act 2002* (WA) s 80.

²⁸⁸ Ashworth, above n 280, 356-57.

²⁸⁹ Ibid 356 (italics not in original).

model based on risk-responsibility is the model of the animal welfare direction under the *ACPA* in Queensland and the *AWA* in England and Wales.²⁹⁰ However, as discussed in Chapter 9,²⁹¹ under the *ACPA*, the requirement is that the nonhuman animal as subject of the animal welfare direction must *already* be in a position that ‘the inspector considers it to be necessary and reasonable’²⁹² to issue the animal welfare direction. Then, the person to whom it has been issued is awarded a nominated time in which to comply with improvement requirements nominated by the inspector.²⁹³ This means that the nonhuman animal may continue to suffer for a further period, without necessary treatment, without appropriate accommodation or living conditions, without food, rest or water, or without being removed from his or her current situation.²⁹⁴ In the Australian Capital Territory, the *Animal Welfare Act 1992* (ACT) s 24C provides that an inspector or authorised officer can issue a written direction to comply with a mandatory code of practice, but ‘the code applies to the person only in relation to a **non-business** activity engaged in by the person’.²⁹⁵ The person must also already be in breach of the code²⁹⁶ and it can only be issued if the person has not already failed to comply with that particular code of practice and been found guilty of that offence.²⁹⁷ These provisions appear to be further indication that the jurisdictions do not properly recognise harms to nonhuman animals.

8.9 Conclusions

8.9.1 Omissions offences need not be ‘of negligence’ and do import a duty of diligence

In section 8.3 above, different definitions of ‘negligence’ were highlighted as they are offered in English and Australian law texts. The discussion confirms that there has been, and continues to be, a difference in opinion of whether ‘negligence’ is a form of *mens rea*, or purely a test of the *actus reus* elements of an offence. In English and Australian animal law cases there has been confusion about the elements necessary to prove what was thought to be ‘negligence’, or more accurately, fault through omissions. Some courts have clarified that animal law omissions offences do not employ any doctrine of negligence, that the duties of care offences are not concerned with the actual harm to any nonhuman animal subject, and

²⁹⁰ *AWA* s 10.

²⁹¹ See Chapter 9, n 28 and accompanying text.

²⁹² *ACPA* s 159(4).

²⁹³ *Ibid* s 160(1)(c).

²⁹⁴ *Ibid* s 159(3)(a)-159(3)(d). *ACPA* s 159(3)(e) provides that the nonhuman animal must be moved when the animal welfare direction is given.

²⁹⁵ *Animal Welfare Act 1992* (ACT) s 24C(1)(b) (highlighting not in original).

²⁹⁶ *Ibid* s 24C(1)(a).

²⁹⁷ *Ibid* s 24C(1)(c).

that the omissions (including the cruelty) offences do not involve any tests of *mens rea*, but rather, merely require proof of failure to comply with the duties.

The purpose of omissions offences is to encourage diligence. It appears that all omissions offences impose a *duty* of (due) diligence. That is even if the offences do not mention 'negligence', or 'neglect', or even if the offences or defences do not employ the terminology of 'diligence'. A duty arises as consequence of the penalty for omission, and the duty may be further highlighted by the requirement to undertake what is effectively due diligence, by stipulating, for example, that 'reasonable steps' must be undertaken. The same forms of articulation can apply for offences that can be made out by a positive act(s).

8.9.2 Differences in terminology of strict liability and 'negligence' in England and Australia

For Australian readers, when reading English animal law commentary, it is critical to appreciate differences in terminology of 'negligence' and 'strict liability' across the jurisdictions. In Glanville Williams', Professor Smith's, Ormerod and Laird's, and the Law Commission of England and Wales' similar definitions, 'negligence' offences are those that require testing of merely the *actus reus* elements. Additionally, 'negligence' offences for them, include availability of the defences of mistake and due diligence. In their definitions of strict liability offences in English law, the defence of mistake is not available for key *actus reus* element(s), and the defence of due diligence is *not* available.

Under Australian animal law statutes, omissions offences are usually made out only on a test of the *actus reus* elements, and as such, they are offences of strict liability (as that is defined in Australian law). The defences of mistake and due diligence *are* usually available for strict liability offences in Australian law.

As a result of these differences in terminology across the jurisdictions, Professor Smith's and Radford's animal law commentaries cannot be assumed to import any test of *mens rea*, or any doctrine of civil or criminal 'negligence' into Australian duty of care and cruelty laws as we understand those terms in Australian law.

8.9.3 Conceptually a legal duty of care towards nonhuman animals is not new at all

Napier J's judgment in *Backhouse v Judd*²⁹⁸ shows that the concept of, and the application of, a legal *duty* to care for nonhuman animals in Australian law, is not new at all.²⁹⁹ The duty

²⁹⁸ (1924) 399 SASR 16.

²⁹⁹ Ibid 20: the duty arises as a consequence of the penalty. See section 8.4.2.1 above. See also Chapter 6, section 6.6 in regard to positive obligations imposed in earlier animal protection statutes.

arises as a result of the imposition of the fine for relevant omissions.³⁰⁰ The operative facts of ownership or where a person is otherwise legally responsible for a nonhuman animal,³⁰¹ direct to whom the duty applies at the relevant time (albeit only in limited circumstances where other excuses and defences are not available).

The modern duty of care offences (including *ACPA* s 17), which have all been implemented to date in Criminal Code jurisdictions, (Queensland, ACT, Tasmania and Northern Territory), confirm specifically stated duties that demand compliance with minimum standards of care that roughly reflect, but do not entirely meet, the requirements of the five freedoms.³⁰² As discussed in Chapter 7,³⁰³ whilst the Queensland and Northern Territory versions express that the duty is 'owed' to the nonhuman animal(s) in question, that cannot be taken literally. Nonhuman animals do not have any legal right-claims, or legal interests. The duties are actually owed to the state, concomitant with ownership, reinforced by the provisions and the application of the penalties.

8.9.4 Property status, utility and liberal ideals deny victim status for nonhuman animals

The liberal presumptions against the imposition of omissions offences appear to mitigate against any recognition of nonhuman animals as victims. That is particularly since a nonhuman animal is mere property. Additionally, and more devastatingly, the animal protections statutes permit degrees of not 'unnecessary' harms to nonhuman animals, in the context of the utility of their bodies to those inflicting harm. What is privileged is the property rights of the owner. This appears to be additionally highlighted under the rules for animal welfare directions in that an alleged offender is granted time to address stipulated requirements. These principles and reasons that ameliorate the force of crimes of omissions bolster and highlight the legitimization of violence against nonhuman animals.

8.9.5 'Harm' and criminality as relevant to human animals

Outside the context of animal protection statutes, definitions and perceptions around 'public interest', 'regulatory' or 'civil penalty' offences, as opposed to properly 'criminal' offences, sets in place a differentiation, cemented, it appears primarily, on the basis of 'harm' caused

³⁰⁰ See also Chapter 7, section 7.6.2 and Appendix 3, Table 7 that provides a summary of the positive obligations to care for nonhuman animals in the animal protection statutes across the Australian jurisdictions.

³⁰¹ *ACPA* s 17(1): 'A person in charge of an animal owes a duty of care to it'.

³⁰² The ability to display normal patterns of behaviours is not included. Neither was that required under the former statutes or cruelty provisions: see Appendix 3, Table 6 that includes an extract of the duty of care provisions.

³⁰³ See Chapter 7, sections 7.5-7.7.

by the offending. Connected to that, is the perception of moral wrongdoing relative to ‘harm’ that is also a factor in assuming the criminality of an offence. In the Australian context, it was also highlighted that the criminality of an offence is associated with violation of ‘some kind of collective interest’.³⁰⁴ Additionally, regulatory offences may only be perceived as criminal when it is a matter of repeated or intentional offending.³⁰⁵ As further explored in Chapter 9, the ‘harm’ that underpins notions of, and justifications for finding criminality, appears to be ‘harm’ to human animals and human animals’ interests. As discussed in Chapter 10, this is also reinforced in sentencing law. An example of that implication arose in this chapter, in the consideration of the case of *Jolley*.³⁰⁶ It may have been a coincidence that the police, rather than the RSPCA prosecuted that case where the offending was deemed a breach of a human taboo.³⁰⁷ It appears that ‘harm’, moral breach, and ‘genuine’ criminality are more likely to arise when the offending impinges on the economies of interests of humans. More broadly, misuse of a nonhuman animal’s body is likely to offend economic interests, in the monetary sense, which may constitute a harm to collective human interests.

8.9.6 Other factors positioning animal protection offences as merely regulatory and less than truly criminal

Another characteristic of ‘civil penalty’ offences generally, is that they may be accompanied by improvement notices.³⁰⁸ It is also accepted that ‘non-criminal’ conduct can be determined without proof of *mens rea*.³⁰⁹ Additionally, the ALRC did not consider that a defence of due diligence would be appropriate where ‘significant harm had been caused to others’.³¹⁰ These factors all appear to work toward a characterisation of the cruelty and duty of care offences in animal protection statutes in Australia as merely regulatory, and as something less than properly criminal. That may be particularly so because they do not involve ‘harm’ to human animals, unless they are so offensive that they violate the public interest.

Lacey’s analysis highlights that community interests not only play out in court in determining criminality, but that they also play a critical role earlier in that citizens are the ‘primary gatekeeper[s]’ that bring the mistreatment of nonhuman animals to the attention of prosecuting authorities. This fact supports the need for community education. It concurrently highlights that *if* the majority of citizens do not view particular harms to nonhuman animals as properly criminal acts, or more troubling, if they *do* realise that the law does not currently

³⁰⁴ *Principled Regulation Report*, above n 87, [2.15]. See also above 205 and accompanying text.

³⁰⁵ *Principled Regulation Report*, above n 87, [2.41]. See also above 208 and accompanying text.

³⁰⁶ [2018] QDC 012.

³⁰⁷ See section 8.4.2.3 of this chapter.

³⁰⁸ *Principled Regulation Report*, above n 87, [2.79]. See also above 216 and accompanying text.

³⁰⁹ *Principled Regulation Report*, above n 87, [4.65]. See also above 221 and accompanying text.

³¹⁰ *Ibid* [4.92].

treat the mistreatment of nonhuman animals as properly criminal acts, then those issues may constitute further systemic disadvantages in protecting nonhuman animals. Of course, that is particularly the case if the education about these issues is only left to underfunded prosecuting authorities³¹¹ or other organisations concerned for animal welfare. It is also an issue where animal welfare directions, as an example, are employed as a key educative mechanism, where only particular, and already offending individuals are the recipients of that education. Secondly, it is hard to know or judge, what, if any stigma might be attached by the public at large, to offenders who breach for example, a duty of care offence under the animal protection statutes. That is because the penalties are generally very low, and because it is perceived as a subordinate offence to the cruelty offence. If the law itself does not position animal protection offences as 'criminal', then it seems unlikely that: they would either carry the deterrent effect that a 'criminal' offence might, or that the public is encouraged to perceive them as such, or that society generally actually perceives harms to nonhuman animals as any moral equivalent to harm to human animals (at least as that is reflected in law). The fact that governments predominantly leave the identification and the dealing with breaches of animal protection provisions to the community and underfunded prosecuting agencies, underscores that animal protection issues have not become so important in the political sphere that it is deemed that they should be addressed more effectively.

8.9.7 A hierarchy of offences as a possible solution to addressing sentencing issues

Discussion of strict liability offences that do not determine, or rather decide, *mens rea* at the adjudication stage highlights potential issues as the sentencing stage.³¹² By not determining *mens rea* at the time of judgment, sentencing at a later stage may be deprived of relevant evidence and context. Additionally, it may leave open the assumption that there was no *actual mens rea*, that is, that there was *no*, intent, recklessness or wilful blindness, or lack of care otherwise, that may arguably warrant a more severe penalty. This invites the suggestion that a hierarchy of offences could be introduced to recognise and punish different forms of offending constituted by different forms of mental fault, different degrees of 'harm' or risk of 'harm' (if that 'harm' can be recognised for nonhuman animals in law), and what is perceived to be different degrees of moral breach. As discussed in Chapters 9 and 10, leaving these issues to be addressed only at the sentencing stage can be ineffective. Suggestions for law reform incorporating these considerations are made in Chapter 9.

³¹¹ See Chapter 9, section 9.3.2.

³¹² See also Chapter 10, section 10.3.6.

8.9.8 Derridean perspectives

Justifications for state power are rationally constructed. The dogma of human animal autonomy is employed, along with conceptions of *mens rea*, to construct *reasons* for legal sanctions. From a Derridean perspective, culpability is constructed through the rational frame, with morality also being constructed rather than divined.³¹³

There is something disturbing about relying on a *moral* duty in law, and setting it up as a pillar in one sense, in employing it as a justification, and in fact calling it a 'moral' duty at all, (as did Napier J in *Backhouse v Judd*)³¹⁴ while then insisting there are always *reasons* for the *moral* obligation to be extinguished.³¹⁵ What this reflects, is the dogmatic *force* of law that institutes a particular, and carnophallogocentric frame. Even though modern conceptions of laws do not require moral justifications in interpretations, what is simultaneously expressed in each animal 'protection' law, and in each animal 'protection' case, is that some harms to nonhuman animals *are* permitted and legitimised.

The force of law is also clear, in that a duty may arise as a matter of sovereign demand,³¹⁶ through the imposition of a penalty, as Napier J suggested.³¹⁷ It also may arise or exist prior to any claim-rights arising in favour of another party,³¹⁸ or without the imposition of a penalty.³¹⁹ Sovereign power can, and does, define duties, rights and penalties, without specific reference to 'principles'. There is not usually any necessity to have recourse to moral justifications at all for laws in the normal course of adjudication, particularly for less-than-serious offences. These mechanisms can be read as an opening to possibly increasing protections for nonhuman animals without needed to resort to rights arguments. Although of course, I do not dismiss the impact of politics and culture that serve to undermine these structural possibilities. At the same time, while 'rights' may be posited as necessary to strengthen purportedly inviolable protections, any 'rights' are similarly always subject to the possibility of extinguishment by sovereign power.

³¹³ See also Arenson, Bagaric and Gillies, above n 67, 24 (*italics in original*): the authors have a similar view in that whilst they come to that conclusion due to the many exceptions to the 'so-called principles' of the criminal law, that those principles 'may be viewed as justifications, the main effect of which is to create an *image* of criminal law as a rational, consistent, and certain system of legal rules'.

³¹⁴ (1924) 399 SASR 16.

³¹⁵ See section 8.4.2.1 above.

³¹⁶ See Chapter 7, section 7.5.4.

³¹⁷ *Backhouse v Judd* (1924) 399 SASR 16, 20.

³¹⁸ See Chapter 7, section 7.5.2.

³¹⁹ It is common that duties are created in statutes separately to provisions that may impose a penalty for a breach of that duty. See, eg, *Animal Welfare Act 1993* (Tas) s 6: 'A person who has the care or charge of an animal has a duty to take all reasonable measures to ensure the welfare of the animal'.

What this chapter also highlights, is that for serious offences, under the 'harm principle', legal sanctions are most often justified by way of ameliorating harms and risk of harms, to human animal interests only. It is believed that *can* properly be argued a *moral* justification because it is perceived as a grounding for what is thought to be an unwavering moral 'truth'. It appears that in law, there is no properly grounded, moral 'truth' that a person has a moral duty *not* to harm nonhuman animals, except perhaps in what human animals may deem as the most heinous forms, which by definition, is that which is sufficiently offensive to humans. Otherwise, the moral 'duty' and the legal duty give way to particular thresholds of utility. Unfortunately, and uniquely for nonhuman animal victims, the intended utility of the animal's body to the offender, usually is an *excuse* for the offender's harmful acts. That excuse may be employed to find that the defendant was not 'cruel' and therefore did not breach the provisions, and therefore not responsible, not criminal. This excluding of a proper recognition of 'harm' to nonhuman animals as a consequence of liberal notions and the limitations of the social contract does appear to be a closing of thought toward increased protections for nonhuman animals.

The following chapter, Chapter 9, further examines the anthropocentricity of law, particularly for the Queensland regime and its enforcement of *ACPA* s 17. Interestingly, the lack of necessity to recognise harm under *ACPA* s 17 provides an opening for potential to strengthen protections for nonhuman animals. That issue is discussed as one of the conclusions of Chapter 9, and the suggestions for law reform. Chapter 9 also culminates in the broader contextualisation and legal characterisation of *ACPA* s 17.

CHAPTER 9: THE CONTEXT AND CHARACTER OF SECTION 17

9.1 Introduction

The purpose of this chapter is to build on the research in the previous chapters, and to culminate in a legal characterisation of *Animal Care and Protection Act 2001* (Qld) ('ACPA') s 17. Among other aspects of this analysis, this chapter answers two thesis sub-questions. The first is: *what anthropocentric elements of the Queensland regime impact application of the duty of care?* The second is: *what contextual and legal characterisation can be offered for ACPA s 17?* This involves recounting already-recognised failings of Australian legal regimes to properly protect non-human animals. It also requires examination of the effects of the *Criminal Code Act 1899* (Qld) and the *Penalties and Sentences Act 1992* (Qld) ('P&S Act'). In section 9.7, a brief comparative analysis is provided between key aspects of the ACPA and the work, health and safety Acts as they are harmonised in Australian law. As a result, this chapter offers three law reform suggestions to improve protections for nonhuman animals under the ACPA. In section 9.8, this chapter additionally applies straightforward empirical analysis to available sentencing statistics. The analysis reveals that ACPA s 17 is the predominant offence under the ACPA. This examination as a whole, has in its sights, whether, or to what extent, the s 17 duty can properly be said to be 'owed' to nonhuman animals, and whether s 17 delivers what it promises in regard to their protection.

9.2 The anthropocentricity of Australian regimes generally

9.2.1 Mill's harm principle in law limiting 'society'

Mill's 'harm principle' posits that: 'the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others'.¹ That is not strictly followed strictly in law. There are other justifications for laws, including economic factors that are deemed to support the common good of society.²

The 'harm principle' is reiterated clearly as an anthropocentric bias within the Queensland regime. For example, the preamble of the P&S Act makes many references to 'society'. Society is not defined in that Act however it can be taken to assume that only human animals are members of it. The preamble includes the statements: '[s]ociety is entitled to protect itself and its members from harm', and that '[s]ociety may limit the liberty of members

¹ John Stuart Mill, 'On Liberty' in David Bromwich and George Kateb (eds), *On Liberty* (Yale University Press, 2003) 69-177, 80. See also Andreas Schloenhardt, *Queensland Criminal Law* (Oxford University Press, 4th ed, 2015) 22-23.

² Schloenhardt, above n 1, 23-24.

of society only to prevent harm to itself or other members of society'. Under s 3(b), a purpose of the *P&S Act* is to ensure that 'in appropriate circumstances', 'protection of the Queensland community is a paramount consideration'.

9.2.2 Lesser protections for nonhuman animals

One obvious repercussion of nonhuman animals' exclusion from 'society', is that the state is not obligated to provide them with the same level of protections as is provided for humans. Additionally, in most Australian jurisdictions, government departments are not the only authorities with powers to enforce protections under the animal protection statutes.³ Whilst police and some government departments may investigate and prosecute animal protection offences directly, Australian jurisdictions have historically and routinely, outsourced investigation and prosecution functions, particularly in relation to domestic, non-farmed animals, to charity organisations, and predominantly the RSPCA.⁴ Prosecuting agencies are also recognised as under-funded.⁵ Further, there is a discretion to prosecute, rather than an obligation.

9.2.3 The State has no duty, or guardianship role in protecting nonhuman animals

This distancing of the state from the enforcement of animal protection laws for non-farmed animals particularly, and the lack of priority of states to protect nonhuman animals generally, can be contextualised by comparison to the development of protections for children (that is, young human animals).⁶ Eekelaar explains that in English law, 'early law viewed children primarily as agents for the devolution of property'.⁷ The common law did not impose any duty of care, or any guardianship role on parents,⁸ and neither were parents compelled in law to act in their children's interests.⁹ Merely a moral obligation was perceived by parents.¹⁰ As evidenced in newspaper articles, children were only protected from what Eekelaar describes as 'severely injurious or life-threatening acts perpetrated against them by their

³ An exception is the Northern Territory where the RSPCA Darwin does not have the authority to prosecute: RSPCA Australia, 'RSPCA Australia National Statistics 2016-2017' (Annual Statistics, RSPCA Australia, 2017) 7.

⁴ See below n 69 and accompanying text.

⁵ See section 9.3.2 below.

⁶ I make this point to clarify that I do not wish to carry, in my use of the words 'child' or 'children' reinstitution of the abyss of metaphysical human-animal differences.

⁷ John Eekelaar, 'The Emergence of Children's Rights' (1986) 6(2) *Oxford Journal of Legal Studies* 161, 163.

⁸ Ibid 163, 165.

⁹ Ibid 164.

¹⁰ Ibid 165 citing William Blackstone, *Commentaries on the Laws of England* (1775, 7thed) 450.

parents'.¹¹ In the 1500s the common law could demand that a father have his children educated and put to work.¹² However, that was a result of utilitarian philosophy in that the children were to work for the purpose of the common good.¹³ Eekelaar disputes that *that* law, at that stage, could be interpreted as instituting legal interests or rights for children.¹⁴ Additionally, he notes that when the early factory and mines statutes were introduced in the 1800s they prohibited only 'the severest depredations of child labour'.¹⁵

Eekelaar explains that the development of English child protection laws developed further with the enactment of the *Prevention of Cruelty to and Protection of Children Act 1889*.¹⁶ That statute, prohibited the 'unnecessary' suffering of, or injury to children.¹⁷ However, Eekelaar insists that it was still not possible to assert that the interests of children were separable from the interests of society more broadly, or from the interests of others.¹⁸ It was not yet clear that children had been awarded any legal interests or rights in that they could make their own legal claims.¹⁹

Eekelaar cites the *Children and Young Persons Act 1969* as transforming the non-legal interests of children into legal rights.²⁰ That Act imposed duties on parents, guardians and local authorities that had a child in their care.²¹ It provided for court orders to be made against parents and guardians.²² Critically, it also *obligated* the State to intervene²³ 'if a child's' proper development is being avoidably prevented or neglected or his health is being avoidably impaired or neglected or he is being ill-treated'.²⁴ It appears that a key element in the development of child protections was the imposition of a duty on the State to intervene to

¹¹ Eekelaar, above n 7, 167.

¹² Ibid 166.

¹³ Ibid 167.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid 168.

¹⁷ *Prevention of Cruelty to and Protection of Children Act 1889*, 52 & 53 Vict, c 44 s 1. See also Eekelaar, above n 7, 169.

¹⁸ Eekelaar, above n 7, 169.

¹⁹ Ibid 169-71.

²⁰ Ibid 172.

²¹ See, eg, *Children and Young Persons Act 1969* (UK) ss 1, 24(2). I refer to the version of the Act as it was enacted.

²² Ibid s 1.

²³ *Children and Young Persons Act 1969* (UK) s 2: Local authorities had a duty to bring care proceedings.

²⁴ Ibid s 1(2)(a). See also Eekelaar, above n 7, 172-73.

protect them.²⁵ Eekelaar argued that children were, as such, awarded 'rights to be removed from the adverse consequences of care'.²⁶ Eekelaar suggests that:

[t]he imposition of these duties is primarily perceived by the enforcement agencies as directed at advancing the interests of the rightholders ... [t]his reflects not only the social recognition of the basic interests of the rightholders as ends in themselves, but also a societal decision of the priority to be applied where those interests conflict with the interests of others.²⁷

It appears that children were then properly enveloped into what constitutes society within the legal definition of it, where they would enjoy the benefits of what is espoused through Mill's 'harm principle'. What is also resolved in the question of rights, is that a child's relevant right could trump that of another.

In Queensland, as a contemporary example, children are protected under the *Child Protection Act 1999* (Qld) where the 'paramount principle' under s 5A is expressed as: '[t]he main principle for administering this Act is the safety, wellbeing and best interest of a child are paramount'. In this way, the interests of a child can be elevated above the interests of an adult caring for the child. Under s 5B(e), another principle is that 'the State should only take action that is warranted in the circumstances'. Under s 14, authorised officers *must* investigate allegations of alleged harm and alleged risks of harm to children. Under s 18, if an authorised officer or a police officer reasonably believes a child is at risk of harm, the child may be taken into protective custody. Schedule 1(a) establishes that the State has direct responsibility in law to protect children under the guardianship of the Act, to be provided with 'a safe and stable living environment'. These provisions award children legal interests and legal rights. It also provides meaning and context to legal 'guardianship'. This is in stark contrast to the treatment of nonhuman animals under the *ACPA*. For example, where when an animal direction notice is issued, the nonhuman animal victim may be left in that inadequate circumstance for a further period.²⁸ Additionally, where a nonhuman animal victim is seized, they may be killed, even if that is not because he or she is suffering to an extent that cannot be alleviated.²⁹ Nonhuman animals in Queensland do not enjoy legal rights or legal interests. Nonhuman animals in Queensland, and all other Australian jurisdictions, do not enjoy the 'guardianship' of the State.

²⁵ Eekelaar, above n 7, 172.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *ACPA* ss 159-160.

²⁹ *Ibid* div 4, ss 142-144, s 157(2), s 162(a).

9.2.4 No culpability for omissions except in the case of legal duties

Hart's liberal ideas are also represented in Australian criminal law jurisdictions, in that liability for omissions, that is a failure to act, is 'rarely' a basis for liability.³⁰ As described in Chapter 8, the 'exceptionality' of liability for negligence, has multiple justifications.³¹ One of the difficulties in justifying liability for omissions is that it is 'intrusive upon the liberties and autonomy of individuals'.³² Schloenhardt explains that:

[i]t is generally accepted that that persons can only be held criminally responsible for those harms consequent on their actions that they could have avoided had they exercised their capacity for reasonable care.³³

As discussed within this chapter, the proving of what is 'reasonable', falls to the prosecution in both work, health and safety legislation that protects human animals, and under the *ACPA* in regard to breaches of the duty of care under s 17. The High Court has declared that liability for omissions can only arise where the duty is made clear in law, in that: 'criminality does not attach to an omission, save the omission of an act that a person is under a legal obligation to perform'.³⁴ In contrast to the Federal *Criminal Code Act 1995* (Cth),³⁵ under Queensland's *Criminal Code Act 1899* (Qld) sch 1 ('*Criminal Code (Qld)*'), that declaration is not made directly. Rather, it appears to be implied in that '[a]n act or omission that renders the person doing the act or making the omission liable to punishment is called an **offence**'.³⁶

9.2.5 The blindness of carnophallogocentrism in law

Under the *Legislative Standards Act 1992* (Qld), the commitment to liberal ideology is further confirmed. Under s 4(2), the 'fundamental legislative principles' require that 'legislation has sufficient regard to (a) rights and liberties of individuals; and (b) the institution of Parliament'. In the Explanatory Memorandum for the Animal Care and Protection Bill 2001, it is stated that the Bill may arguably include 'some departures' from the 'fundamental legislative

³⁰ Schloenhardt, above n 1, 67-68.

³¹ See Chapter 8, n 35.

³² Schloenhardt, above n 1, 67.

³³ Ibid citing H L A Hart, *Punishment and Responsibility* (1968) 145-47.

³⁴ *DPP (Cth) v Poniatowska* [2011] HCA 43 [29] (French CJ, Gummow, Kiefel and Bell JJ); *Patel v The Queen* [2012] HCA 29 [14]. See also, Mirko Bagaric and Keith Akers, *Humanising Animals: Civilizing People* (CCH Australia, 2012) 77-79: the authors describe the 'acts and omissions doctrine' where, at 77: 'Western law has shown a bias toward individual liberty'.

³⁵ *Criminal Code Act 1995* (Cth) Sch 'The Criminal Code' ('*Criminal Code (Cth)*') 4.3:

An omission to perform an act can only be a physical element if: (a) the law creating the offence makes it so; or (b) the law creating the offence impliedly provides that the offence is committed by an omission to perform an act that there is a duty to perform by a law of the Commonwealth, a State or a Territory, or at common law.

³⁶ *Criminal Code (Qld)* s 2 (highlighting and italics in original).

principles'.³⁷ It was noted that clause 8 of the Bill provided for the making of regulations that could prescribe conditions for the doing of acts 'done by an Aborigine under Aboriginal tradition or a Torres Strait Islander under Island Custom'.³⁸ The potential prescribing of those conditions was deemed a potential impingement on some citizens' rights and liberties.³⁹ It was stated that departures from those libertarian 'fundamental legislative principles', 'occurred in the context of a tension between' those principles, and the:

competing community desire to protect animals from cruelty, unnecessary suffering, injury and death and to bring those responsible for animal welfare offences to justice.⁴⁰

Hence, whilst the Explanatory Memorandum for the *ACPA* signals that some minority cultural practices may be cruel and warrant what is deemed a legally just response, the Bill does not confess its *own* legitimisations of particular harms to nonhuman animals in the same way. They are outside the realm of its 'justice'. Western practices involving some harms *are* condoned in law. They are presented as something *other than* cultural practices. It is as if, the Western culture of carnophallogocentrism manifest within the statute, does not exist, since it highlights minority practices as if they are something entirely different. Its carnophallogocentrism is repressed and subsumed within what is deemed acceptable rationalisation. For example, in the Explanatory Memorandum, a purpose of the *ACPA* is described as to 'achieve a reasonable balance between the welfare needs of animals and the interests of people who use animals for a livelihood'.⁴¹

This culture and logic of sacrifice is elsewhere revealed and rationalised as it occurs operationally within law. Edge and Bailey report that in the context of livestock regulations, breaches of animal welfare regulations will occur 'as side-effects', that is, as means to, 'socially valuable business operations'.⁴² Goodfellow makes a similar claim. He explains that in context to the compliance approach to regulation in the commercial context, it is possible

³⁷ Explanatory Memorandum, Animal Care and Protection Bill 2001, 6.

³⁸ *Ibid.*

³⁹ *Ibid* 7.

⁴⁰ *Ibid* 6.

⁴¹ *Ibid* 1. Slightly different articulation is applied in the Act - *ACPA* s 3(b)(i): 'achieve a reasonable balance between the welfare of animals and the interests of persons whose livelihood is dependent on animals'.

⁴² M K Edge and P J Bailey, Victoria Government Department of Primary Industries, 'The Livestock Management Act: A New Approach to Livestock Regulation in Victoria' (Report, Department of Primary Industries, 2010) 10 quoted in Jed Goodfellow, 'Animal Welfare Law Enforcement: To Punish or Persuade?' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law In Australasia* (Federation Press, 2nd ed, 2013) 183-207, 204 ('*Punish or Persuade*'). See also Jed Goodfellow, *Animal Welfare Regulation in the Australian Agricultural Sector: A Legitimacy Maximising Analysis* (PhD Thesis, Macquarie University, 2015) 205: Goodfellow further details the arms-length regulatory regime that is dependent on self-regulation by primary producers. See also sections 9.3.1 and 9.3.2 below.

that 'breaches of animal welfare standards are conceived of as nothing more than technical rule violations, or simple "side effects" of business operations'.⁴³ Goodfellow also asserts that Governments implement an approach that supports dialogue between the prosecuting agency and the offender, and that the result can be that 'only after repeated incidences of non-compliance should the regulator impose punitive sanctions'.⁴⁴ He suggests that the end result is 'a system that excuses animal mistreatment and implicitly accepts the *management* of animal cruelty rather than its prohibition'.⁴⁵

Markham recognises the lack of legal recognition of 'harm' to individual nonhuman animals. She laments that:

[t]here is also a sense in which existing sentencing practice treats animal cruelty as a purely regulatory offence, rather than locating it in its proper context on a continuum of other forms of violent and anti-social behaviour ...⁴⁶

This differentiation in law, of 'use' from 'harm' reflects, or rather, is a continuing reinstitution of the carnophallogocentric foundation of animal protection statutes. Under the *ACPA*, whilst a breach of s 17 may render a maximum penalty of 300 penalty units or 1 year's imprisonment, the statistics show that high penalties are rarely, if ever, awarded.⁴⁷ Very few prosecutions are made in relation to farmed animals.⁴⁸ The case study in Chapter 10 also touches on these issues in the context of the promise made by the Minister in the *ACPA* second reading speech in relation the cruelty offence. He declared that the penalties should *not* be so low as to fail to be a deterrent to commercial enterprises.⁴⁹ Yet, it appears that *that* promise is not reflected in practice.

⁴³ Goodfellow, *Punish or Persuade*, above n 42, 184.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ Annabel Markham, 'Animal Cruelty Sentencing in Australia and New Zealand' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia* (Federation Press, 2nd ed, 2013) 208-25, 224.

⁴⁷ See sections 9.3.5 and 9.7 below; Appendix 5 in relation to a sample of RSPCA Queensland prosecutions.

⁴⁸ See below nn 255-256 and accompanying text.

⁴⁹ Queensland, *Parliamentary Debates*, Legislative Assembly, 31 July 2001, 1988 (Henry Palaszczuk, Minister for Primary Industries and Rural Communities):

The maximum penalties are deliberately severe. The maximum penalty for cruelty is \$75,000 or two years' jail for an individual. Such high penalties are necessary where cruelty offences occur in high-value commercial animal enterprises, where smaller penalties may be considered an acceptable business risk. These high penalties will send a signal to the community that the government is not prepared to tolerate animal cruelty.

9.2.6 Nonhuman animals as property, not 'beings', in law

'Animals' are classified as property of human animals⁵⁰ or the State.⁵¹ That in itself, is of course, a manifestation of sovereignty through law. Human animal owners can be compensated for economic losses deriving from damage to their nonhuman animals under civil law.⁵² Offenders are liable in criminal law for damage to nonhuman animals' bodies that are owned by another person or the State.⁵³ Under the *Criminal Code (Qld)*, where nonhuman animals' bodies are more obviously signified as economic resources,⁵⁴ all nonhuman animals are included in the definition.⁵⁵ That broad definition also seems to apply in relation to *Criminal Code (Qld)* s 242 '[s]erious animal cruelty', however, the act or omission in question may be 'authorised, justified or excused by - (a) the *Animal Care and Protection Act 2001*...',⁵⁶ where the definition of 'animal' is limited.

Protections for nonhuman animals under the *ACPA*, are limited by both its restricted definition of 'animal',⁵⁷ and the deemed utility of the nonhuman animal in the particular circumstance.⁵⁸ In other words, in law, not all animals are worthy of equal protections. Law

⁵⁰ See Chapter 7, section 7.3.3. See also in Queensland law: *Sale of Goods Act 1896* (Qld) s 3 (definition of 'goods') which includes 'all chattels personal other than things in action and money'; *Criminal Code (Qld)* s 1 (definition of 'property') which includes:

(a) every thing animate or inanimate that is capable of being the subject of ownership; and... (e) an animal that is—(i) a tame animal, whether or not naturally tame; or (ii) an untamed animal of a type that, if kept, is usually kept confined; or (iii) an untamed animal in a person's possession or being pursued for return to possession after escape; and (f) a thing produced by an animal mentioned in paragraph (e).

See also *Competition and Consumer Act 2010* (Cth) sch 2 'Australian Consumer Law' s 2 (definition of 'goods') which includes: '(b) animals, including fish'; *Fair Trading Act 1989* s 5 (Qld) (definition of 'goods') which 'has the same meaning as it has in the Australian Consumer Law (Queensland).'

⁵¹ See, eg, *Nature Conservation Act 1992* (Qld) s 83(1): 'Subject to subsections (2) to (5), sections 85 and 86 and the provisions of any captive breeding agreement, all protected animals are the property of the State'.

⁵² See, eg, *Crump v Equine Nutrition Systems Pty Ltd t/as Horsepower* [2006] NSWSC 512.

⁵³ See, eg, *Criminal Code (Qld)* s 458(1): 'An act which causes injury to the property of another, and which is done without the owner's consent, is unlawful unless it is authorised or justified or excused by law'; *Criminal Code (Qld)* s 468 'Injuring Animals': '(1) Any person who wilfully and unlawfully kills, maims, or wounds, any animal capable of being stolen is guilty of an indictable offence'.

⁵⁴ See, eg, *Criminal Code (Qld)* s 486(2) where a significantly higher penalty applies if the animal was 'stock', and under s 468(4): '... where in respect of the animal in question a value is determined in accordance with the provisions of the regulations made pursuant to section 450F ...'

⁵⁵ *Criminal Code (Qld)* s 1 (definition of 'property') quoted at above n 50.

⁵⁶ *Criminal Code (Qld)* s 242(2).

⁵⁷ *ACPA* s 11 (cited in full in Appendix 3, Table 9).

⁵⁸ *ACPA* s 17(4) where what is appropriate is limited by (a) the species, environment and circumstances of the animal; and (b) the steps a reasonable person in the circumstances of the person would reasonably be expected to have taken; *ACPA* s 18(2) where cruelty is limited by what is deemed unjustifiable, unnecessary or unreasonable; *ACPA* s 3: where the purposes of the Act include taking into account: 'the interests of persons whose livelihood is dependent on animals' and what is deemed 'unjustifiable, unnecessary or unreasonable pain'.

does not account for nonhuman animals as individual beings, worthy of substantive protections separate to their utility to human animals. O'Sullivan recognises a further distinction. Where nonhuman animals are perceived as 'economic animals', recognised as 'generating wealth, carrying out functions of the state, stimulating the economy, or achieving technological advantage', they are deemed worthy of lower legal protections than those nonhuman animals perceived as 'non-economic': that is, domestic or pet animals.⁵⁹ Another factor that O'Sullivan finds is relevant to the likelihood of greater protections for categories of nonhuman animals, is their level of visibility to the public.⁶⁰

9.2.7 The ACPA as instrument of economic rationalism

The institutionalisation of economic rationalism as something other than cultural phenomena and as opposed as *irrationality*, is highlighted in the following explanation of Ibrahim in the context of United States' cruelty statutes:

As Professor Francione has explained, economic theory tells us that rational property owners will only harm their animal property for good reason; i.e., if it will produce a societal benefit. Therefore, anticruelty statutes need only protect against the irrational property owner—one who causes or allows harm to his property that is of no benefit to society. Viewed in this manner, the focus of anticruelty statutes on the prevention of gratuitous suffering is effectively a regulation of the irrational property owner, while the conduct of rational property owners is exempted.⁶¹

Ibrahim's paragraph offers one example of rationality at work in law: in cementing human animal sovereignty, and; in making irrationality in the context of particularly economic, 'mis-use' of nonhuman animals' bodies unfavourable, and potentially illegal. It also highlights the anthropocentric and exclusive nature of the liberal notion of 'society'. Animal 'protection' statutes are one of its instruments. An accused is only guilty of an offence relating to the harming of a nonhuman animal if the court decides that the harm perpetrated was *beyond* what is objectively considered the *reasonable* utility of the nonhuman animal's body by the accused.⁶² Economic rationalism is applied to determine what is *irrational* and illegal.

⁵⁹ Siobhan O'Sullivan, 'Australasian Animal Protection Laws and the Challenge of Equal Consideration', in Peter Sankoff and Steven White, *Animal Law in Australasia* (Federation Press, 2009) 108-127, 114.

⁶⁰ O'Sullivan, above n 59, 120, 127; Siobhan O'Sullivan, *Animals, Equality and Democracy* (Palgrave, 2012) 4.

⁶¹ Darian M Ibrahim, 'The Anticruelty Statute: A Study in Animal Welfare' (2006) 1 *Journal of Animal Law and Ethics* 175, 187 citing Gary L Francione, *Introduction to Animal Rights: Your Child or the Dog?* (Temple University Press, 2000) 66-67.

⁶² See above n 58. See also Steven White, 'Standards and Standards Setting in Companion Animal Protection' (2016) 38(4) *Sydney Law Review* 463 ('*Standards Setting*'); Steven White, 'Regulation of

9.3 Other recognised failures of animal ‘protections’ in law

This section recounts additional elements of what other commentators have already highlighted about the ineffectiveness of animal protections in Australian law.

9.3.1 Effects of codes of practice and exempting factors

As discussed in Chapter 6,⁶³ and as recounted in in Appendix 3, Table 5,⁶⁴ protections for nonhuman animals are undermined by the permissive exemptions and codes of practice that exist as part of all Australian animal protection regimes. Bagaric and Akers explain that the codes of practice can be employed either as a defence to an offence under the animal protection statutes, or they may apply as an offence exemption.⁶⁵ Cao exclaims that ‘the majority of farm animal cruelty taking place in Australia today has been legalised’⁶⁶ as a result of the available defences and exemptions that serve to institutionalise cruelty to nonhuman animals.⁶⁷ As an example, a broad exemption is provided under the *Animal Welfare Act 2002* (WA) s 23 where it is a defence to the cruelty offence if the defendant can show that the ‘offence was done - (a) in accordance with a generally accepted husbandry practice...’ conducted ‘(b) in a ‘humane manner’. Sharman explains that the provision essentially ‘empowers industry to dictate future animal welfare standards’ on the basis that the practices are ‘normal or widely accepted’.⁶⁸

9.3.2 Under resourcing of prosecuting agencies

Whilst the police and some government departments have powers to prosecute breaches of the animal protection statutes, predominantly, investigations and prosecutions are left to other authorised prosecuting agencies and inspectors as appointed under each jurisdictions’

Animal Welfare in Australia and the Emergent Commonwealth: Entrenching the Traditional Approach of the States and Territories or Laying the Ground for Reform?’ (2007) 35 *Federal Law Review* 347 [(iii) Critique of the standard regulatory approach] (‘*Regulation*’): White discusses the economics of the ‘differential standards’ applied in the context of companion and farmed animals.

⁶³ See Chapter 6, section 6.6.

⁶⁴ See Appendix 3, Table 5 and especially the entry for Queensland and ACPA s 16.

⁶⁵ Bagaric and Akers, above n 34, 83, 91-96. See also Alex Bruce, *Animal Law in Australia: An Integrated Approach* (LexisNexis, 2012) 218.

⁶⁶ Deborah Cao, *Animal Law in Australia* (Lawbook Co, 2nd ed, 2015) 224.

⁶⁷ See also *ibid* 213-21. See also Andrew Bartlett, ‘Animal Welfare in a Federal System: A Federal Politician’s Perspective’, in Peter Sankoff and Steven White, *Animal Law in Australasia* (Federation Press, 2009) 376-88, 380; Arnja Dale, ‘Animal Welfare Codes and Regulations – The Devil in Disguise?’ in Peter Sankoff and Steven White, *Animal Law in Australasia* (Federation Press, 2009) 174-197, 197.

⁶⁸ Katrina Sharman, ‘Farm Animals and Welfare Law: An Unhappy Union’ in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law In Australasia* (Federation Press, 2nd ed, 2013) 61-83, 77.

statutes and regulations.⁶⁹ In Queensland, enforcement of the ACPA now falls to the RSPCA Queensland and Biosecurity Queensland⁷⁰ which is part of the Department of Agriculture and Fisheries.⁷¹ Biosecurity Queensland as it is now known, ‘generally [has] responsibility for dealing with livestock animal welfare issues’, whilst ‘the RSPCA has responsibility for companion animal issues’.⁷² The Queensland Police Service are not inspectors under the ACPA, but do have powers to: respond to animal welfare complaints;⁷³ issue animal welfare directions, and; seize, provide relief to, and destroy animals.⁷⁴

Commentators have noted the lack of funding and resources available to prosecuting agencies.⁷⁵ Goodfellow’s thesis notes that regulators have themselves acknowledged problems of under resourcing.⁷⁶ Goodfellow found that ‘[a]nimal welfare services attract a fraction of one per cent of most department of agriculture funding arrangements’.⁷⁷ Under resourcing appears evident within the RSPCA’s national annual statistics. They reveal that whilst there were more than fifty-five thousand cruelty complaints lodged and then investigated by the RSPCA across all of the RSPCA State and Territory organisations in Australia in 2016-2017, there were only nine hundred charges laid, and three hundred and

⁶⁹ See, eg, *Animal Welfare Act 1992* (ACT) ss 76-77; *Prevention of Cruelty to Animals Act 1979* (NSW) s 24D; *Animal Welfare Act* (NT) ss 57-58A; *Animal Care and Protection Act 2001* (Qld) s 114; *ACPA* s 99; *Animal Care and Protection Regulation 2012* (Qld), r 9; *Animal Welfare Act 1985* (SA) s 28; *Animal Welfare Act 1993* (Tas) s 13; *Prevention of Cruelty to Animals Act 1986* (Vic) ss 18, 18A; *Animal Welfare Act 2002* (WA) ss 33-35. See also Cao, above n 66, 221-224: Cao lists the organisations that act as enforcement agencies in each state and territory.

⁷⁰ Queensland Government, *Business Queensland Enforcing the Animal Care and Protection Act* (12 June 2017) <<https://www.business.qld.gov.au/industries/farms-fishing-forestry/agriculture/livestock/animal-welfare/law/enforcing>>.

⁷¹ Queensland Government, *Department of Agriculture and Fisheries: About Us* (20 February 2018) <<https://www.daf.qld.gov.au/our-organisation/the-organisation>>.

⁷² Evidence to Senate Rural and Regional Affairs and Transport Committee, Parliament of Australia, Canberra, 15 February 2006, 4 (Jim Varghese, Director General, Queensland Department of Primary Industries and Fisheries) describing the memorandum of understanding between the RSPCA and the Department, quoted in Tracy-Lynne Geysen, Jenni Weick and Steven White, ‘Companion Animal Cruelty and Neglect in Queensland: Penalties, Sentencing and “Community Expectations”’ (2010) 4 *Australian Animal Protection Law Journal* 46, 47-48.

⁷³ Queensland Government, *Business Queensland Enforcing the Animal Care and Protection Act* (12 June 2017) <<https://www.business.qld.gov.au/industries/farms-fishing-forestry/agriculture/livestock/animal-welfare/law/enforcing>> .

⁷⁴ *Police Powers and Responsibilities Act 2000* (Qld) ch 6.

⁷⁵ See, eg, Cao, above n 66, 181, 228-29; Bagaric and Akers, above n 34, 63; White, *Standards Setting*, above n 62; White, *Regulation*, above n 62, [B Standard regulatory approach].

⁷⁶ Goodfellow, *Thesis*, above n 42, 193. See also RSPCA, *Animal Cruelty* <<https://www.rspca.org.au/what-we-do/preventing-animal-cruelty>>:

The associated costs of funding just one RSPCA Inspector can be as much as \$100,000 each year, which constitutes a large part of each Society’s annual budget. While each state and territory RSPCA struggles to raise enough funds for its existing Inspectors, the sad reality is that, more inspectors are desperately needed.

⁷⁷ Goodfellow, *Thesis*, above n 42, 191.

forty prosecutions.⁷⁸ That resulted in three hundred and twenty-one successful prosecutions where the ‘facts [were] proved in relation to [the] principal charges’.⁷⁹ The Queensland Department of Agriculture and Fisheries Annual Report 2016-2017 notes that it made a \$300,000 grant ‘for facility upgrades’ to RSPCA Queensland.⁸⁰ RSPCA Queensland notes that it receives only three percent of its funding from government, and that it requires a total of \$48 million to operate its programs and services.⁸¹ It appears evident that the RSPCA organisations are only likely to undertake prosecutions where there is a high chance of success.⁸² That of course is understandable given they cannot afford to risk costs being awarded against them, and that they must employ their resources as effectively as possible.

9.3.3 Conflicts of interest and regulatory capture in regulation making

In Queensland, the Governor in Council has broad regulation-making powers⁸³ which includes mandating compliance with codes of practice⁸⁴ that the relevant Minister directs and must table in Parliament.⁸⁵ In Queensland, the same Ministerial portfolio is responsible for ‘biosecurity, agriculture, animal welfare, food and fibre industry development, rural economic development, and racing integrity’.⁸⁶

Dale explains that government departments that have responsibility for agriculture and primary industry are also responsible for development of codes of practice.⁸⁷ She concludes that their ‘emphasis on profitability and self-reliance of farming practices is difficult to reconcile with a commitment to significant improvements for animal welfare’.⁸⁸ Goodfellow’s thesis acknowledges broad recognition of this conflict of interest in the political, animal protection and research spheres.⁸⁹ He also finds that decision makers involved in standards setting for animal welfare in Australia rely on animal welfare science that ‘prioritises conceptions of animal welfare that align with economic interests and productivity goals but

⁷⁸ RSPCA Australia, ‘RSPCA Australia National Statistics 2016-2017’ (Annual Statistics, RSPCA Australia, 2017) 7.

⁷⁹ Ibid.

⁸⁰ Queensland Government, ‘Annual Report 2016-2017’ (Annual Report, Department of Agriculture and Fisheries, 2017) 72.

⁸¹ RSPCA Queensland, *About Us* <<https://www.rspcaqld.org.au/who-we-are/about-rspca-qld>>.

⁸² See also section 9.7 below.

⁸³ *ACPA* s 217.

⁸⁴ Ibid s 13.

⁸⁵ Ibid s 14.

⁸⁶ Queensland Government, *The Queensland Cabinet and Ministerial Directory* <<https://www.cabinet.qld.gov.au/ministers.aspx>>.

⁸⁷ Dale, above n 67, 185-86.

⁸⁸ Ibid 186. See also Bruce, above n 65, 83-84.

⁸⁹ Goodfellow, *Thesis*, above n 42, 5-7.

not with community expectations'.⁹⁰ He asserts that the institutional opposition of 'subjective concerns' about animal welfare outcomes to 'objective science', 'is consistent with the closed nature of the agricultural policy community and a regulatory framework that is designed to serve a competing economic interest'.⁹¹

9.3.4 Lack of standing

Another well-recognised failing within Australian jurisdictions in regard to effective representation of nonhuman animal interests, is the lack of standing awarded to nonhuman animal interest groups.⁹² However, in a single case, the Full Court of the Federal Court of Australia did award standing to the animal interest group Animal Angels in 2014.⁹³ That case was concerned with asserting animal welfare standards in context to the granting of a live animal export license. The Court found that: it was relevant that the organisation had been recognised by the relevant government department, that it had devoted financial resources to the cause, that as an international organisation its engagement in Australia did not derogate from its global objects, and that the decision was directly relevant to animal welfare.⁹⁴

Intertwined with issues of funding, conflicts of interest, and standing, Goodfellow clarifies why the RSPCA, that *does* have standing to prosecute under the animal protection statutes, does not undertake greater prosecutions that may have strategic value.⁹⁵ He explains that the RSPCA is subject to the control of the government departments whose responsible ministers grant the RSPCA its powers and obligations.⁹⁶ He states that '[i]n reality, the RSPCA's enforcement functions are controlled and constrained by the administering departments of agriculture'.⁹⁷

9.3.5 Inadequate sentencing and penalty awards

Cao considered the inadequacy of sentences and penalties awarded by Australian courts and highlighted that very few prosecutions have been made in regard to farmed animals.⁹⁸

⁹⁰ Ibid 237. See also Chapter 3, section 3.5.1.

⁹¹ Ibid 238.

⁹² See, eg, Bagaric and Akers, above n 34, 121-33.

⁹³ *Animal Angels v Secretary, Department of Agriculture* [2014] FCAFC 173 (Kenny, Robertson and Pagone JJ).

⁹⁴ Ibid [120].

⁹⁵ Goodfellow, *Thesis*, above n 42, 280-81.

⁹⁶ Ibid.

⁹⁷ Ibid 281.

⁹⁸ Cao, above n 66, 182, 224. See also Steven White, 'Legislating for Animal Welfare: Making the Interests of Animals Count' (2003) 28(6) *Alternative Law Journal* 277, 280; Nik Taylor and Tania Signal, 'Lock 'em Up and Throw Away the Key? Community Opinions Regarding Current Animal

Cao also questions whether the sentences actually awarded have been reflective of stated legislative intent given there has been increases in maximum penalties over time.⁹⁹ She is also concerned that orders that can be made to prohibit offenders from owning animals have not been 'utilised as effectively as they could be'.¹⁰⁰ Following Sharman, Cao cites two reasons why appropriate sentences should be made.¹⁰¹ Sharman argued that inadequate sentences reaffirm the belief that nonhuman animals are 'property and not living, sentient beings', and that the practice of lenient sentencing does not take into account purported links between animal cruelty and anti-social behaviours more broadly.¹⁰²

Goodfellow makes the distinction that there are essentially two forms of 'regulatory styles' implemented within animal protection regimes.¹⁰³ He suggests that in regard to domestic or 'pet' nonhuman animals, a deterrence approach is implemented,¹⁰⁴ and in regard to nonhuman animals utilised for particular human animal purposes, such as farming or particular forms of entertainment, a 'compliance' approach is employed.¹⁰⁵ The compliance approach '[favours] the provision of education and advice to encourage and facilitate adherence to the law'.¹⁰⁶ This difference in models of compliance where primary produces are to an extent, self-regulated,¹⁰⁷ helps to explain why few prosecutions in relation to farm animals have been undertaken.

In Markham's survey of sentencing in Australian and New Zealand jurisdictions, she highlights that it is not only the sentencing and penalty awards that are usually insufficient, but there are also issues with the low number of actual prosecutions, and the prosecutorial

Abuse Penalties' (2009) 3 *Australian Animal Protection Law Journal* 33; Geysen, Weick and White, above n 72. But see Keely Boom and Elizabeth Ellis, 'Enforcing Animal Law: The NSW Experience' (2009) 3 *Australian Animal Protection Law Journal* 6, 31: the authors suggest that increases in penalties are not always the best solution for addressing animal cruelty, and that 'Government reforms tend to focus on symbolic initiatives'; Alexandra Broughton McEwan, *The Concept of Violence: A Proposed Framework for the Study of Animal Protection Law and Policy* (PhD Thesis, The Australian National University, 2016) 254-55: McEwan suggests that in the face of lack of evidence regarding the effect of higher penalties on recidivism, or that certainty of apprehension may have a greater deterrent effect, that possibly a better solution is 'increased commitment to consistent and effective enforcement rather than additional offences and increasingly draconian penalties'.

⁹⁹ Cao, above n 66, 182-83.

¹⁰⁰ Ibid 183.

¹⁰¹ Ibid citing Katrina Sharman, 'Sentencing under our Anti-Cruelty Statutes: Why our Leniency will come back to Bite Us' (2002) 13 *Current Issues in Criminal Justice* 333, 334.

¹⁰² Sharman, above n 101, 334. See also section 9.3.5 below.

¹⁰³ Goodfellow, *Punish or Persuade*, above n 42, 183.

¹⁰⁴ Ibid 183. See also White, *Standards Setting*, above n 62, 475-76.

¹⁰⁵ Goodfellow, *Punish or Persuade*, above n 42, 184.

¹⁰⁶ Ibid 184, 187-98. See also White, *Regulation*, above n 67, 466.

¹⁰⁷ See, eg, Goodfellow, *Thesis*, above n 42, 205; *Livestock Management Act 2010* (Vic); *ACPR* ch 2 regarding codes of practice that may or may not be compulsory and are admissible in a proceeding for an offence.

practice of negotiating guilty pleas in return for amended and withdrawal of charges.¹⁰⁸ Markham's analysis of sentencing in Australia using RSPCA statistics, shows that very few offenders faced terms of imprisonment. She suggests that there was one that did in Tasmania between 2009-2012 where there were forty-five successful prosecutions, one that did in Victoria between 2005-2007 where there were forty-four successful prosecutions, and three that did in Queensland between 2009-2010 where there were forty-two successful prosecutions.¹⁰⁹ In the analysis of more recent RSPCA Queensland statistics summarised in section 9.8 below, and detailed within Appendix 5 (that cannot be assumed to be complete) there were 26 convictions recorded from a total of 86 cases across the three years 2014-2015, 2015-2016 and 2016-2017. Across that period within those statistics, 3 offenders were reported as having received suspended sentences.

In 2008, Graeme Page SC in his address to the Queensland Magistrates Conference, commented that one of the elements contributing to the low penalty awards under the *ACPA*, was that prosecution submissions to the Court:

appeared ... to be [of] little assistance to the Court ... [including] the factors necessary ... to take up under the *Penalties and Sentences Act 1992* (Qld) and how these factors might properly be applied to a prosecution under [ACPA] as against an act dealing with offences against humans ... There was [also] little direction given as to the necessity to consider the deterrent aspect of the sentence given that there existed little by way of rehabilitation and counselling available particularly relating to conduct toward animals.¹¹⁰

As described in section 9.7 below, the law reforms suggested within this thesis have potential to help address these issues.

9.4 ACPA context under the Criminal Code act 1899 (QLD)

9.4.1 Queensland's Criminal Code

The *Criminal Code (Qld)* has the purpose of replacing the common law, for criminal offences, even though the common law is still applied in relation to offences that are defined

¹⁰⁸ Markham, above n 46, 211-212.

¹⁰⁹ Ibid 213-214.

¹¹⁰ Graeme Page, 'Changing Attitudes and Expectations of the Community and the Relevance of those Changes to Sentencing in Prosecutions commenced under the Animal Care and Protection Act 2001', (Paper presented at Queensland Magistrates Conference, Brisbane, 25-28 May 2008) 1-2.

in both the Code and the common law, and in interpretation of the Code itself.¹¹¹ In Queensland criminal offences are defined in a multitude of statutes including the *ACPA*.

9.4.2 The absence of articulation of *mens rea* elements

The *Criminal Code* (Qld) s 23 institutes the objective test as to foreseeability for crimes constituted by negligence and omissions. It seeks to eliminate from consideration on the question of guilt, any arguments by the accused in relation to their intention, unless intention is specifically made part of the elements of the offence. In effect, this provision generally, reflects and reinforces that Queensland's criminal law does not express criminal offences as consisting of *mens rea* and *actus reus* elements.¹¹²

9.4.3 Ignorance of the law and the defence of mistake of fact

Another relevant provision of the *Criminal Code* (Qld) is that for offences constituted by acts or omissions, ignorance of the law does not provide any excuse, unless that knowledge is required as an element of the offence.¹¹³ A general defence of mistake of fact is also provided in s 24. It states that:

- (1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.
- (2) The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

Schloenhardt notes that the judiciary have not concurred as to whether ss 22-24 results in an 'identical' formulation to that of *mens rea* under common law.¹¹⁴

9.5 Relevant provisions under the Penalties and Sentences Act 1992 (QLD)

9.5.1 Key provisions

The most relevant provisions of the *Penalties and Sentences Act 1992* (Qld) that are applied to the cruelty and duty of care offences are described here. I refer to the current version of the *P&S Act* at the time of writing this chapter, which is the version 'current as at 12

¹¹¹ *Criminal Code Act 1899* (Qld) ss 2, 4-5; *Murray v The Queen* (2002) 211 CLR 193, 218 (Kirby J): The purpose of the Criminal Code Qld, is to: 'provide a fresh start and thereby to introduce greater clarity of expression and sharpness of concepts'.

¹¹² See, eg, Schloenhardt, above n 1, 58.

¹¹³ *Criminal Code* (Qld) s 22(1).

¹¹⁴ Schloenhardt, above n 1, 80.

February 2018'. The case study in Chapter 10 provides a greater insight to how the *P&S Act* is applied for offences under the *ACPA*.

Among other objectives, the *P&S Act* has the purposes of providing for consistency in approach to: 'ensuring the protection of the Queensland community is a paramount consideration',¹¹⁵ sentencing,¹¹⁶ providing 'fair procedures',¹¹⁷ and provision of sentencing principles.¹¹⁸

Under Part 2, s 9(1), the sentencing guidelines limit the purposes for which sentences may be imposed. They are to:

(a) to punish the offender to an extent or in a way that is just in all the circumstances; or (b) to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or (c) to deter the offender or other persons from committing the same or a similar offence; or (d) to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or (e) to protect the Queensland community from the offender; or (f) a combination of 2 or more of the purposes mentioned in paragraphs (a) to (e).

Under s 9, the court, in sentencing an offender, must have regard to the many listed considerations that include the principle that 'imprisonment should only be imposed as a last resort' and that allowing 'the offender to stay in the community is preferable'.¹¹⁹ None of the listed considerations are concerned with harm to beings unless those beings are human animals.¹²⁰ However, s 9(2)(r) does not seem to exclude consideration of harm to nonhuman animal(s) since it allows consideration of 'any other relevant circumstance'. Under s 9(11), 'the sentence imposed must not be disproportionate to the gravity of the current offence'.

Under the *P&S Act* s 13, a guilty plea must be taken into account by the court and the court has discretion to reduce the sentence as a result. Under s 13A, the sentence may be reduced where the offender has cooperated with law enforcement agencies.

9.6 Sentencing and the question of 'harm' to nonhuman animals

9.6.1 Harm not an element under *ACPA* s 17

In Clare DCJ's recent interpretation of *ACPA* s 17 specifically:

¹¹⁵ *P&S Act* s 3(b).

¹¹⁶ *Ibid* s 3(d).

¹¹⁷ *Ibid* s 3(e).

¹¹⁸ *Ibid* s 3(f).

¹¹⁹ *Ibid* s 9(2)(a).

¹²⁰ *Ibid* ss 9(2)(c), 9(2A), 9(3)-9(6).

... the s 17 duty is a proactive one. It concerns the reasonable steps that ought to be taken. The breaching offence is the failure to take those steps. It is not dependent upon the occurrence of any particular consequences. The court must identify what steps ought to have been taken for the animal's welfare in the circumstances. The breach may be in the form of neglect or mistreatment, but actual harm is not [an] element.¹²¹

Her Honour highlights that the degree of harm is *not* an element in proving a failure to meet the duty of care under *ACPA* s 17. This could be read as a negative, but it also indicates that the provision can be interpreted analogously to the duty provisions under the work health and safety legislation across Australian jurisdictions. I suggest that would be of benefit in context to nonhuman animal protections, as outlined in the following section.

The lack of necessity to find harm as a result of a breach of *ACPA* s 17 also makes it easier to prove a breach of the minimum standards of care mandated under the provision. However, it may also be read that it concurrently reinstitutes that harms to nonhuman animal victims are not recognised in law in the same way that harms to human animals are under human-focussed laws and particularly in relation to sentencing. Additionally, under the harmonised work health and safety regimes, it is *risk* of harm to human animals, rather than consequences that is the focus.¹²² Additionally, a hierarchy of offences is enacted under that regime to ensure recognition of different degrees of culpability which is relevant to sentencing.¹²³ I take up these structural potentialities for animal protection laws in section 9.7 below.

9.6.2 Potential to guide sentencing

Markham notes that in the United Kingdom, the publication of sentencing guidelines appears to have contributed to an increase in convictions.¹²⁴ She argues that guidelines have 'the potential to reduce inconsistencies and to result in more appropriate penalty levels'.¹²⁵ The United Kingdom Sentencing Council guideline situates seriousness of offending within different bands of appropriate recommended penalties.¹²⁶ The guideline applies to sentencing under the *Animal Welfare Act 2006* (of England and Wales) cruelty offence

¹²¹ *Jolley* [2018] QDC 12 [22], [2]: In that case, the appellant argued that the offence was not made out because he believed there was no harm to the puppy as a result of his breach.

¹²² See section 9.7.4 below.

¹²³ See section 9.7.4 below.

¹²⁴ Markham, above n 46, 217 citing <www.rspca.org.uk/media/news/story/-/article/EM_A_rising_tide_of_animal_cruelty_Apr12>.

¹²⁵ Ibid 220.

¹²⁶ Sentencing Council, *Animal cruelty* (Revised 2017) <<https://www.sentencingcouncil.org.uk/offences/item/animal-cruelty-revised-2017/>>.

expressed as causing unnecessary suffering,¹²⁷ the animal fighting offence,¹²⁸ and the s 9 offence which is described in the guideline as the ‘breach of duty of person responsible to ensure welfare’.¹²⁹ The guidelines are strict in that they direct that a court ‘should determine culpability and harm caused with reference **only** to the factors’ listed,¹³⁰ although different weightings may be applied if the offending ‘does not fall squarely into a category’.¹³¹ The factors ‘indicating high culpability’ are: ‘[d]eliberate or gratuitous attempt to cause suffering’, ‘[p]rolonged or deliberate ill treatment or neglect’, ‘[i]ll treatment in a commercial context’, and ‘[a] leading role in illegal activity’.¹³² ‘Medium culpability is indicated by ‘[a]ll cases not falling into high or low culpability’.¹³³ Low culpability is indicated by ‘[w]ell intentioned but incompetent care’, or ‘[m]ental disorder or learning disability, where linked to the commission of the offence’.¹³⁴ Greater harm is indicated by ‘[d]eath or serious injury/harm to animal’ or ‘[h]igh level of suffering caused’. Once the category above is determined, then the Court is directed to determine the range of sentence according to a stipulated table. Then, aggravating or mitigating factors are to be considered.¹³⁵ Further sentencing direction is also offered in context to the existing sentencing laws and other related laws.¹³⁶

9.6.3 Issues in requiring harm as an element

There are potential issues in *requiring* harm to have eventuated as a consequence of a breach of a duty, even if that is only applied in determining the degree of culpability at sentencing. A defendant may merely enjoy good fortune if a failure in some cases resulted in less harm than it could have otherwise. Additionally, in many cases actual harm could be difficult and expensive to prove in many cases. Requiring that harm be recognised may also be seen to result in injustice in sentencing. In some cases where harm is not found and a lesser penalty is applied, it may also undermine the focus on, and effect of, general deterrence.

¹²⁷ *Animal Welfare Act 2006* s 4.

¹²⁸ *Ibid* s 8.

¹²⁹ Sentencing Council, above n 126.

¹³⁰ *Ibid* (highlighting in original).

¹³¹ *Ibid*.

¹³² *Ibid*.

¹³³ *Ibid*.

¹³⁴ *Ibid*.

¹³⁵ *Ibid*.

¹³⁶ *Ibid*.

9.7 Comparative analysis: the work health & safety model laws and the ACPA

9.7.1 Introduction

This section provides a comparative analysis of particular elements involved in proving omissions offences under *ACPA* s 17, and under the Australian harmonised, work health and safety legislation ('the Model WHS Acts'). This is necessary because this thesis ultimately suggests three law reform measures, based on elements of the WHS regime that could improve the effectiveness of protections for nonhuman animals under *ACPA* and in context to the duty under s 17 (and similar provisions in other jurisdictions).

The first suggestion involves adopting, from the WHS regime, the requirement of strictness in the specification of charges, and the model of interpretation of the offence by courts. This would help to ensure that practices in laying charges would be improved (or sustained if the practices are already followed), to potentially capture *each* failure to comply with the *ACPA* s 17 duties that a prosecuting agency wishes to allege. That would in turn, assist in determining culpability and deciding sentences. This model is already indicated to a degree, in the *ACPA* s 17 appeal cases of *Flaherty v Petersen*,¹³⁷ and *Jolley*.¹³⁸ This reform would also provide opportunity to strengthen the effect of *ACPA* s 17 without having to take that further step, that I described in the previous section, to recognise actual 'harm' to nonhuman animals. It also avoids the potential issues mentioned in section 9.6.3 above if harm was made an element of the offence.

The second law reform suggestion is to create a new offence of reckless failure to comply with the *ACPA* s 17 duties. Prosecuting agencies could then identify and lay charges in the context of this offence where they allege there was the requisite degree of culpability. That is, where offenders, without reasonable excuse, breach the *ACPA* minimum standards of care, *and* are found to have been reckless in exposing a nonhuman animal(s) to the *risk* of death or serious injury. The new offence would help to overcome what appears to be some existing issues in sentencing under *ACPA* s 17. They include difficulties in determining culpability, deciding gravity, and achieving greater parity in sentencing.¹³⁹ The new offence would also provide a more appropriate offence where offenders are engaging in breaching conduct for the purpose of commercial benefit. This model of offence would not be something that is structurally new to the Queensland regime, or other Australian regimes,

¹³⁷ [2018] QDC 21 ('*Flaherty*').

¹³⁸ [2018] QDC 12 [16].

¹³⁹ See section 9.7 below and Chapter 10, Part One.

since it already exists under the Model WHS Acts including the *Work Health and Safety Act 2011* (Qld) (*'WHS Qld'*).¹⁴⁰

A third law reform suggestion, or perhaps merely a consequence of the two suggestions above, should they be adopted, is to properly recognise *ACPA* as 'social legislation'. As described below, this would demand a greater focus on general deterrence. From the perspective of working toward Derridean justice for individual beings, a commitment to actual implementation of effective general deterrence may be the only form of justice that law can provide for nonhuman animals who have no concern for retribution, or for righting past wrongs by punishment in the present.

As a first step, in the following subsection, I provide a brief description of relevant aspects of the Australian doctrine of precedent. This is necessary because I refer to appeal cases across jurisdictions on the basis that they are, or could be, authoritative for Queensland courts and interpretation of Queensland legislation.

In subsequent subsections, I highlight what may be instances of current practice of prosecuting agencies, and RSPCA Queensland specifically, in particularising alleged breaches of the duty of care under *ACPA* s 17. That practice is highlighted in the recent appeal judgment of *Flaherty*.¹⁴¹ The Court in that case also applied the tests of 'reasonableness' to the steps that the prosecution alleged ought to have been taken by the defendant that constituted the breaches. The Court adopted the tests as they were articulated by Clare DCJ in *Jolley*.¹⁴² Those cases highlight that successful prosecution under *ACPA* s 17 appears to require particularisation within the charges, of the 'reasonable steps' that *ought* to have been taken, and proof of the failure to take those 'reasonable steps'. That is in line with the requirements for omissions offences under the *Criminal Code (Qld)* as highlighted in section 9.2.4 above (and as further explained in sections 9.7.4 and 9.7.6 below). The court will decide if the steps were 'reasonable'. This model of application and interpretation of the requirements of the Act has commonality with the requirements for establishing breaches under the relevant duties in the Model WHS Acts. I provide a relative analysis of the Model WHS Acts below. That is then followed by discussion of: the structural similarities and differences between the Model WHS Acts and the *ACPA*, the need to properly particularise charges in both regimes, the benefits of identifying the *ACPA* as 'social legislation', and finally, an extrapolation of interpretation of the reckless failure offence under the model WHS Acts.

¹⁴⁰ *WHS Qld* s 31.

¹⁴¹ [2018] QDC 21

¹⁴² *Jolley* [2018] QDC 12 [16].

9.7.2 The doctrine of precedent in Australian jurisdictions

Australia has a common law system. Each State and Territory has its own hierarchy of courts, as does the Federal system. The highest court for all is the High Court of Australia.¹⁴³ The doctrine of precedent applies and lower courts are bound to follow the ratio decidendi of a higher court in its hierarchy.¹⁴⁴ Additionally, in each State's hierarchy, the highest State court is its Supreme Court of Appeal. It is an intermediate appellate court, in that an appeal from it is available to the High Court of Australia. A State's Supreme Court is also an intermediate appellate court in that an appeal from it is available to its own Supreme Court of Appeal. As declared by the Full Court of the High Court, particularly in relation to uniform national legislation implemented across jurisdictions:

An intermediate appellate court — and all the more so a single judge — should not depart from an interpretation placed on such legislation by another Australian intermediate appellate court unless convinced that that interpretation is plainly wrong.¹⁴⁵

As a point of qualification, McHugh J in the High Court highlighted the primary need to give effect to the purpose of the legislation in each case.¹⁴⁶ The High Court has also declared that the principle of following a decision of another Australian intermediate appellate court is relevant 'in relation to non-statutory law'.¹⁴⁷ However, the New South Wales Court of Appeal has clarified that there are broader considerations in following common law interpretations across jurisdictions.¹⁴⁸

¹⁴³ *Viro v R* (1978) 141 CLR 88; *Miller v R*; *Smith v R*; *Presley v DPP* (SA) [2016] HCA 30 [105] Gageler J.

¹⁴⁴ *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395. For further detail that I cannot articulate here, see Steven Rares, 'The role of the Intermediate Appellate Court after Farah Constructions' [2008] *Federal Judicial Scholarship* 27.

¹⁴⁵ *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492.

¹⁴⁶ McHugh J in *Marshall v Director-General, Department of Transport* [2001] HCA 37 [62]:

But that does not mean that the courts of Queensland, when construing the legislation of that State, should slavishly follow judicial decisions of the courts of another jurisdiction in respect of similar or even identical legislation. The duty of courts, when construing legislation, is to give effect to the purpose of the legislation. The primary guide to understanding that purpose is the natural and ordinary meaning of the words of the legislation. Judicial decisions on similar or identical legislation in other jurisdictions are guides to, but cannot control, the meaning of legislation in the court's jurisdiction. Judicial decisions are not substitutes for the text of legislation although, by reason of the doctrine of precedent and the hierarchical nature of our court system, particular courts may be bound to apply the decision of a particular court as to the meaning of legislation.

¹⁴⁷ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

¹⁴⁸ *Hasler v Singtel Optus Pty Ltd*; *Curtis v Singtel Optus Pty Ltd*; *Singtel Optus Pty Ltd v Almad Pty Ltd* [2014] NSWCA 266 [95]:

It is one thing to acknowledge that there is a range of potentially available legal meanings to be given to legislation, and to insist on a heightened deference to the decision of an intermediate appellate court which has selected one of those legal meanings. It is another when the question is whether a particular principle is or is not part of the common law of Australia. In the latter case, the leeways of choice turn on

These cases highlight that ratios decided particularly in a Supreme Court of Appeal in any Australian State (that are not decided differently by a States' own Supreme Court of Appeal), are likely to apply in other Australian jurisdictions. This is the case in interpretation of the Model WHS Acts at least in respect to the elements that I highlight below (although there are some differences that are not pertinent to the following points). The application of the doctrine of precedent may also lend weight the suggestion that animal protection statutes generally in Australia, should be recognised as 'social legislation'.

9.7.3 The specification and proving of 'reasonable steps' under ACPA s 17

This section describes how the District Court of Queensland, in the recent appeal cases of *Jolley*¹⁴⁹ and *Flaherty*,¹⁵⁰ as the highest court to interpret breaches of ACPA s 17,¹⁵¹ has approached the task.

In *Jolley*,¹⁵² Clare DCJ explained that:

[Section] 17 sets out the duty of care owed by a person in charge of an animal. It is a duty to take reasonable steps to appropriately provide for the animal's needs and to ensure appropriate handling of the animal. A failure to take reasonable steps is made an offence.

The above paragraph highlights that 'reasonable steps',¹⁵³ are necessary to be taken (which is judged objectively).¹⁵⁴ Failure to do so constitutes the offence.

Her Honour also explained that:

... the s 17 duty is a proactive one. It concerns the reasonable steps that ought to be taken. The breaching offence is the failure to take those steps. It is not dependent upon the occurrence of any particular consequences. The court must identify what steps ought to have

different and in some ways broader considerations (such as questions of coherence with the rest of the law, the extent to which the change departs from the previous position, and the extent to which such change has been presaged in earlier decisions).

¹⁴⁹ *Jolley* [2018] QDC 12 [16].

¹⁵⁰ [2018] QDC 21.

¹⁵¹ See Appendix 2.

¹⁵² [2018] QDC 12 [16].

¹⁵³ ACPA s 17(3): '... a person breaches the duty only if the person does not take reasonable steps to – (a) provide for the animal's needs for the following in a way that is appropriate...'

¹⁵⁴ *Ibid* s 17(4):

In deciding what is appropriate, regard must be had to— (a) the species, environment and circumstances of the animal; and (b) the steps a reasonable person in the circumstances of the person would reasonably be expected to have taken.

been taken for the animal's welfare in the circumstances. The breach may be in the form of neglect or mistreatment, but actual harm is not element.¹⁵⁵

The above paragraph highlights that steps that 'ought' to be taken are necessary to be identifiable by the court, and that consequences, including actual harm are irrelevant.

Further, it was found in that case, that the defendant:

was properly convicted of the offence, not because his conduct was immoral but because he failed to "take reasonable steps to ... ensure" his handling of the dog was "appropriate" within the meaning of s 17 (3) (b) of the Act ... the appellant's conduct fell so obviously below appropriate handling that it is beyond doubt that it breached the duty of care laid down by s 17. A reasonable person would have quickly moved, covered up or chased the dog away. With minimum effort the appellant could have ended the episode straight away. But instead he presented himself to the dog for more. In so doing, he breached his duty of care contrary to s 17.¹⁵⁶

In *Jolley*,¹⁵⁷ Queensland Police was the prosecuting agency and the appellant. The judgment does not provide any indication of what words were used to articulate the charge. It is clear that the *Court* did identify the particular, reasonable steps that the defendant ought to have taken, and so the offence was made out.

In *Flaherty*,¹⁵⁸ it is clear that RSPCA Queensland as the prosecuting agency and the complainant, had particularised, within the charge, the reasonable steps that the defendant ought to have taken.¹⁵⁹ Those reasonable steps are, to a degree, prescribed by the minimum standards expressed under *ACPA* s 17(3), and need to be stated in the context of the particular case. Robertson DCJ recited them as follows:

*The defendant failed to ensure appropriate treatment was provided for respiratory difficulty and blood discharge from the dog 's anus.*¹⁶⁰

The defendant failed to provide appropriate treatment for infected sore eyes by failing to obtain veterinary treatment or apply a medication prescribed by a veterinarian ...

*The defendant failed to provide appropriate treatment for ear infection in the left ear, by failing to obtain veterinary treatment or apply a medication prescribed by a veterinarian.*¹⁶¹

¹⁵⁵ Ibid [22].

¹⁵⁶ Ibid [29].

¹⁵⁷ [2018] QDC 12.

¹⁵⁸ [2018] QDC 21.

¹⁵⁹ Ibid [6].

¹⁶⁰ Ibid.

It appears that *ACPA* s 17 places an onus on the prosecution to define *what* reasonable steps a defendant ought to have taken. If those steps are proven as ‘reasonable’ to the court, then the offence will be made out.¹⁶² The test of what is ‘reasonable’, and what is ‘appropriate’ was restated in *Flaherty*, where his Honour recited Clare DCJ’s definition as she articulated it in *Jolley*.¹⁶³

[Section] 17 (4) refines the meaning of “appropriate” by requiring consideration of what a reasonable person in the same situation would reasonably be expected to do in the same circumstances... There are a wide range of ways in which people reasonably care for their animals. Some allow their dogs indoors, some keep them outside, some make them work ... It recognises there must be a variety of ways in which the care of animals may be carried out appropriately ... That measure of reasonable expectations invokes a minimum reasonable standard based on the prevailing community attitude towards animal welfare. [Section] 3 (b) makes clear the standard of care is to balance animal welfare and economic interests, and to respond to new knowledge and changes in community expectations. The objective is the “responsible” care and use of animals.¹⁶⁴

As I explain further in applying an analogous interpretation of *ACPA* s 17, in relation the requirements under the Model WHS Acts below, it appears that the ‘reasonable’ steps that ought to have been taken regarding alleged breaches of *ACPA* s 17, must be expressed within the charges. That appears to be the practice of RSPCA Queensland at least, as prosecutor, as highlighted in the case of *Flaherty*.¹⁶⁵

9.7.4 The model work, health and safety laws

In 2011, in Australia, harmonised national laws, known as model laws, were developed in relation to work, health and safety.¹⁶⁶ Those model laws have been adopted and enacted in Australian Capital Territory, New South Wales, the Northern Territory, Queensland, South Australia, Tasmania and the Commonwealth jurisdictions.¹⁶⁷

¹⁶¹ Ibid [9] (*italics* in original).

¹⁶² *ACPA* s 17(4):

In deciding what is appropriate, regard must be had to— (a) the species, environment and circumstances of the animal; and (b) the steps a reasonable person in the circumstances of the person would reasonably be expected to have taken.

¹⁶³ [2018] QDC 12.

¹⁶⁴ *Flaherty* [2018] QDC 21 [69] quoting *Jolley* [2018] QDC 12 [21].

¹⁶⁵ [2018] QDC 21.

¹⁶⁶ Safe Work Australia, *Model WHS Laws* (18 July 2018) <<https://www.safeworkaustralia.gov.au/law-and-regulation/model-whs-laws>>.

¹⁶⁷ Ibid.

What the harmonised laws impose, on ‘persons conducting a business or undertaking’ is that they ‘must ensure, so far as reasonably practicable, the health and safety of’¹⁶⁸ workers. Prior to the development of the harmonised laws, the High Court in *Kirk v Industrial Relations Commission of New South Wales*¹⁶⁹ made a judgment regarding relevant provisions in the predecessor legislation in New South Wales.¹⁷⁰ That judgment stands as precedent today in the interpretation of the harmonised laws.¹⁷¹ In *Kirk*,¹⁷² the Full Bench found that the word ‘ensure’ in the relevant provision means that what is required is a higher standard of care than under the common law, to take ‘reasonable care’.¹⁷³ The duty demands minimisation of the exposure to risks,¹⁷⁴ and not avoidance of any actual injury or death. It was decided that what the prosecution must do, is to plead particular ‘reasonably practicable’ measure(s) that *should have* been undertaken by the employer to minimise risk, but were not.¹⁷⁵ When the employer is found to have failed to take any particularised reasonably practicable measure, then the offence is made out.¹⁷⁶ It *not* necessary that any harm actually arose as a result of that failure.¹⁷⁷ The lower standard of care relevant to the common law requirement of ‘reasonable care’ was also found by the High Court to be excluded, since the defence was available under the Act, that the employer could satisfy the Court that it was *not* reasonably practicable to take the measure that the prosecution pleads.¹⁷⁸

¹⁶⁸ See, eg, *Work Health and Safety Act 2011* (Qld) s 19 (*‘WHS Qld’*).

¹⁶⁹ [2010] HCA 1 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (*‘Kirk’*). At [113], Heydon J agreed with the relevant ‘substance of the reasoning’ (which includes those issues that I discuss here).

¹⁷⁰ It was the *Occupational Health and Safety Act 1983* (NSW).

¹⁷¹ See, eg, in the Supreme Court of Queensland Court of Appeal in *Archer v Simon Transport Pty Ltd* [2016] QCA 168 (Atkinson J, with Margaret McMurdo P and Gotterson JA agreeing), at [31], after citing *Kirk* [2010] HCA 1 [14]:

No matter whether the limitation “so far as is reasonably practicable” is found in the legislation, or is available as a defence, what must be identified in the offence alleged is the employer’s act or omission with respect to the measures which should have been taken to address identifiable risks.

At [32]:

Referring to *Johnson v Miller* and *John L Pty Ltd*, the Court in *Kirk* held that “the common law requires that a defendant is entitled to be told not only of the legal nature of the offence with which he or she is charged, but also of the particular act, matter or thing alleged as the foundation of the charge.”

¹⁷² [2010] HCA 1.

¹⁷³ *Ibid* [10] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) with Heydon J agreeing at [113].

¹⁷⁴ *Ibid* [10].

¹⁷⁵ *Ibid* [14]-[15], [19]. At [38], as reasonably practicable measures were not particularised in the charges, then the defendant was denied opportunity to apply the defence that the particularised measures were *not* reasonably practicable.

¹⁷⁶ *Ibid* [12].

¹⁷⁷ *Ibid* [13].

¹⁷⁸ *Ibid* [10], [15]-[18].

Under the current, harmonised Queensland statute, *WHS Qld*, s 17 provides that:

- [a] duty imposed on a person to ensure health and safety requires the person—
- (a) to eliminate risks to health and safety, so far as is reasonably practicable; and
 - (b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.

What is 'reasonably practicable' is defined under *WHS Qld* s 18.¹⁷⁹ It has also been clarified in relation to the Model WHS Acts¹⁸⁰ by the plurality of the High Court in *Baiada Poultry Pty Ltd v R*.¹⁸¹ As expressed in the provision, and as clarified in *Kirk*,¹⁸² the particularised steps that must be stated in the charge, must be 'reasonably practicable'.¹⁸³ In its discussion of jury directions, the High Court in *Baiada*¹⁸⁴ also clarified that a defendant has opportunity to prove, on the balance of probabilities, that they were not 'reasonably practicable', and hence the *actus reus* elements would not be made out.¹⁸⁵ The prosecution bears the evidential

¹⁷⁹ *WHS Qld* s 18:

In this Act, "reasonably practicable", in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including—

- (a) the likelihood of the hazard or the risk concerned occurring; and
- (b) the degree of harm that might result from the hazard or the risk; and
- (c) what the person concerned knows, or ought reasonably to know, about—
 - (i) the hazard or the risk; and
 - (ii) ways of eliminating or minimising the risk; and
- (d) the availability and suitability of ways to eliminate or minimise the risk; and
- (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

¹⁸⁰ As a result of the doctrine of precedent as explained in section 9.7.2 above.

¹⁸¹ [2012] HCA 14 [15] (French CJ, Gummow, Hayne and Crennan JJ) (*italics in original*): In considering the analogous provision under the *Occupational Health and Safety Act 2004* (Vic):

All elements of the statutory description of the duty were important. The words "so far as is reasonably practicable" direct attention to the extent of the duty. The words "reasonably practicable" indicate that the duty does not require an employer to take every *possible* step that could be taken. The steps that are to be taken in performance of the duty are those that are reasonably practicable for the employer to take to achieve the identified end of providing and maintaining a safe working environment. Bare demonstration that a step could have been taken and that, if taken, it might have had some effect on the safety of a working environment does not, without more, demonstrate that an employer has broken the duty imposed by s 21(1). The question remains whether the employer has so far as is reasonably practicable provided and maintained a safe working environment.

Heydon J did not provide any other definition of 'reasonably practicable'.

¹⁸² [2010] HCA 1.

¹⁸³ *Ibid* [12].

¹⁸⁴ [2012] HCA 14.

¹⁸⁵ [2012] HCA 14 [32] (French CJ, Gummow, Hayne and Crennan JJ) (*italics in original*): 'the better view is that the jury were not sufficiently directed about the need to be satisfied about an element of the *offence* rather than about a matter of *defence*'; at [55] (Heydon J):

These "defences" were not matters on which the appellant as the accused bore any burden of proof, whether legal (that is persuasive) or evidential. They were not matters which the appellant as the accused was required to establish in order to avoid the prosecution's *prima facie* entitlement to a

burden to prove, beyond reasonable doubt, that the particularised steps were ‘reasonably practicable’.¹⁸⁶

Within the Model WHS Acts, a hierarchy of offences are created. Under *WHS Qld*, when a person fails to comply with a health and safety duty (which includes a failure to undertake a particularised, practicable measure), then a ‘category 3 offence’ is made out under s 33. It has a maximum penalty of 500 penalty units for an individual, and 5,000 penalty units for a corporation.

Under *WHS Qld* s 33, a ‘category 2 offence’ is made out where a person fails to comply with a health and safety duty *and* where ‘the failure exposes an individual to a risk of death or serious injury or illness’. The maximum penalty for an individual is 1,500 penalty units, and 15,000 penalty units for a corporation.

I describe the reckless conduct offence, which is the ‘category 1 offence’, in section 9.7.8 below. A further offence of ‘industrial manslaughter’ is also defined under s 34C which requires negligent conduct causing death.

9.7.5 Structural similarities and differences

In both the Model WHS Acts (under the category 1, 2 and 3 offences), and under *ACPA* s 17, the tests do not require that actual harm eventuated. What must be proven, is that the defendant failed to comply with the duty, and did so, in context to the additional qualifications of the offences.

Under the Model WHS Acts it is *necessary* that the charges properly particularise the nature of the offending by stipulating what measures the defendant *ought* to have undertaken to minimise risk. I take up the case law on that issue in further detail, in the following subsection. Further, those measures must be found to have been ‘reasonably practicable’. In regard to *ACPA* s 17, in *Jolley*,¹⁸⁷ Clare DCJ stated that ‘[t]he *court* must identify what steps

conviction. Rather, they were denials of essential ingredients in the prosecution's case. They were matters on which the prosecution bore a legal (that is persuasive) burden of proof beyond reasonable doubt.

¹⁸⁶ See, eg, *ibid* [16], [32], at [35]:

The Court of Appeal could conclude (as the majority did) that it was proved beyond reasonable doubt that it was reasonably practicable for Baiada to take these steps only if it was not open to a jury to conclude to the contrary. If it was open to a jury to reach a contrary conclusion, the point was not established beyond reasonable doubt. In particular, if it was open to a jury to conclude that it had not been proved beyond reasonable doubt that it was reasonably practicable for Baiada to give its subcontractors instructions about how they were to perform their work and to check that the instructions were observed, it was open to a jury to acquit.

¹⁸⁷ [2018] QDC 12.

ought to have been taken for the animal's welfare in the circumstances'.¹⁸⁸ Whilst in *Flaherty*¹⁸⁹ it appears clearer that what the Court relied on were the *prosecution's* detailed particularisations of the charges to identify what the 'reasonable steps' were, that ought to have been undertaken by the defendant. Both regimes require that the measures the defendant ought to have undertaken are recognised by the Court. Each regime then requires its own particular test of reasonableness be applied to the measures that have been identified. If the tests of reasonableness fail, then the *actus reus* elements are not made out.¹⁹⁰ In both regimes, the base offences, (that is excluding the reckless failure offence under the Model WHS Acts), are strict liability offences.

A difference in the regimes is that the Model WHS Acts are primarily concerned with minimising *risks*. A hierarchy of offences allows for recognition of an increasing level of exposure to risks that *could* result in increasing levels of harms.¹⁹¹ As such, it is attentive to varying degrees of gravity in offending, and implementation of varying ranges of severity in sentencing. Under the *ACPA*, there is no recognition of *risks* of harms to nonhuman animals, and neither does the s 17 offence itself provide any guidance to prosecutors or adjudicators in relation to the laying of charges or making decisions that more directly reflect the gravity of the offending. However it appears that the risks are already indicated since s 17 prescribes the necessary minimum standards of care.

9.7.6 Charges and interpretation: Kirk and Baiada

As described in section 9.7.4 above, in *Kirk*¹⁹² it was found that '[a] statement of an offence must identify the act or omission said to constitute a contravention'¹⁹³ of the relevant duties to minimise risks of harms to employees.¹⁹⁴ The High Court also recited the relevant procedural law in that case that required that it was necessary that a defendant be furnished

¹⁸⁸ Ibid [22] (*italics not in original*).

¹⁸⁹ [2018] QDC 21 [6], [9].

¹⁹⁰ Both regimes also permit reliance on codes of practice as evidence of whether a duty has been complied with. See, eg, *WHS QLD* s 275, *ACPA* s 16.

¹⁹¹ *WHS QLD* also includes an 'industrial manslaughter' offence in s 34C, where negligent conduct causes the death of a worker.

¹⁹² [2010] HCA 1.

¹⁹³ Ibid [14] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

¹⁹⁴ See also *The GEO Group Australia Pty Limited t/as Junee Correctional Centre v WorkCover Authority of New South Wales* [2012] NSWCA 150 [15] (with Beazley and Whealy JA agreeing at [1]-[2]):

In *Kirk* it was held that a statement of the charge in respect of an offence of contravening [the relevant provisions] must specify the act or omission said to constitute the contravention. In relation to such a provision, the act or omission is one which it is alleged should have been taken to obviate an identified risk to a person's health or safety. In the case of an omission, what must be identified is the measure or measures which it is alleged should have been taken.

with information that stipulated 'the nature of the offence that was alleged'.¹⁹⁵ In addition, the High Court considered common law requirements in furnishing both courts and the accused with 'the substance of the charge which he or she is called upon to meet'.¹⁹⁶ The Court explained that '[t]he acts or omissions the subject of the charges here in question had to be identified' if the defendants were to be able to rely on the available defences.¹⁹⁷ It was found that:

The statements of the offences as particularised do not identify what measures the Kirk company could have taken but did not take. They do not identify an act or omission which constitutes a contravention of [the relevant duties] ... The particulars of the s 16(1) offence say nothing about what should have been done to avoid exposing the contractors to risk to their health and safety ... the appellants could not have known what measures they were required to prove were not reasonably practicable.¹⁹⁸

Importantly, in *Kirk*,¹⁹⁹ the plurality also stated the following:

... it may be said that the matter should not have proceeded without further particularisation of the acts and omissions said to found the charges. Without that particularisation, the Industrial Court would be placed in the position to which Evatt J referred in *Johnson v Miller* where it would act as "an administrative commission of inquiry" rather than undertake a judicial function.²⁰⁰

In contrast, in *Jolley*,²⁰¹ Clare DCJ stated that as part of the adjudication: '[t]he court must identify what steps ought to have been taken'.²⁰² In light of the analysis in *Kirk*²⁰³ as above,²⁰⁴ it seems that that statement by her Honour should not be interpreted as implying that a court has a responsibility *itself* to determine what the prosecution may have failed to clearly identify in the charge(s) as any 'reasonable steps' that the defendant ought to have taken that allegedly constitute breach of *ACPA* s 17. It seems appropriate that what should always be clearly stated in the charges in relation to *ACPA* s 17, are particulars that sufficiently inform the defendant of what 'reasonable 'steps' they ought to have taken, and

¹⁹⁵ *Kirk* [2010] HCA 1 [20] citing *Industrial Relations Commission Rules 1996* (NSW), r 217B(2).

¹⁹⁶ *Kirk* [2010] HCA 1 [26] citing *John L Pty Ltd* (1987) 163 CLR 508, 519. The Court also cited other relevant authorities.

¹⁹⁷ *Kirk* [2010] HCA 1 [27].

¹⁹⁸ *Ibid* [28].

¹⁹⁹ [2010] HCA 1

²⁰⁰ *Ibid* [30] quoting *Johnson v Miller* (1937) 59 CLR 467, 495.

²⁰¹ [2018] QDC 12.

²⁰² *Ibid* [22] (*italics not in original*).

²⁰³ [2010] HCA 1

²⁰⁴ See above n 200 and accompanying text.

sufficiently so.²⁰⁵ That would provide the defendant with possibility to refute the charge(s) that those steps were ‘reasonable’ in the circumstances (as that is defined in interpretation of that provision under the *ACPA*).²⁰⁶

The findings of *Kirk*²⁰⁷ and the subsequent relevant cases,²⁰⁸ it seems, could sensibly apply to interpretation of the requirements for laying charges under *ACPA* s 17. As indicated in *Flaherty*,²⁰⁹ provision of the necessary level of detail in specifying the ‘reasonable steps’ that ought to have been taken, may already be common practice by RSPCA Queensland at least. If this practice is implemented and demanded by courts, then the benefits would include that it ensures a degree of fairness for defendants, and it would ensure that courts are not called upon to take on a role of inquiry. It would also seem that the practice would not demand that new case law be developed in regard to rules for specification. Most importantly, if every breach of *ACPA* s 17 that a prosecuting agency wishes to make the subject of a charge, is properly particularised, courts will also be better informed as to the totality of the offending, which should reduce the likelihood of underestimating the degree of the gravity of the offending, and the culpability involved. That should lead to a greater degree of consistency in sentencing. I suggest that these benefits would be further enhanced with the implementation of a reckless conduct offence as I describe in section 9.7.8 below.

²⁰⁵ In *Baiada Poultry Pty Ltd v Inspector Glenister (Victorian Workcover Authority)* [2015] VSCA 344, [48] (italics not in original) Ferguson and McLeish JJA found that the required level of particularisation of the charges does *not* require ‘specification of the *detailed* actions which it was reasonably practicable for the defendant to take’. At [45], whilst it was necessary to identify *what* act or omission constituted the offence, further detailed particularisation of the omission was found not to be necessary in the charge itself: [48]-[49]. At [52] Ferguson and McLeish JJA concluded that:

There can be little doubt that the present charges should not proceed to hearing unless full and proper particulars have been provided. But that does not mean that without complete particulars the charge-sheet is invalid. We accept that it would be insufficient if the charge-sheet merely recited the statutory language without more.

This reasoning was subsequently approved in the Supreme Court of Victoria Court of Appeal in *DPP v Vibro-Pile (Aust) Pty Ltd* [2016] VSCA 55 [133]-[134] (Maxwell P, Redlich and Whelan JJA). In relation to *WHS Qld* duties, a charge must include enough detail to specify what acts or omissions should have been undertaken to minimise risks, however, it may not include a full recitation of details that must be provided prior to a hearing. See, eg, *Archer v Simon Transport Pty Ltd* [2016] QCA 168 [8] (Gotterson JA). At [1] Margaret McMurdo P agreed. At [36]-[37] Atkinson J concluded, after applying the test in *Kirk*, and as it was applied in *NK Collins Industries Pty Ltd v President of the Industrial Court* [2013] QCA 179, that the complaint in question was not deficient in traversing the stated measures that ought to have been taken. See also *John Holland Pty Ltd v Hanel* [2016] SASC 192 [33] (Peek J); *Nash v Resource Pacific Pty Ltd (No 3)* [2018] NSWSC 45 [449]; *A-G of New South Wales v Built NSW Pty Ltd* [2013] NSWCCA 299 [125].

²⁰⁶ Under *ACPA* s 17(4). See above n 162.

²⁰⁷ [2010] HCA 1.

²⁰⁸ See above n 205.

²⁰⁹ [2018] QDC 21.

9.7.7 ACPA and animal protections statutes generally as ‘social legislation’

Work, health and safety legislation is recognised across Australian jurisdictions as ‘social legislation’ or analogously as ‘regulatory legislation’.²¹⁰ In the Supreme Court of Western Australia Court of Appeal, Wheeler JA found that the expression ‘social legislation’:

has most often been used in respect of legislation of the kind which I have endeavoured to describe as regulating in detail an entire field of activity, so that the activity can only be carried out in accordance with the conditions laid down.²¹¹

Examples of social legislation that Wheeler JA mentioned included that concerning driving a motor vehicle,²¹² clearing native vegetation,²¹³ and legislation ‘which would be widely regarded as very important in the protection of the community’.²¹⁴ Other authorities have recognised ‘social legislation’ or ‘regulatory legislation’ in the domains of door to door sales,²¹⁵ domestic violence,²¹⁶ fisheries offences,²¹⁷ hunting birds without a license,²¹⁸ and wildlife conservation.²¹⁹

More recently in the Supreme Court of South Australia, Hinton J, after making reference to Bray CJ’s discussion of ‘social legislation’ in *Liddy v Cobiac*,²²⁰ explained that ‘[r]egulatory offences, generally speaking, take on the form of absolute or strict liability offences’.²²¹ His Honour also cited Roscoe Pound’s contention that strict and absolute liability offences

²¹⁰ See, eg, *Westlift Hire Pty Ltd v Markos* [2003] SAIRC 84 [40] (W D Jennings Senior Judge); *Baker v Carter Holt Harvey Wood Products Australia Pty Ltd* [2003] SAIRC 2 [20] (M Ardlie Industrial Magistrate); *Stratton v Van Del Limited* [1998] VSC 75 [15] (Byrne J); *R v Irvine; DPP v Dynamic Industries Pty Ltd*; *DPP v Irvine* [2009] VSCA 239 [90] Neave JA; *Inspector Jelley v Dupond Industries Pty Ltd* [2007] NSWIRComm 316 [63] (Staff J); *Inspector Beacham v Delta Shelving Systems Pty Ltd* [2012] NSWIRComm 103 [83] (Staff J). See also *Piva v Brinkworth* (1992) 59 SASR 92 [12]-[13] (Duggan J): *not* in relation to WHS offences, but where the term ‘regulatory legislation’ was used as analogous to ‘social legislation’.

²¹¹ *Riggall v The State of Western Australia* [2008] WASCA 69 [64] (*‘Riggall’*). Miller JA agreed with this description at [81].

²¹² *Ibid* [65] citing *Liddy v Cobiac* [1969] SASR 6.

²¹³ *Ibid* citing *Piva v Brinkworth* (1992) 59 SASR 92.

²¹⁴ *Riggall* [2008] WASCA 69 [66].

²¹⁵ *Bembridge v G-K-R Karate Australia Pty Ltd* (1998) 103 A Crim R 362 (Miller J) cited in *Pennings v Maryan* [2000] WASCA 172 [26] (Hasluck J).

²¹⁶ *Pillage v Coyne* [2000] WASCA 135 [13] (Miller J).

²¹⁷ *Hemming v Neave* [1989] SASR 1660; *Rusby v Kerley* [2002] SASR 141.

²¹⁸ *Walker v Eves* (1976) 13 SASR 349, 350 (Bray CJ).

²¹⁹ *Waldon v Hensler* [1987] HCA 54 [19] (Brennon J); *Pennings v Maryan* [2000] WASCA 172 [26] (Hasluck J).

²²⁰ [1969] SASR 6.

²²¹ *Chehade v Commissioner for Consumer Affairs* [2016] SASR 105 [61] (*‘Chehade’*) citing *H Stanke & Son v Parkes* (2010) 108 SASR 296 [34] (White J).

‘[express] the needs of society’ and ‘are not meant to punish the vicious will but to put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morals’.²²² That also characterises those offences as imposing a duty of diligence as discussed in detail in Chapter 8. Hinton J suggested that strict and absolute liability offences are more likely to be considered ‘regulatory offences’.²²³ His Honour explained that:

[s]uch offences call the general public to the strict observance of the norm of conduct prescribed because the Legislature has determined that such a high duty of observance should be imposed with respect to the subject matter of the offence in the public interest.²²⁴

The recognition of legislation as ‘social’ or ‘regulatory’ is important because it potentially brings with it the demand, or at least the intimation, that sentencing *must* take into account general (or objective) deterrence.²²⁵ Additionally, it appears that where a defendant is found to have acted deliberately with knowledge of the breach, then that should also be taken into account in sentencing,²²⁶ and particularly if the offender did breach provisions where it has provided commercial financial gain.²²⁷ It appears there is a degree of equivocality in this regard in the Queensland regime, if the doctrine of precedent properly applies in relation to these demands, since the *Penalty and Sentences Act 1992* (Qld) s 9(1) does *not* make

²²² R Pound, *The Spirit of the Common Law* (Faculty Publications, University of Nebraska College of Law, 1921) 52 quoted in *Chehade* [2016] SASC 105 [61] (Hinton J).

²²³ *Chehade* [2016] SASC 105 [61].

²²⁴ *Ibid* [61] (*‘Chehade’*) citing *H Stanke & Son v Parkes* (2010) 108 SASR 296 [34] (White J).

²²⁵ See, eg, *Waldon v Hensler* [1987] HCA 54 [19] (Brennon J):

The wider interpretation unduly subverts the capacity of the criminal law to serve the public interest, for it would go far towards frustrating its broad educative and deterrent function (especially in relation to statutes creating regulatory offences).

Liddy v Cobiac [1969] SASR 6, 10 (Bray CJ); *Walker v Eves* (1976) 13 SASR 349, 350 (Bray CJ): ‘In cases like this I think that the deterrent aspect of punishment is paramount’; *Hemming v Neave* [1989] SASC 1660, 3 (Bollen J): ‘I think that breaches of regulatory legislation do not readily lend themselves to suspension of sentence’; *Rusby v Kerley* [2002] SASC 141 [77] (Lander J): ‘Offences under the Act are termed regulatory offences ... the deterrent aspect of punishment is paramount’, at 80:

The offence is likely to be committed by persons who would not normally commit more serious criminal offences. The penalty is usually not a burden to the offender. The real penalty is in the recording of a conviction. The stigma and embarrassment of the conviction provides both the present and general deterrent effect.

See also *R v Irvine*; *DPP v Dynamic Industries Pty Ltd*; *DPP v Irvine* [2009] VSCA 239 [52] (Neave JA); *Pennings v Maryan* [2000] WASCA 172 [26] (Hasluck J).

²²⁶ See, eg, *Piva v Brinkworth* (1992) 59 SASR 92 [14]-[15] (Duggan J). See also *Riggall* [2008] WASCA 69 [54]-[67] (Wheeler JA) in regard to his Honour’s discussion of the circumstances of the offending and deliberate as opposed to ‘technical’ breaches which do not touch on the mischief that the provisions aim to address.

²²⁷ *Piva v Brinkworth* (1992) 59 SASR 92 [15] (Duggan J).

general deterrence a mandatory consideration.²²⁸ Further, under the three part test of whether or not to record a conviction, under *P&S Act* s 12(2):

In considering whether or not to record a conviction, a court must have regard to all circumstances of the case, including—that requires consideration of ‘(a) the nature of the offence; and (b) the offender’s character and age; and (c) the impact that recording a conviction will have on the offender’s— (i) economic or social wellbeing; or (ii) chances of finding employment.

I was unable to locate any Queensland cases where in applying *P&S Act* s 12, a court made reference to the need for general deterrence specifically in the context of breaches of ‘social legislation’ or legislation analogously described, outside of employment-related statutes.²²⁹ It also appears that under *P&S Act* s 12(2)(a), consideration of the ‘nature of the offence’ is limited to the seriousness of the offence and not the classification of the offence as regulatory or otherwise.²³⁰

Courts in South Australia have more directly articulated the need for general deterrence when sentencing under ‘social legislation’. In the Supreme Court of South Australia, in *Piva v Brinkworth*²³¹ Duggan J explained that the exercise of a court’s discretion to refrain from recording a conviction or to impose a penalty, has a ‘restricted application ... in cases of regulatory and social legislation’.²³² In that case the defendant had cleared land in breach of the *Native Vegetation Management Act 1985* (SA). Duggan J found that particularly since the breaching acts of the defendant were ‘deliberate actions’ with knowledge of the breaches, that the need for both ‘general and individual deterrence’ in enforcing the relevant provisions meant that the sentencing discretions as to convictions and fines were

²²⁸ See also *R v Brown; ex parte A-G of Queensland* [1993] QCA 271 (Macrossan CJ):

Where the recording of a conviction is not compelled by the sentencing legislation, all relevant circumstances must be taken into account by the sentencing court. The opening words of s. 12(2) of the Act say so and then there follow certain specified matters which are not exhaustive of all relevant circumstances. In my opinion nothing justifies granting a general predominance to one of those specified features rather than to another. They must be kept in balance and none of them overlooked, although in a particular case one, rather than another, may have claim to greater weight.

²²⁹ See, eg, *Steward v Mac Plant Pty Ltd and Mac Farms Pty Ltd* [2018] QDC 20 [140]:

The penalty imposed in relation to these offences must provide for general deterrence. Employers, suppliers and managers must take the obligations imposed by the Act very seriously. The community is entitled to expect that both small and large employers will comply with safety requirements. General deterrence is a significant factor when safety obligations are breached. The court has a duty to ensure a level of penalty for a breach as will compel attention to occupational health and safety issues so that persons are not exposed to risks to their health and safety at the workplace.

²³⁰ See above n 228. See also Chapter 10, section 10.3.6; J M Robertson, ‘Sentencing in Queensland’ (Paper presented The Magistrates Conference, Brisbane, 30 May 2006) 2.

²³¹ [1992] SASC 3629.

²³² *Ibid* [13].

‘inappropriate in this case’.²³³ Duggan J reiterated that as such, ‘the emphasis on general and individual deterrence remains a vital consideration’.²³⁴

There are a number of reasons why I suggest the *ACPA* should be recognised as social legislation, and particularly when it comes to sentencing under the cruelty and duty of care provisions. Firstly because it is concerned with harm and suffering to living beings. That is important whether one recognises harm to nonhuman animals, or whether one is more concerned that harm to nonhuman animals can indicate potential to harm human animals. Secondly because it meets the test of social legislation articulated by Wheeler JA, in that it ‘[regulates] in detail an entire field of activity, so that the activity can only be carried out in accordance with the conditions laid down’.²³⁵ As explained by Clare DCJ in *Jolley*:²³⁶ ‘the Act is intended to apply to all animals’,²³⁷ and that the *ACPA* s 17 duty ‘cast[s] the general duty of care wider than a duty not to inflict harm’,²³⁸ and that the purposes of the Act includes ‘the objective [of] the “responsible” care and use of animals’.²³⁹ Thirdly the Minister in the second reading speech declared that: ‘[t]he bill aims to address all aspects of animal welfare from the need to care for animals to the provision of strong penalties for cruelty’,²⁴⁰ and that:

[t]he general community holds that deliberate cruelty to animals is abhorrent and unacceptable, and expects that, in other than exceptional circumstances, the perpetrator must be punished severely, and severely enough to deter others ...

The maximum penalty for cruelty is \$75,000 or two years’ jail for an individual. Such high penalties are necessary where cruelty offences occur in high-value commercial animal enterprises, where smaller penalties may be considered an acceptable business risk. These high penalties will send a signal to the community that the government is not prepared to tolerate animal cruelty.²⁴¹

[The bill] covers all areas in which animals are used in the state, including pets and companion animals, circuses, rodeos, zoos, animals in farming, transport and so on.²⁴²

²³³ Ibid [14].

²³⁴ Ibid [15].

²³⁵ *Riggall v The State of Western Australia* [2008] WASCA 69 [64] (*‘Riggall’*). Miller JA agreed with this description at [81].

²³⁶ [2018] QDC 12.

²³⁷ Ibid [18] citing *ACPA* s 11.

²³⁸ *Jolley* [2018] QDC 12 [19].

²³⁹ Ibid [21] citing *ACPA* s 3.

²⁴⁰ Queensland, *Parliamentary Debates*, Legislative Assembly, 31 July 2001, 1987 (Henry Palaszczuk, Minister for Primary Industries and Rural Communities).

²⁴¹ Ibid 1988.

²⁴² Ibid 1989-90.

Fourthly, because *ACPA* s 17, as argued above, is analogous in certain respects to the Model WHS Acts in that it is not only concerned with punishing actual harms but with the *prevention* of harms²⁴³ through the enforcing of particular standards. Fifthly because *ACPA* s 17 is a strict liability offence that imposes a duty of diligence. I suggest all of these factors should be taken into account, and that the *ACPA* should be recognised as ‘social legislation’ particularly in the face of ameliorating arguments in sentencing. That includes those arguments that reference the fact that the *P&S Act* does not make general deterrence a mandatory consideration. Those arguments should be undermined since general deterrence is recognised as a necessary consideration when sentencing under *WHS Qld* as ‘social legislation’.²⁴⁴ I further take up this issue in the case study in Chapter 11.

9.7.8 Reckless failure as a target for reform

One element of suggested reforms to *ACPA* (and other animal protection statutes that include a duty of care offence), is the introduction of a more serious offence to prohibit reckless failure to comply with the duty of care. This model of offence is suggested as one that would be analogous to the reckless conduct offence under the Model WHS Acts.

Under *WHS Qld* s 31, a ‘category 1 offence’, that is ‘reckless conduct’ is made out where a person has a health and safety duty, and where:

- (b) the person, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness; and
- (c) the person is reckless as to the risk to an individual of death or serious injury or illness.

The maximum penalty under *WHS Qld* s 31 is 3,000 penalty units or 5 years imprisonment, or for a person ‘conducting a business or undertaking or as an officer of a person conducting a business or undertaking’, 6,000 penalty units or 5 years imprisonment, or for a body corporate, 30,000 penalty units. In addition, under *WHS Qld* s 31(2), ‘[t]he prosecution bears the burden of proving that the conduct was engaged in without reasonable excuse’. The s 31 offence is also defined as a ‘crime’ under s 31(3). This means that it is an indictable offence.²⁴⁵ I could not locate any reported prosecutions under *WHS Qld* s 31.

²⁴³ *ACPA* purposes include, under s 3a to ‘promote the responsible care and use of animals’ and under s 3(c), to: ‘protect animals from unjustifiable, unnecessary or unreasonable pain’.

²⁴⁴ See, eg, above n 229.

²⁴⁵ *Criminal Code Qld* s 3(3).

In *Orr v Cudal Lime Products Pty Ltd*²⁴⁶ AC Scotting J described that under the equivalent New South Wales provision, the risk as a result of not undertaking particularised reasonably practical measures must have been foreseeable,²⁴⁷ and that the consequences are relevant to the ‘objective seriousness’ of the offence which must be taken into account in sentencing.²⁴⁸ In that particular case, his Honour also inferred that the failure to meet the reasonably practical measures ‘was motivated by a desire to save costs’.²⁴⁹ The risk was found to be ‘recklessly disregarded’,²⁵⁰ and that ‘the foresight of the possibility of the risk of serious injury or death arising was sufficient to constitute recklessness’.²⁵¹ Further, there was an element of aggravation in that the defendant ‘was on notice’ of various safety risks that it had ‘not properly rectified’.²⁵² His Honour also highlighted the need for general deterrence:

The penalty imposed in relation to the offences must provide for general deterrence. Employers must take the obligations imposed by the Act very seriously. The community is entitled to expect that both small and large employers will comply with safety requirements. General deterrence is a significant factor when safety obligations are breached.²⁵³

No doubt, if a reckless conduct offence was implemented under *ACPA* in relation the s 17 duty, then it would also remain limited by the anthropocentric qualifications of what is deemed ‘appropriate’ and ‘reasonable’ as described above. Whilst that would not be ideal in terms of properly protecting nonhuman animals from all harms, the new offence would serve as a more effective deterrent particularly in the case of offending by omission, that is less likely to be charged under the cruelty or aggravated cruelty provisions.²⁵⁴ A reckless conduct

²⁴⁶ [2018] NSWDC 27 (*Orr*).

²⁴⁷ *Ibid* [130]-[132].

²⁴⁸ *Ibid* [127] citing *Nash v Silver City Drilling (NSW) Pty Ltd* [2017] NSWCCA 96 [45] (*Nash*). See also *Nash* [2017] NSWCCA 96 [41] (Basten JA):

The assessment of the objective seriousness of the offence was to be carried out in accordance with Pt 3 of the Sentencing Procedure Act and, in particular, having regard to the aggravating and mitigating circumstances set out in s 21A. Many of those factors have salience in relation to deliberate or reckless criminal conduct. Broadly speaking, the degree of culpability of the respondent may properly be assessed by reference to the risk against which steps falling within the definition of what is “reasonably practicable” are to be taken.

²⁴⁹ *Orr* [2018] NSWDC 27 [135].

²⁵⁰ *Ibid* [136].

²⁵¹ *Ibid* citing *Aubrey v The Queen* [2017] HCA 18 [49], at [49] among other statements, citing *Pemble v R* [1971] HCA 2 (Barwick CJ). At [49] Kiefel CJ, Keane, Nettle and Edelman JJ explained that:

... the reasonableness of an act and the degree of foresight of harm required to constitute recklessness in so acting are logically connected. So much is implicit in the notion of an accused’s willingness to “run the risk” or to proceed notwithstanding a risk.

²⁵² *Orr* [2018] NSWDC 27 [137].

²⁵³ *Ibid* [146] citing *Bulga Underground Operations Pty Ltd v Nash* [2016] NSWCCA 37 [180].

²⁵⁴ See, eg, *Department of Employment, Economic Development and Innovation v Schloss & Schloss* [2012] QDC 30 which is the subject of the case study in Chapter 10.

offence under the *ACPA* would also open the opportunity to properly implement recognition of a higher gravity of offending in the case of omissions or positive acts, where the defendant has done so for the purpose of commercial gains, and, or, where they had failed to implement any requirements under an animal welfare direction without reasonable excuse, and where the risks of higher degrees of harm were evident. The offence would direct courts away from erroneous considerations of 'neglect' that focuses on the mental state of the offender rather than the risk of harms to the nonhuman animal victims in circumstances that indicate aggravated forms of offending (such as for commercial gain or not addressing the requirements of an animal welfare direction). Additionally, the court will be directed to a higher range of penalties that should help address greater degrees of consistency in sentencing.

9.8 Analysis of duty of care and cruelty prosecutions in Queensland

This section provides an indication of the impact of *ACPA* s 17 on prosecutions in Queensland since its introduction in 2001. It also serves to contextualise the prevalence of offending by omission(s) in comparison to offending by way of positive act(s).

9.8.1 Overall Queensland statistics

McEwan reported in her thesis that in 2013, the responsible Department (the Department of Agriculture, Fisheries and Forestry Queensland), had confirmed that they respond to approximately 1200 animal welfare complaints per annum, with less than 10 prosecutions arising from these complaints'.²⁵⁵ The Department of Agriculture and Fisheries Annual Report 2016-2017 notes it performed '1,379 animal welfare investigations to ensure high standards of animal welfare and support the ethical production of food products' and '94 registration licences were issued for using animals for scientific purposes'.²⁵⁶ The Department does not publish further detail as to investigation or prosecution statistics.

²⁵⁵ McEwan, above n 98, 63. The relevant footnote cites her Interview with Paul Willett, Principal Bio-security Officer for Inspectors, Department of Agriculture, Fisheries and Forestry, Queensland (Telephone Interview, 4 October 2013). By way of comparison, the Department of Agriculture in Victoria reports that between 2012 to 2017, it prosecuted sixty-nine cases: Agriculture Victoria, *Record of Prosecutions* <<http://agriculture.vic.gov.au/agriculture/animal-health-and-welfare/animal-welfare/record-of-prosecutions>>.

²⁵⁶ Queensland Government 'Department of Agriculture and Fisheries Annual Report 2016-2017' (Annual Report, Department of Agriculture and Fisheries, 2017).

9.8.1.1 Relevant Statistics for RSPCA Queensland from the RSPCA Australia National Statistics

The only detailed published statistics regarding prosecutions under the *ACPA* in Queensland are those that have been published by RSPCA Australia and RSPCA Queensland. The following Table 2 lists the relevant statistics from the RSPCA Australia national statistics²⁵⁷ for each year. There has been no separate accounting in those national statistics for cruelty and duty of care prosecutions. The numbers of duty of care prosecutions are included within the figures for the number of 'cruelty' prosecutions.

Table 2: RSPCA Queensland prosecution statistics as reported within the national statistics

Year	Total Complaints ²⁵⁸	Total Investigated	Charges Laid	Prosecns 'Cruelty' ²⁵⁹	Convictions 'Cruelty' ²⁶⁰	Succ Pros ²⁶¹	Cases Pending
1999-2000	9,411	9,411	109	70	65		5
2000-2001	10,704	10,704	129	87	61		25
2001-2002	10,675	10,675	103	62	56		10
2002-2003	10,630	9,079	100	57	N/A		16
2003-2004	11,843	10,260	89	43	32		11
2004-2005	10,942	10,942	78	48	34		11
2005-2006		9,445	71	51	41		9
2006-2007		9,576	62	40	32		9
2007-2008		11,034	75	51	50		3
2008-2009		11,724	528	23	20		3
2009-2010		13,191	68	26	18		14
2010-2011		13,661	100	26	10		16
2011-2012		15,099	50			30	4
2012-2013		15,737	26			11	10
2013-2014		18,332	22			22	18
2014-2015		18,499	174			20	36
2015-2016		18,386	100			44	57
2016-2017		17,986	n/a			31	63

²⁵⁷ The national statistics for each year from 1999-2000 to 2016-2017 are available at: RSPCA, *Published statistics* <<https://www.rspca.org.au/facts/annual-statistics-2015-16/published-statistics>>.

²⁵⁸ Within the national statistics published by the RSPCA Australia, the total number of complaints ceased being reported from the year 2005-2006.

²⁵⁹ Within the national statistics published by the RSPCA Australia, there is no separation of the statistics for cruelty offences and the duty of care offences.

²⁶⁰ Within the national statistics published by the RSPCA Australia, there is no separation of the statistics for cruelty offences and the duty of care offences.

²⁶¹ From the year 2011-2012, the RSPCA national statistics listed the number of 'Successful prosecutions' noted as 'Facts proved in relation to principal charges': See, eg, RSPCA Australia, *RSPCA Australia National Statistics 2011-2012* <<https://www.rspca.org.au/sites/default/files/website/The-facts/Statistics/RSPCA%20Australia%20National%20Statistics%202011-2012.pdf>>.

9.8.2 RSPCA Queensland cruelty and duty of care statistics

9.8.2.2 Source: RSPCA Queensland Data

The figures in the following Table 3 for the years 2014-2015 to 2016-2017 are compiled from a spreadsheet provided to me by RSPCA Queensland on 4th May 2018. The figures in the following Table 3 for the years 1998-1999 to 2013-2014 are compiled from a spreadsheet provided to me by RSPCA Queensland on 7th August 2018. All of the data provided to me by RSPCA Queensland was provided in confidence, and hence the raw data provided to me is not included in this thesis. RSPCA Queensland has confirmed that they accept my interpretation of the figures as I have presented them, with a number of qualifications that are listed in Appendix 4. Appendix 4 also provides evidence of the permission I have received from RSPCA Queensland to include within this research: my interpretations of the data, the figures in Table 3, with the necessary qualifications and clarifications, and the detailed data presented in Appendix 5. The more detailed data in Appendix 5 is included to provide further insight into the types of offending for the years 2014-2015 to 2016-2017.

Table 3: RSPCA Queensland prosecution statistics from RSPCA Queensland provided data.

Year	Column A Total 'cruelty' prosecutions from National Statistics ²⁶²	Column B Total prosecutions (all offences) from RQ data ²⁶³	Column C # Cruelty 'ill-treat' cases from RQ data ²⁶⁴	Column D # 'Fail to's 17 cases from RQ data ²⁶⁵
1998-1999		67	8	56
1999-2000	70	71	12	53
2000-2001	87	93	15	79
2001-2002	62	68	14	52
2002-2003	57	60	8	40
2003-2004	43	43	6	36
2004-2005	48	48	11	32
2005-2006	51	49	6	43
2006-2007	40	42	5	35
2007-2008	51	46	9	34
2008-2009	23	19	4	14
2009-2010	26	18	3	15
2010-2011	26	24	7	15
2011-2012	30	19	4	13
2012-2013	11	18	0	18
2013-2014	22	11	2	9
2014-2015	20		5	28
2015-2016	44		6	29
2016-2017	31		2	29
2017-2018 ²⁶⁶		74	11	49

²⁶² The figures in this column are taken from the RSPCA Australia national statistics published at RSPCA, *Published statistics* <<https://www.rspca.org.au/facts/annual-statistics-2015-16/published-statistics>>. Within the national statistics published by the RSPCA Australia, there is no separation of the statistics for cruelty offences and the duty of care offences. From the year 2011-2012 within this column, the numbers reported by RSPCA Australia were for 'successful prosecutions'.

²⁶³ These figures in this column were determined from the data in the spreadsheets provided to me by RSPCA Queensland (except for the year 2017-2018: see section 9.8.2.3 below). The method of determining these figures is explained in section 9.8.2.3 below.

²⁶⁴ These figures were determined from examination of the spreadsheets provided to me by RSPCA Queensland (except for the year 2017-2018: see section 9.8.2.3 below). The method of determining these figures is explained in section 9.8.2.3 below.

²⁶⁵ These figures were determined from examination of the spreadsheets provided to me by RSPCA Queensland (except for the year 2017-2018: see section 9.8.2.3 below). The method of determining these figures is explained in section 9.8.2.3 below.

²⁶⁶ The figures for 2017-2018 were provided to me by RSPCA Queensland in an email dated 7 August 2018. See section 9.8.2.3 of this chapter.

9.8.2.3 2017-2018 preliminary figures

RSPCA Queensland advised separately, in an email of 7th August 2018, that the total number of successful prosecutions in 2017-2018 was then currently estimated at 74 from a total of 75 total prosecutions. As reflected in the above table, this consists of an estimated total of 11 cases where the defendant was found guilty of a breach of s 18 (and possibly other offences), and 49 cases where the defendant was found guilty of a breach of s 17 (and possibly other offences). RSPCA Queensland has confirmed that this is a significant increase in prosecutions over the previous years.

9.8.2.4 RSPCA Queensland indicative cruelty and duty of care prosecutions over time

Figure 1: RSPCA Queensland indicative total prosecutions over time – offending by positive act and offending by omission under *ACPA* ss 17, 18.

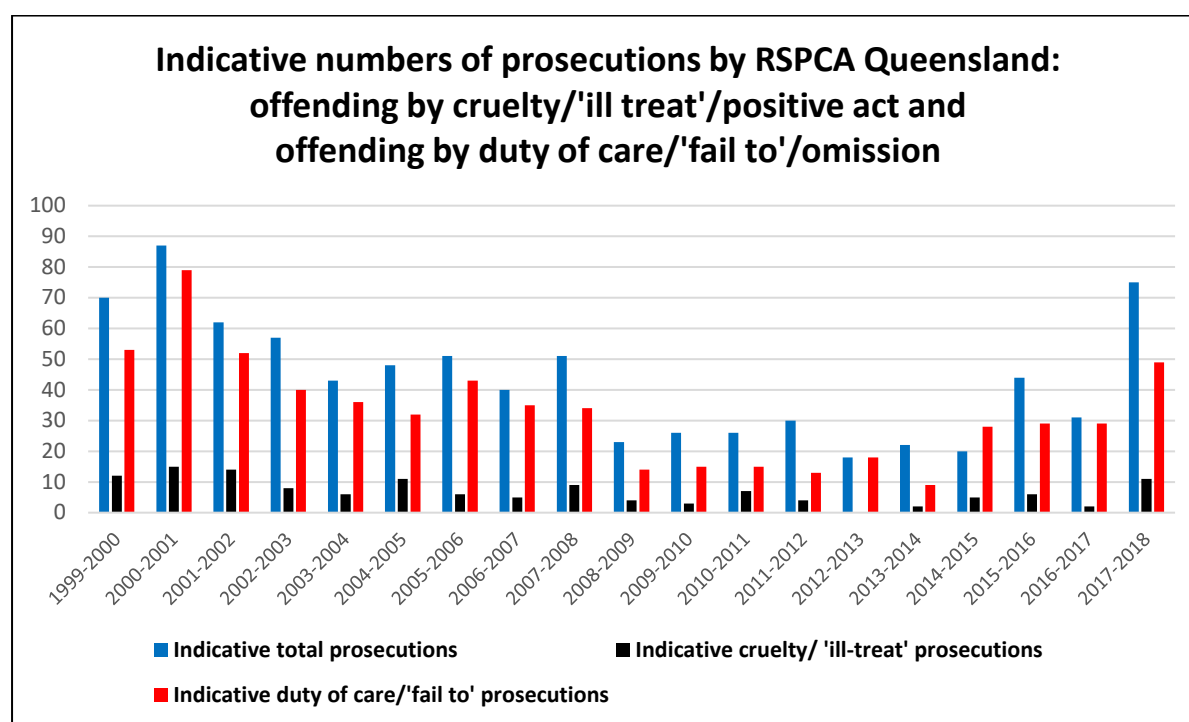
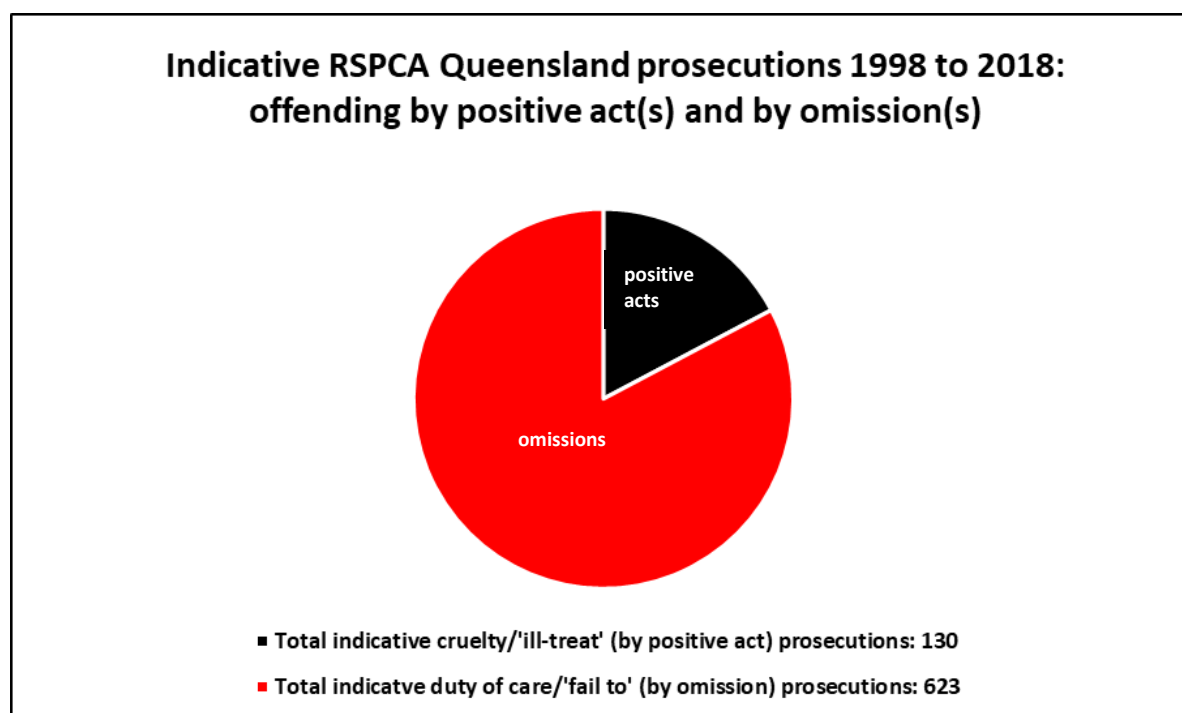


Figure 1 is constructed from the data in Table 2 and Table 3 (see above). Figure 1 only pertains to cases prosecuted by RSPCA Queensland. The purpose of Figure 1 is to indicate the proportion of total offending related to offences made out by positive acts under the cruelty offence, compared to: offending made out by omission under the former Act (prior to 2001—2002) and its cruelty offence, and by omission (or positive act although such cases are not likely) under s 17. The former Act did not include an omissions-specific offence equivalent to s 17. Rather, omissions offending was charged under particular subsections of the cruelty offence.

The total number of prosecutions is the highest number as reported in Table 2 and Table 3 for each particular year. The qualification points in Appendix 4 explain that these figures may not be completely accurate but nevertheless they are sufficient to highlight the proportional relationship between offending by positive act(s) and offending by omission(s). The following pie chart also highlights this relationship.

Figure 2: RSPCA Queensland indicative total prosecutions 1998 to 2018 – offending by positive act and offending by omission under ACPA ss 17, 18.



The above data, and as it presented Figure 1 and Figure 2, clearly demonstrates that the bulk of the RSPCA Queensland prosecutions under the ACPA is related to offending by way of omission. It is clear that since the introduction of s 17, and in the vast majority of cases where the offending has been committed by way of omission(s), s 17 has been employed by RSPCA Queensland as the appropriate offence. The detail of the charges from the years 2014-2015 through to 2016-2017, provided in Appendix 5, further substantiates this fact. The descriptions of some of the cases there, also indicate that substantial suffering by nonhuman animals may have been the result of some of the omissions offending.²⁶⁷ Offending by way of omission can constitute equal or perhaps even worse harms and even death for nonhuman animals. It would seem such cases *could* be prosecuted under the ACPA s 18

²⁶⁷ See, eg, Appendix 5, cases: 14-15/67, 14-15/124, 14-15/132, 15-16/69, 15-16/91, 15-16/128, 15-16/137, 15-16/146, 16-17/41, 16-17/52, 16-17/80.

cruelty offence that provides higher maximum penalties.²⁶⁸ However, it is understandable and appropriate that RSPCA Queensland may not employ the s 18 offence in cases of omissions. That is because there is a risk to the prosecution that doing so may invite an objection or appeal on the basis that such an exercise of the prosecution's discretion, in applying the cruelty charge, would be an abuse of process.²⁶⁹ That is because *ACPA* s 17 may be read by a court to cover the field of omissions offending. In addition, as discussed in section 9.2.4 above, because Queensland is a Criminal Code jurisdiction, liability for omissions, it seems, needs to be enlivened through the clear enunciation of a duty. That is what *ACPA* s 17(1) provides. What is of most interest, is that it is clear, on the basis of this data, that in relation to *ACPA* ss 17-18, offending by way of omission(s) is much more prevalent in the community than offending by way of positive act(s). These facts lend weight to the argument that s 17 should *not* be regarded as merely a supplementary or subordinate offence to the cruelty offence. Neither should it be assumed that s 17 addresses a form of offending with a lower *actual* gravity of offending. Omissions offending can result in nonhuman animals suffering for extended periods of time, for example, by slowly being starved or deprived of water. Omissions offending can also result in nonhuman animals suffering unnecessarily, and to a high degree for a prolonged period, as a result of a lack of appropriate treatment or appropriate shelter. This highlights the issue that omissions offences *should* carry an appropriate deterrent element and not be positioned or perceived as merely a subsidiary offence to s 18.

Further, offending by way of omission under s 17, should *not* be positioned, described or perceived as mere 'neglect'. That characterisation of the offending in a *non-legal* sense, invites thinking about the offending in a manner that prioritises focus on the purported state of mind, 'inadvertence', or lack of intention of the offender, over and above the *actual* failure to meet the *mandatory duties*, and the *actual* suffering of the nonhuman animal victims. In a *legal* sense, characterisation of offending under s 17 as mere 'neglect', and the positioning of s 17 as merely a subsidiary offence, can invite amelioration of the gravity of the offending at sentencing time, through *assumptions* about a lack of *deliberate* offending, which can also be problematic. These issues in determining gravity are examined further in Chapter 10.

²⁶⁸ See, eg, Chapter 10 in relation to the case *Department of Employment, Economic Development and Innovation v Schloss & Schloss* [2012] QDC 30 that was prosecuted by the Department.

²⁶⁹ See, eg, *Francisco Chung v Regina* [2007] NSWCCA 231 [47] (Spigelman CJ):

The fact that particular conduct may constitute the Commission of more than one criminal offence is not an unusual situation. It is only in exceptional circumstances that the prosecutorial choice in laying a charge would constitute an abuse of process. However, in my opinion, the fact relied upon by the Applicant, namely the difference between the maximum penalties applicable to alternative charges, is a perfectly legitimate basis for the exercise of prosecutorial choice.

Clearly, the prevalence of offending by way of omission and the gravity of the offending in some, if not many of the cases prosecuted under *ACPA* s 17, lends weight to an argument that elements such as prolonged suffering, deliberately-caused suffering, and suffering caused for the purpose of commercial gain, should all be recognised as aggravating factors. I suggest they warrant a focus on general deterrence, proper recognition of the gravity of the offending, higher penalties, and penalties that are commensurate with offending under the cruelty provision. As described in section 9.7 above, this may be partially addressed with the implementation of the introduction of a reckless conduct offence, and recognition that the *ACPA* is social legislation.

Overall, this data and this perspective on the prevalence and potential gravity of offending by way of omission under the *ACPA*, invites further research to ascertain RSPCA Queensland's own perspective on this form of offending, and how it may be deterred. Further research in this area would add to the body of knowledge and could more properly reflect the practical issues facing prosecuting agencies who face a multitude of challenges in this jurisdiction. It may serve to be of further benefit to law reform.

9.9 A legal characterisation of s 17

9.9.1 Introduction

Based on this research, this summarises the legal position of nonhuman animals within Australian jurisdictions, and provides a legal characterisation of *ACPA* s 17. It also contrasts what characteristics *ACPA* s 17 shares with *ACPA* s 18 which is the cruelty offence.

9.9.2 Background elements

9.9.2.1 The legal position of nonhuman animals

In Australia, nonhuman animals remain classed as property of humans. Nonhuman animals are without legal rights and they have no legal interests in that respect. Nonhuman animals themselves cannot bring a legal claim and neither do they have legal duties. In Australia, other than for the relevant government departments and the RSPCA, it is rare that other advocates would be granted standing to prosecute claims as a proxy for nonhuman animals. Neither States nor prosecuting agencies have obligations to enforce the animal protection laws. Rather, they have a discretion to do so. In that sense, no State or organisation acts as a legal guardian for nonhuman animals.

ACPA s 17 does not recognise harms to individual nonhuman animals. Additionally, the Queensland sentencing regime, does not appear to recognise 'harm' to nonhuman animals

in context to sentencing law, unless a court chose to do so under *P&S Act* s 9(2)(r) which provides that 'any other relevant circumstance' may be a purpose to which a court 'must have regard'. Neither are nonhuman animals properly recognised as victims within any statutory provisions.

9.9.2.2 Historical and Cultural Context of ACPA ss 17-18

Since the Queensland regime is a liberal regime, the *ACPA* provisions are situated within the context of liberal ideology, including the effects of Hart's 'harm principle'. The notion of 'society' and 'community' as it is implemented in law, excludes nonhuman animals. As a result, 'harms' to nonhuman animals are not properly recognised in law, and certainly not to the degree that harms to human animals are recognised and deterred. The law also serves to uphold the ownership rights of human animals. It privileges an owner's limited rights to utilise nonhuman animals providing that utilisation is not in breach of law. Different degrees of utilisation which may include different degrees of harms to nonhuman animals are made lawful under the excuses and defences provided under the *ACPA* provisions.

ACPA s 17, and s 18 implement outcome-based responsibility where only 'unnecessary suffering' is prohibited. Those laws institute the utilitarian and anthropocentric focus of the statute. Whilst there are general duties under *ACPA* s 17 and s 18 not to harm nonhuman animals to particular degrees, the Queensland regime, in common with other regimes, provides regulations, codes of practice, excuses and defences that provide exemptions from the 'duties'.

The question of *mens rea*, particularly for omissions offences under cruelty statutes has remained problematic. This research identifies that whilst *ACPA* ss 17-18 do not require proof of *mens rea*, confusions can arise particularly at the time of sentencing, in regard to whether the defendant was merely 'negligent'.

It appears that it is a result of the liberal and cultural context of nonhuman animals in law, that the animal 'protection' offences under the *ACPA* are enacted as merely summary, regulatory offences. With this categorisation comes the perception that *ACPA* offences (as opposed to the aggravated cruelty offence under the *Criminal Code (Qld)*), are not properly 'criminal'. That implies that the degree of moral wrongdoing is considered a lower degree than would be assumed for breaches of laws that prohibit harms to human animals.

Arguably, the possibility of issuing animal welfare directions instead of charging breaches of *ACPA* s 17, when a breach is *already* occurring, underscores the lack of recognition of harms to nonhuman animals and the positioning in law, of a lack of offending in a moral sense. The *ACPA* offences are also underscored as not representing truly criminal offending in that the maximum penalties are not severe and that the actual awarding of penalties is

usually at a low level. Rarely is imprisonment ordered. It appears that imprisonment is only awarded in cases of repeated offending or for offending that is deemed heinous in that it offends human animal sentiments. As highlighted in Chapter 10, it also seems possible that a perception of less-than-properly-moral wrongdoing is highlighted in some cases where culpability and gravity are sometimes ameliorated with an assumption that the offending was *not* deliberate, but merely a result of ‘neglect’.

A perceived lack seriousness of breaches of *ACPA* s 17 and s 18 may be problematic in another sense. It may serve to repress reporting of alleged breaches. That is because, as described in Chapter 8, section 8, in this jurisdiction it is the public that acts as a primary gatekeeper (in Lacey’s terminology), in reporting alleged offending. Another related issue is that since *ACPA* s 17 and s 18 are summary offences, the majority of cases are heard in the Magistrates Courts and are rarely reported. This means that it is difficult for the public to appreciate the prevalence of breaches within the community. Governments’ lack of allocation of funding toward the protection of nonhuman animals, and their reluctance to provide an independent voice for the protection of them, is another expression of governments’ perceptions that the issue is not a serious (enough) issue for the community. As Lacey suggested, the public can be influenced by the law’s representation of the seriousness of breaches of laws. That is not to say that the public does not, or cannot also play a role toward development of more protective laws. In fact, that seemed to be a factor in the enactment of *ACPA* s 17 as was indicated in the second reading speech. Nevertheless, the lack of development and implementation of more meaningful and more effective animal protection laws over the past century seems to belie that possibility. I take up that issue in Chapter 11 in addressing whether *ACPA* s 17 delivers what was promised.

9.9.3 Legal Characterisation of *ACPA* s 17

9.9.3.1 What the duty of care offence shares with the cruelty offence

Whilst *ACPA* s 17 is expressed as being ‘owed’ to a nonhuman animal, that is not actually true in legal terms. Nonhuman animals do not have any legal rights-claims, or legal interests. Nonhuman animals cannot be duties recipients since they are excluded from the social contract in law. In common with the cruelty provision, the duties that arise both under *ACPA* s 17 and s 18, are actually owed to the State, concomitant with ownership, reinforced by the provisions and the application of the penalties.

Both *ACPA* s 17 and s 18, are summary offences,²⁷⁰ and therefore classified as a ‘regulatory’ offences rather than properly ‘criminal’ offences.²⁷¹ They are not indictable

²⁷⁰ *ACPA* s 178.

offences and hence are not 'serious' offences that can be heard in the District Courts in the first instance.

In regard to the powers of inspectors under the *ACPA*, an inspector may issue an animal welfare direction if the inspector reasonably believes that 'a person has committed, is committing, or is about to commit, an animal welfare offence'.²⁷² The issuing of animal welfare directions is therefore associated with circumstances involving failures of the duty of care, or actual or potential breaches of the cruelty offence. As such, animal welfare directions are not unique to the context of breaches of *ACPA* s 17.

In context to the former Queensland animal protection statutes, *ACPA* is not new in its provision of prohibitions against particular omissions in failing to provide minimum standards of care. *ACPA* s 18 could also be made out by way of some forms of omissions, and historically, the former Queensland statutes' cruelty offences already included some prohibitions against some omissions to care for some nonhuman animals in some circumstances.

In the former Queensland statute, the term 'neglect' was used in the sense of 'failing to', to provide that the cruelty offence could be made out through omission.²⁷³ By 2002, that statute had been changed in its terminology, under the cruelty offence, to identify offending through omission using the words to 'fail to'.²⁷⁴ In 2001, the *ACPA* was enacted. It introduced the new s 17 offence where regardless of whether the offence is caused by a positive act or omission, the offence can be made out if a person 'does not take reasonable steps to', 'provide the animal's needs ... in a way that is appropriate'.²⁷⁵ What the *ACPA* clarified for both offences, was that *mens rea* was not a necessary element. Since both offences are strict liability offences, that also highlights the availability for both offences, the defence of due diligence (by taking reasonable steps) as well as the defence of mistake of fact (that is also made clear as available under *Criminal Code (Qld)* s 24).

In common with *ACPA* s 18, s 17 provides limited prohibitions on some harms to some nonhuman animals in particular circumstances, although the cruelty offence is applied to cases of offending that are determined by the prosecuting agency as more serious and where a broader range of offending acts can constitute the offence. Both offences can potentially be made out by way of positive act or omission. Since both offences can be made out by omission, they both institute a duty of diligence. That duty is underscored under

²⁷¹ *Criminal Code (Qld)* s 3(1).

²⁷² *Ibid* s 158(1)(a).

²⁷³ *Animals Protection Act 1925 (Qld)* 16 Geo 5, No 25 s 4(1)(b). See Chapter 6, section 6.6.2.2.

²⁷⁴ See Chapter 6, section 6.6.2.3.

²⁷⁵ *ACPA* s 17(3).

ACPA s 17 since it requires that reasonable steps are required to be undertaken.²⁷⁶ ACPA s 18 provides that under some of the circumstances in which cruelty may be made out, the breaching act(s) must be found to be 'unjustifiable, unnecessary or unreasonable'.²⁷⁷ As such, if a defendant can show that they did take reasonable steps then the relevant *actus reus* element will not be established. Neither offence as such, employs concepts of 'negligence' as that is understood otherwise in civil law where common law tests of foreseeability apply, and in criminal law where a high standard care is mandated. Further, the duty of diligence that is implied indicates that there is a duty of knowledge. That is not only knowledge of the obligations under the offences, but also as to the circumstances of the nonhuman animals for which a person has the obligations under both provisions. That is, to maintain the minimum or 'reasonable' standards of care under both provisions, or to *not* 'be cruel' as that is defined under s 18. The duties under both offences are buttressed by the *Criminal Code (Qld)* as: ignorance of the law is no excuse,²⁷⁸ foreseeability of the consequences are irrelevant as neither offence is concerned with intention to cause particular consequences,²⁷⁹ and questions of intention more generally are excluded.²⁸⁰ What can be said about the offences and their commonality with the civil law interpretation of 'negligence', is that what is 'reasonable' under both ACPA offences is determined through implementation of an objective test.

The offences are made out through the *actus reus* elements only. In proceedings for breaches of ACPA s 17 or s 18, compliance with codes of practice is admissible as evidence to negate proof of the breaching conduct. In Hohfeldian terms, the operative fact that enlivens the duty under s 18 is whether the person committed the alleged act of cruelty. An operative fact that enlivens the duty under s 17 is whether the person was the person 'in charge of' the animal.²⁸¹ As a result of the available excuses and defences relevant to s 17 and s 18, privileges arise for all citizens in relation to their own animals particularly,²⁸² to utilise the bodies of, and to *not* care for those animals in a manner above particular thresholds, and in particular circumstances. In generalised terms, where that treatment or lack of treatment is deemed *not* to cause 'unnecessary' suffering, those evidential facts and operative facts give rise to a privilege which negates the duties under the provisions. It is not a stretch of the Hohfeldian schema to claim that the law provides a license to harm

²⁷⁶ ACPA ss 17(3), 17(4)(b).

²⁷⁷ Ibid ss 18(2)(a), 18(2)(h).

²⁷⁸ *Criminal Code (Qld)* s 22(1).

²⁷⁹ Ibid s 23(2).

²⁸⁰ Ibid.

²⁸¹ Ibid s 17(1).

²⁸² Or a person is authorised by the owner.

nonhuman animals providing the minimum thresholds are met. That applies for both *ACPA* s 17 and s 18.

A potential cause of ineffectiveness for both *ACPA* s 17 and s 18 is that the *ACPA* is not recognised as ‘social legislation’ despite the fact that it is concerned with preventing harms, or punishing actual harms to living beings. This does not help courts to retain a greater focus on general deterrence in sentencing. The anthropocentric focus of sentencing law in Queensland generally, appears to result in few sentences of imprisonment.

9.9.3.2 How the duty of care differs from the cruelty offence

What *ACPA* s 17 provides in clear differentiation from s 18 is that it nominates particular minimum standards of care in relation to food, water, living conditions, treatment and handling. Whereas s 18 defines a greater range of circumstances under which an offence may be made out. In addition, the s 17(1) clearly expressed ‘duty’ helps to ensure, in light of liberal principles, that criminality *does* attach to a breaching omission.

The requirement for harm is another difference between the offences. The cruelty offence defines and prohibits what is ‘cruel’, and most of the acts defined as cruel are clear that some form of harm must be proven. Whereas s 17 is not concerned with proof of harm at all. As described in section 9.6.3 above, this can be read as a benefit in that proof of harm would make prosecutions more onerous for prosecuting agencies. Additionally, a requirement for harm may result in injustice where some defendants are merely fortunate that their breaching acts or omissions do not result in identifiable, or provable, or significant-enough harm in that particular case.

Another significant difference between the provisions is the maximum penalties. The maximum penalty under s 17 is 300 penalty units or 1 year’s imprisonment.²⁸³ Under s 18 it is 2000 penalty units or 3 years imprisonment.

A benefit in the structure of the *ACPA* s 17 offence is that it provides opportunity, if not the requirement, that prosecuting agencies are to articulate appropriately detailed charges that specify what ‘reasonable steps’ ought to have been undertaken by the defendant. The opportunity to charge for every breach, for every nonhuman animal victim, means that the offence can serve to more properly inform the court of the extent and gravity of the offending in each case. It also provides benefit to defendants in that they can be better informed of the charges against them. Arguably, the structure of *ACPA* s 17 also opens the opportunity to create a hierarchy of offences that can more effectively help courts to determine the gravity of offending and where the legislature has opportunity to define commensurate ranges of

²⁸³ *ACPA* s 17(1).

penalties. The Model WHS Acts are precedents for this structure of offences and additionally demonstrate that a more effective model of protection and prevention can be implemented by recognising *risk* of harm rather than merely failure to meet a duty.

The history of the application of *ACPA* s 17 shows that it has acted as a form of (Derridean) supplement to the animal 'protection' regime. Section 17 has not really 'added to' the regime other than further defining minimum standards of care. Rather, it has in the vast majority of cases, *replaced* prosecutions under *ACPA* s 18 particularly for offences that are made out through omissions. This fact, coupled with the disparity in maximum penalties is a cause for concern. That is primarily because the statistics show that the majority of prosecutions involve offending by way of omission, and because the degree of suffering by way of omission can be greater and more prolonged as a result of failures to meet the s 17 duties (than a discrete act of 'cruelty'). It is also a concern in relation to the potential lack of general deterrence provided by *ACPA* s 17 and particularly so in the context of sentencing practices that appear to indicate that courts rarely order imprisonment or high-level fines.

9.10 Key conclusions

Part 4 of this research has examined *ACPA* s 17 in its legal and cultural contexts. To the extent that it permits certain degrees of harms to be inflicted on nonhuman animals, it must be recognised that it is an instrument of carnophallogocentrism. That broader context is further taken up in the concluding chapter, Chapter 11. In bringing together the research within Chapters 6 to 9, Chapter 9 has provided a rich legal characterisation of *ACPA* s 17. That characterisation clarifies that despite the articulation in s 17(1), that '[a] person in charge of an animal owes a duty of care to it', that the duty is not owed to the animal at all. It is owed to the State. Additionally, whilst the Act's title indicates that it is concerned with the 'care' and 'protection' of nonhuman animals, its qualifications through the demand of the 'balancing' of the interests of owners²⁸⁴ and the effective permissions to *cause* some degrees of harms through the test of what is 'reasonable',²⁸⁵ as well as the various excuses and defences, undermine its protective effects. Taken from these perspectives, *ACPA* s 17 does not strictly deliver what it promises. Other than the more detailed specification of minimum standards of care, *ACPA* s 17 and its interpretation within the anthropocentric envelope of the Queensland legal regime, does little to actually increase protections for nonhuman animals. Whilst the existence of the law may have some deterrent effect in the community, and whilst the offence may ease prosecutions, the following chapter, Chapter 10, highlights that the enforcement of general deterrence is not always taken up as a priority

²⁸⁴ *ACPA* s 3.

²⁸⁵ *Ibid* s 17(3).

to further support its protective effect. The law reform suggestions offered in this chapter attempt to strengthen the protective aspects of the *ACPA*.

The following chapter, Chapter 10, brings together key elements of this research through a case study in examination of the appeal case of *Schloss*.²⁸⁶ To address the legal content of this research, the first part of Chapter 10 is a legal analysis of the judgment. To address the Derridean content of this research, and particularly to highlight how the metaphysics of presence and rationality get-to-work in law and legal thinking, the second part provides a deconstructive reading of the judgment. As such, the reading is concerned with how the workings of law are antithetical to Derridean justice.

²⁸⁶ [2010] QDC 30.

PART 5: CASE STUDY - SCHLOSS

CHAPTER 10: CASE STUDY – LEGAL AND DECONSTRUCTIVE READINGS OF SCHLOSS

10.1 Introduction

This chapter as presented incorporates two parts. Part One provides a legal reading, and Part Two a deconstructive reading, of the ‘judgment’: *Department of Employment, Economic Development and Innovation v Schloss & Schloss*,¹ delivered *ex tempore*. The structure of this ‘judgment’ document, which is all that is available for this case, consists of two cover pages, and the remaining pages are the transcript of what was stated by her Honour Judge Bradley in Court. As such, what needs to be considered is that the body of the ‘judgment’, which is the transcript, recites her Honour’s reasoning at the time, but it is not a judgment in the formal sense where usually more time is taken to write the judgment and then it is formally published in court. To carry this distinction throughout this chapter, I retain the quotation marks when I refer to it as the ‘judgment’. An electronic copy of the full extract of the ‘judgment’ cover pages and the transcript is provided as an attachment to the PDF version of this thesis. **Before reading that electronic copy of the ‘judgment’ is it necessary to note the copyright notices in Appendix 6.**

*Schloss*² is the only appeal case that I could locate,³ that provides sufficient text for a deconstructive reading, and that considers issues of central relevance to this research. The case was heard by her Honour on 15 February 2015 in the Kingaroy District Court. This case was also selected because the Queensland *Magistrates Court Criminal Law Benchbook*⁴ lists it as the only precedent in interpreting the *Animal Care and Protection Act 2001* (Qld) (‘ACPA’). It lists *Schloss*⁵ as relevant to interpreting the duty of care provision in particular to: s 17(3)(a)(ii) regarding ‘accommodation or living conditions’ in relation to ‘providing appropriate accommodation at a dog breeding facility’,⁶ and; s 17(3)(a)(iv) regarding ‘the treatment of disease or injury’, ‘in relation to providing treatment for dogs’.⁷ As such, it has

¹ [2012] QDC 30 (‘*Schloss*’).

² Ibid.

³ See Appendix 2 for a list of all reported cases that I could locate, that considered the *Animal Care and Protection Act 2001* (Qld), and my reasons for not selecting each of those cases for a deconstructive reading.

⁴ Supreme Court Library of Queensland, *Magistrates Court Criminal Law Benchbook: Animal Care and Protection Act 2001 Breach of duty of care prohibited – s 17 Animal Care and Protection Act 2001 (Qld)* <<https://www.sclqld.org.au/benchbooks/criminal-law-benchbook/#Animal%20Care%20and%20Protection%20Act%202001>> (‘*Benchbook*’).

⁵ [2012] QDC 30.

⁶ Supreme Court Library of Queensland, *Benchbook*, above n 4, 2 n 13.

⁷ Ibid 3 n 14.

been recognised to a degree, as an influential case, although I could not locate any reported cases that referred to it.⁸

In Part One of this chapter, I provide a critical legal reading of *Schloss*⁹ that highlights the anthropocentricity of the law in interpretation of the *ACPA* and the scope for penalties under the *Penalties and Sentences Act 1992* (Qld) ('*P&S Act*'). In Part Two, I provide a deconstructive reading that seeks to uncover how the 'judgment' was constrained within the metaphysics of presence. The purpose of both readings, is to highlight what the law and the 'judgment' actually re-institutes for nonhuman animals in this case.

PART ONE: LEGAL READING OF *SCHLOSS*

10.2. Outline of the facts in *Schloss*

The defendants and respondents in the appeal, Ruth Lurline Schloss and Kenneth Schloss, were dairy farmers that operated a dog breeding and sales business called *K and R Puppies*.¹⁰ On 8th April 2009 an inspector from the Department of Employment, Economic Development and Innovation served Ruth Schloss with an animal welfare direction requiring that the care of her dogs be improved to a standard that would comply with a New South Wales code of practice.¹¹ At some later time, the required improvements were not found to have been made. On 9th September 2009, two hundred and forty six dogs were seized and taken into the care of RSPCA Queensland.¹² Five dogs had emergency veterinary treatment and two died.¹³ The costs incurred by the RSPCA in regard to the seizure and veterinary treatments for the dogs was in excess of \$550,000.¹⁴ One cruelty charge was laid against each defendant in relation to fourteen dogs who were caused pain due to a lack of veterinary

⁸ I searched the two case databases: Australasian Legal Information Institute <<http://classic.austlii.edu.au/>> and LexisNexis, *Lexis Advance Pacific* <<https://advance.lexis.com/pacificresearchhome/>> on 30 June 2018. However, in Australia lower courts' judgments are rarely reported. In Queensland, the lower courts include the Magistrates Court where most *ACPA* offences would be heard in the first instance.

⁹ [2012] QDC 30.

¹⁰ *Ibid* 4.

¹¹ *Ibid* 5. I assume that there was no relevant Queensland code of practice available at the time, and there does not appear to be a current Queensland animal welfare code of practice specific to dog breeding. See Queensland Government, *List of animal welfare codes of practice* (25 November 2016) Business Queensland <<https://www.business.qld.gov.au/industries/farms-fishing-forestry/agriculture/livestock/animal-welfare/codes/list>>.

¹² *Schloss* [2012] QDC 30, 5.

¹³ *Ibid*.

¹⁴ *Ibid* 7.

treatment.¹⁵ One breach of the duty of care offence was laid against each defendant for failures to take reasonable steps to attain treatments for some of the dogs, and for failing to take reasonable steps to provide appropriate accommodation or living conditions for all of the dogs.¹⁶ Ruth Schloss was also charged with a failure to comply with the animal welfare direction.¹⁷

The circumstances of the defendants during the period of the offending, were that they were being effected by drought, had little water, had to pay for feed for the dairy herd, and had been forced to reduce the herd as a result.¹⁸ They also had one sixteen year old daughter that they were still caring for, had high expenses and large debts, were receiving Centrelink benefits, and were taking food voucher donations.¹⁹ They also claimed that they were hampered in their attempts to address what was required under the animal welfare direction as Kenneth Schloss suffered from depression at the time.²⁰

The sentencing Magistrate was quoted by Bradley DCJ as stating that the case was ‘a bad case of animal cruelty and failure to comply with directions and breaches of duty of care’, that the number of dogs ‘far exceeded the number of dogs that [they] had the ability to care for’, and that they operated a ‘commercial concern to generate profit’.²¹ The sentencing Magistrate had, according to her Honour, also stated that the drought had necessitated the reduction in the dairy herd, and that the dog breeding activity was ‘an endeavour to meet feed, water and other outlays’.²² The sentencing Magistrate had ordered that Ruth Schloss was to pay a fine of \$9,000, plus \$10,000 compensation, and that Kenneth Schloss was to pay a fine of \$6,000 plus \$10,000 compensation.²³ Both respondents also had prohibition orders made against them that they could not acquire a certain number of dogs for a certain number of years.²⁴ No convictions were recorded.²⁵

The prosecution argued that the facts indicated that the defendants ‘had little to no regard for the welfare of the dogs’.²⁶ According to her Honour, the Department had argued for sentences that ‘particularly emphasised the seriousness of the offences and the need for

¹⁵ Ibid 5.

¹⁶ Ibid.

¹⁷ Ibid 6.

¹⁸ Ibid 8-9.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid 10.

²² Ibid.

²³ Ibid 3.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid 6.

both personal and general deterrence'.²⁷ There were a number of grounds for the appeal in relation to an error of fact, and that the sentences were manifestly inadequate.²⁸ All of those arguments failed.

10.3 Legal reading

10.3.1 The charges

ACPA s 17 provides that a duty is 'owed' to each animal.²⁹ Different forms of breaches are possible in relation to any particular animal.³⁰ As such, the provision allows for separate charges to be laid for separate breaches of each minimum standard of care, for each animal victim.³¹ In *Schloss*³² however, it was recalled that the Department, had laid one charge for each defendant for breach of s 17 in regard to all of the two hundred and forty-six dogs.³³ Some of the dogs were also the subject of multiple categories of breach.³⁴ Nevertheless, the Department appealed and sought a sentence to reflect the totality of the offending. Each defendant had pleaded guilty in the Magistrates Court, to one charge under *ACPA* s 17 for breaching their duty of care to animals.³⁵ Each defendant had also pleaded guilty to one charge of cruelty to animals under *ACPA* s 18.³⁶

10.3.2 The breaches

²⁷ Ibid 6.

²⁸ Ibid 3-4.

²⁹ *ACPA* s 17(1): 'A person in charge of an animal owes a duty of care to it'.

³⁰ Ibid s 17(3): Different breaches may be found where the person:

does not take reasonable steps to - (a) provide the animal's needs for the following in a way that is appropriate— (i) food and water; (ii) accommodation or living conditions for the animal; (iii) to display normal patterns of behaviour; (iv) the treatment of disease or injury; or (b) ensure any handling of the animal by the person, or caused by the person, is appropriate.

³¹ See, eg, *Johnson v RSPCA Queensland* [2016] QDC 185 ('*Johnson*'): Six charges were laid in relation to three turtles, at [1]: '[i]n the case of each turtle [the defendant] was charged with failing to take reasonable steps to provide appropriately for the turtles' needs or living conditions and failing to provide appropriate living conditions for the turtles'.

³² [2012] QDC 30.

³³ Ibid 3.

³⁴ Ibid 3, 5:

The particulars of the breach of the duty of care to the animals were that the respondents failed to take reasonable steps to provide treatment with respect to particular dogs for dental disease and ear infection or control of parasites, particularly fleas and ticks. And further, that they failed to provide appropriate accommodation or living conditions with respect to all of the dogs.

³⁵ Ibid 3.

³⁶ Ibid.

10.3.2.1 Section 18: cruelty

Under the cruelty provision, the defendants were on notice³⁷ that they had a duty, owed to the State, not to cause any animal 'pain that, in the circumstances, is unjustifiable, unnecessary or unreasonable'.³⁸ The offence can be made out by a positive act or by omission.³⁹ Since it could be made out by omission, the defendants had a duty of diligence.⁴⁰ The defendants were found to have breached this provision in relation to fourteen dogs since they failed 'to seek or provide appropriate treatment for their veterinary conditions'.⁴¹ The defendants had no excuse of taking *any* appropriate steps in attempts to seek or administer such treatment.

The facts, as they are recited in the 'judgment' appear to indicate that the omissions that led to the breaches were deliberate. That is, the defendants deliberately did not fulfil their duty to seek or provide veterinary treatments for the dogs. They did not argue that they were mistaken as to the health status of the dogs.⁴² The defendants did plead guilty. The 'judgment' revealed that some of the dogs were so ill that five required emergency medical treatment, and two died.⁴³ There are no fault elements, (including knowledge) relevant to the cruelty offence. It was enacted as a strict liability offence.⁴⁴ Clearly, the cruelty offence and the offending in this case, leave no room for an excuse of inadvertence.

10.3.2.2 Section 17: duty of care

Under s 17, the defendants were on notice that they had a duty, owed to the State, to

³⁷ *Criminal Code Act 1899* (Qld) sch 1 ('*Criminal Code (Qld)*') s 22(1): Ignorance of the law is not an excuse.

³⁸ *ACPA* s 18(2)(a).

³⁹ *ACPA* s 18(2)(a) can be made out by omission. See also Appendix 3, *Prosecutions under ACPA s 18 'Cruelty'*: RSPCA case 2005/2006 39 where a Brandon man failed to remove an electronic bark collar from his dog, causing it pain and was fined \$4,000; RSPCA case 2007/2008 26 where a Bundamba man taped his dog's mouth closed and failed to treat the injuries caused as a result and was fined \$2,200.

⁴⁰ See Chapter 8, section 8.4.

⁴¹ *Schloss* [2012] QDC 30, 5.

⁴² *Criminal Code (Qld)* s 24: Mistake of fact.

⁴³ *Schloss* [2012] QDC 30, 5. See also at 8: Whilst not relevant to determination of culpability, the 'judgment' revealed that in the previous year, the defendants had 'worked with a vet to overcome' disease in relation to some puppies. I assume that the puppies were potential sources of revenue for the defendants. They did not claim that they sought *any* veterinary treatment for the fourteen dogs that were the subjects of the cruelty charge.

⁴⁴ *Criminal Code (Qld)* s 23(2) applies:

Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

take reasonable steps to – (a) provide the animal's needs for the following in a way that is appropriate – (ii) accommodation and or living conditions for the animal; ...[and] ... (iv) the treatment of disease or injury.⁴⁵

The offence can be made out by positive act or omission.⁴⁶ Since it could be made out by omission, the defendants had a duty of diligence which is underscored by the requirement to 'take *reasonable* steps'.⁴⁷ The defendants had no excuse in relation to actually undertaking appropriate due diligence by taking reasonable steps, or any defence of mistake of fact. Neither did they dispute that any of reasonable steps that the Court identified as 'reasonable' were not 'reasonable' that would negate the finding of the *actus reus* elements.⁴⁸ The defendants did plead guilty. The Court found that the defendants failed to:

provide treatment with respect to particular dogs for dental disease and ear infection or control of parasites, particularly fleas and ticks ... [and] ... to provide appropriate accommodation or living conditions with respect to all of the dogs.⁴⁹

The facts, as they are recited in the 'judgment', appear to indicate that the defendants deliberately maintained the inadequate living conditions for all of the two hundred and forty-six dogs. That was even after the animal welfare direction had been issued that required provision of appropriate standards relating to 'kennels, environment, hygiene, [and] the stacking of cages'.⁵⁰ The facts, as they are recited in the 'judgment', also indicate that the defendants deliberately chose not to take reasonable steps to provide treatment for 'dental disease and ear infection or control of parasites, particularly fleas and ticks'.⁵¹ At least twenty-seven of the dogs were found to have continued to suffer one or more of those ailments as a result of that lack of treatment,⁵² (excluding the fourteen dogs that were subjects of the cruelty offence). There are no fault elements, (including knowledge) relevant

⁴⁵ ACPA s 17(3).

⁴⁶ See also *Jolley v Queensland Police* [2018] QDC 12 [16] (Clare DCJ) ('*Jolley*'): 'It seems clear that the omission was deliberate ... the offence is styled as a "breach of duty of care". It is not called negligence'.

⁴⁷ ACPA s 17(3) (italics not in original). See also Chapter 8, section 8.4.

⁴⁸ See also Chapter 9, section 9.7.3.

⁴⁹ *Schloss* [2012] QDC 30, 5.

⁵⁰ *Ibid* 6.

⁵¹ *Ibid* 5.

⁵² *Ibid* 9.

to the duty of care offence. It was enacted as a strict liability offence.⁵³ Clearly the duty of care, and the offending in this case, leave no room for an excuse of inadvertence.⁵⁴

10.3.3 *P&S Act* s 48: Financial circumstances and arguments for prioritising general deterrence

As some of the grounds of appeal, the Department argued that the sentencing Magistrate placed: 'too much weight on the circumstances of the defendant, particularly the financial circumstances'; 'too little weight on the injury caused to the animals', and 'too little weight on general deterrence'.⁵⁵ I highlight that this prosecution and appeal was taken by the Department that also had an interest, as part of its portfolio, in economic development and the encouragement of small business. Yet, it argued that the sentences in this case were manifestly inadequate.⁵⁶

In the appeal, Bradley DCJ explained that *P&S Act* s 48 requires that the Court take into account 'as far **as practicable**', '[t]he financial circumstances of the offender' and the 'nature of the burden that payment of the fine will be on the offender'.⁵⁷ Her Honour found that the sentences awarded were not 'inadequate'.⁵⁸ In 2016, Wall DCJ in context to breaches of *ACPA* s 17, and *P&S Act* s 48, declared that: '[i]t is not the case that offenders can be fined regardless of their personal circumstances...'.⁵⁹ Additionally, Mc Gill DCJ, outside of the context of the *ACPA*, in considering *P&S Act* s 48, suggested that it is an error of law for a sentencing magistrate *not* to consider the financial circumstances of a defendant since the requirement under s 48 is mandatory.⁶⁰

However, it seems that such a provision has not always been, and need not be, interpreted to elevate the financial circumstances of the defendant above *all* other considerations. In the Supreme Court of Queensland in 2006,⁶¹ Fryberg J explained that in some cases, under analogous provisions⁶² including *P&S Act* s 48,⁶³ and the rules in common law prior to the

⁵³ *Criminal Code (Qld)* s 23(2) applies:

Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

⁵⁴ See also *Jolley* [2018] QDC 12 [16] (Clare DCJ): 'It seems clear that the omission was deliberate ... the offence is styled as a "breach of duty of care". It is not called negligence'.

⁵⁵ *Schloss* [2012] QDC 30, 4.

⁵⁶ *Ibid.*

⁵⁷ *Ibid* 12-13 (highlighting not in original).

⁵⁸ *Ibid* 15-16.

⁵⁹ *Johnson* [2016] QDC 185 [18].

⁶⁰ *Young v White* [2016] QDC 159 [74]-[75].

⁶¹ *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd (No 2)* [2006] QSC 40 ('*Labrador*').

⁶² In that case s 16C of the *Crimes Act 1914* (Cth) applied which required that:

enactment of the analogous provisions, the financial circumstances of the offender would *not* always be the primary consideration when a fine is the appropriate penalty.⁶⁴ His Honour recalled that in the New South Wales Supreme Court of Appeal, Mahoney JA in *Smith v R*,⁶⁵ had explained that in some cases, even if the fine could not be collected, and imprisonment was inappropriate, then the court should still turn its mind to the need for deterrence in determining the amount of the fine.⁶⁶ In *Labrador*,⁶⁷ the crimes included excise evasion.⁶⁸ In *Smith v R*⁶⁹ the crime was contempt of court where the defendant was already serving life imprisonment.⁷⁰ In *Labrador*,⁷¹ Fryberg J explained that:

It is not the law that a fine, the amount of which plainly exceeds the capacity of the offender to pay it, is by that fact alone excessive.⁷²

In the present case, there is no alternative punishment to a substantial pecuniary penalty. If imprisonment were an available option, the section might point to that rather than a penalty. The minimum penalty, the seriousness of the criminality and the weight which must be given to the factor of general deterrence leave no scope for s 16C [of the *Crimes Act 1914* (Cth)] which required consideration of the financial circumstances of the person] to perform any useful function. The financial circumstances of the defendants cannot sensibly affect the penalties in this case.⁷³

Jerrard JA, in the Supreme Court of Queensland Court of Appeal, confirmed this reasoning of Fryberg J.⁷⁴ In 2016, in relation to *P&S Act* s 48 specifically, Harrison DCJ suggested that deterrence can be relevant to determining the fine amount *despite* the financial circumstances of the defendant.⁷⁵ In that case, the crime was 'an offence of possession of

a court must take into account the financial circumstances of the person, in addition to any other matters that the court is required or permitted to take into account.

⁶³ *Labrador* [2006] QSC 40 [20] n 18.

⁶⁴ *Ibid* [20].

⁶⁵ (1991) 25 NSWLR 1, 23-24.

⁶⁶ *Ibid* 23-34 quoted in *Labrador* [2006] QSC 40 [20].

⁶⁷ [2006] QSC 40.

⁶⁸ *Ibid* [3]-[4].

⁶⁹ (1991) 25 NSWLR 1.

⁷⁰ See *Labrador* [2006] QSC 40 [20].

⁷¹ [2006] QSC 40.

⁷² *Ibid* [21].

⁷³ *Ibid* [22].

⁷⁴ *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* [2006] QCA 558 [98]:

I agree with the learned judge that the fact of those minimum penalties, the seriousness of the criminality of the offenders, and the weight which had to be given to general deterrence, left no scope for s 16C of the *Crimes Act* to perform any useful function.

de Jersey CJ agreed at [2], Williams JA agreed at [47].

⁷⁵ *Fourmile v Queensland Police Service* [2016] QDC 182 [8]-[9].

liquor in excess of the prescribed amount in a restricted area',⁷⁶ and the applicant 'was in receipt of a carer's pension'.⁷⁷

Whilst it might be argued that these cases are not relevant because the crimes did not involve mistreatment of nonhuman animals, it seems that this reasoning *should* apply given that living beings suffer as a result of breaches of *ACPA* ss 17-18. Also relevant to the issue of general deterrence are the factors that I highlighted in Chapter 9, section 9.7.7 in suggesting that the *ACPA* should be regarded 'social legislation'. Additionally, whilst there is a lack of consistency in sentencing in regard to *ACPA* cruelty and duty of care offences,⁷⁸ in some cases, it appears there is less weight placed on the financial status of the offenders.⁷⁹

Determining a sentence is of course, an extremely difficult task, where courts are required to 'balance' competing interests and factors. On the basis of what is presented in the 'judgment', it appears that in *Schloss*,⁸⁰ other reasons toward a more significant financial penalty, that could have been argued and put to the Magistrates Court, and then the District Court in the appeal, for the purpose of personal deterrence could have been: that the defendants had already found themselves in dire financial circumstances and had *continued* to sustain if not increase their financial burdens by not significantly reducing the number of dogs that they kept and bred, and so a relatively small increment to that already-owing debt appears to be hardly a punishment at all; that the defendants' failed to comply with the animal welfare direction, even though they had five months to do so, with knowledge of the risk of financial penalty which had not stirred them into action, and; because they were motivated by profit. It appears that the defendants were aware of the risk of a financial penalty and willingly took on that risk. For the purpose of general deterrence, there are three key factors that I suggest could have been given more weight. First is the number of living beings that were caused to live in the breaching conditions for an extended period of time. It seems that that issue and an argument that the breaches were deliberate, would have been assisted if the pleading had consisted of a great number of particulars that articulated each

⁷⁶ Ibid [1].

⁷⁷ Ibid [3].

⁷⁸ See Appendix 3; Chapter 9, sections 9.3.5-9.3.6.

⁷⁹ See, eg, *Johnson* [2016] QDC 185 [16] where Wall DCJ disapprovingly noted that in some of the comparative cases presented to him:

... some of the defendants there referred to seem to have been fined amounts clearly beyond their financial circumstances. One of those decisions is the case of Stormont which was particularly referred to his Honour in the present case. The defendant there was fined \$4,000 notwithstanding that she was a single unemployed mother with four young dependent children and the matter was dealt with in her absence.

But see *Johnson* [2016] QDC 185 [25]: the \$4,000 fine was set aside, and a probation order was made in lieu. The offence involved mistreatment of six turtles under *ACPA* s 17; at [12]: the defendant was described as a vision impaired disability pensioner.

⁸⁰ [2012] QDC 30.

breach for each dog. Second, more weight could have been associated with the fact that the breaches were motivated by profit in a commercial context. As it was highlighted by the Minister in the second reading speech, it is necessary that the fines not be so low as to be perceived by businesses as a cost of doing business.⁸¹ A third consideration is that a purpose of the *ACPA* is to ‘*promote the responsible care and use of animals*’.⁸² As Clare DCJ recently highlighted in *Jolley*:⁸³

The short title to the Act is the *Animal Care **and** Protection Act*. The long title is: “*An Act to promote the responsible care and use of animals **and** to protect animals from cruelty, and for other purposes*.”⁸⁴

By not attending to general deterrence, it is difficult to discern how the penalties awarded in *Schloss*⁸⁵ did ‘promote’ that responsible care, or did support the *protective* purpose of the Act.

10.3.4 The anthropocentricity of justness under *P&S Act* s 9(1)(a)

Bradley DCJ also stated that the ‘Magistrate also was obliged, as he did, to consider **all** of the purposes for which sentences may be imposed as outlined in section 9’⁸⁶ of the *P&S Act*. Of interest, is that the ‘judgment’ did *not* specifically reference s 9(1)(a) which allows imposition of sentences for the purpose ‘to punish the offender to an extent or in a way that is just in all the circumstances’. That may have been because it is so obvious it goes without saying. However, it seems worthy of a discussion here since the provision highlights some anthropocentric elements of the sentencing regime. ‘Just punishment’ refers to the proportionality of the sentence.⁸⁷ The principle of proportionality requires that the sentence must not exceed that appropriate to the *objective seriousness* of the offence committed.⁸⁸ As confirmed by McMurdo P in the Supreme Court of Queensland Court of Appeal:

⁸¹ See also below n 99 and accompanying text where this issue was raised in the second reading speech.

⁸² *ACPA* s 3(a) (italics not in original).

⁸³ [2018] QDC 12 [17] (highlighting in original): Clare DCJ made this statement in her explanation that harm to animals was not required in order to find breach under *ACPA* s 17.

⁸⁴ *Ibid* (italics in original) (highlighting in original).

⁸⁵ [2012] QDC 30.

⁸⁶ *Ibid* 15 (highlighting not in original).

⁸⁷ See, eg, *R v Patel; ex parte A-G (Qld)* [2011] QCA 81 [200] (Margaret McMurdo P, Muir and Fraser JJA) citing *Moyse v The Queen* (1988) 38 A Crim R 169, 172-73 (Jacobs J).

⁸⁸ *Veen v R (No 2)* (1988) 164 CLR 465, 473-74 (Mason CJ, Brennan, Dawson and Toohey JJ), at 488 (Wilson J).

[t]he objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders but by reference wholly to the nature of the offending.⁸⁹

P&S Act s 9(1)(a) in its imposition of objective seriousness appears a little duplicitous and circular since s 9(2) requires that the court must have had regard to '(c) the nature of the offence and how serious the offence was, including – (i) any physical, mental or emotional harm done to a victim ... ' The objective seriousness of the relevant offences under the *ACPA* is already diluted since *ACPA* ss 17 and 18 are merely summary offences with low maximum penalties. Another diluting factor is the harm principle that underpins the *P&S Act*, in its purpose of: '... ensuring the protection of the Queensland community is a paramount consideration ...'⁹⁰ That is of course, explicit its exclusive recognition of the need to protect the community from harms, where the community is exclusively comprised of human animals. That is also reinforced by *P&S Act* s 9(2)(c)(i) where it appears that the 'victim' is assumed to be a human animal.⁹¹ It appears that recognition of 'objective seriousness', for offending under the *ACPA* will be limited. However, as I suggest in Chapter 9, section 9.7.7, this problem could be at least be partially ameliorated where the *ACPA* is recognised as 'social legislation' which may impact perceptions of the nature of the offences and the nature of the offending, and particularly in cases where a court finds the offending to be 'serious' (even though that remains somewhat of a circular logic).

10.3.5 Lack of consideration of denunciation

Bradley DCJ did make a *qualified* reference to general deterrence which is a purpose under *P&S Act* s 9(1)(c), even though her Honour decided not to apply it as a factor to increase the sentences.⁹² Additionally, the 'judgment' does not reference s 9(1)(d) which is the purpose in sentencing 'to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved'. However, it should be noted that in the second reading speech (to which her Honour did make reference, but for different purposes which I recount in a following subsection), the Minister had declared:

⁸⁹ *R v Perini; ex parte A-G (Qld) (No 2)* [2011] QCA 384 [34] (Margaret McMurdo P) quoting *Muldrock v The Queen* [2011] HCA 39 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) [27].

⁹⁰ *P&S Act* s 3(b); Preamble: '1 Society is entitled to protect itself and its members from harm ... '

⁹¹ In contrast, Markham has made reference to New Zealand courts making a connection between harm to nonhuman animals in cruelty cases and the need to protect the community; Annabel Markham, 'Animal Cruelty Sentencing in Australia and New Zealand' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law In Australasia* (Federation Press, 2nd ed, 2013) 221-22, 222 n 66.

⁹² See section 10.3.7 below.

There are increasing community demands that people should treat animals humanely whether those animals are used for companionship, sport, entertainment, profit or science.⁹³

The bill retains some important conventional wisdoms that the general community holds that deliberate cruelty to animals is abhorrent and unacceptable, and expects that, **in other than exceptional circumstances, the perpetrator must be punished severely, and severely enough to deter others...**⁹⁴

In the year 2000, I received over 7,000 items of correspondence from members of the community on animal welfare issues.⁹⁵

The lack of attention to general deterrence *was* permitted under the sentencing guidelines of the *P&S Act*. It stipulates that general deterrence is not a matter that a court *must* have regard to. It is merely a purpose for which sentences *may* be imposed.⁹⁶ This problem could be ameliorated at least to a degree, where the *ACPA* is recognised as ‘social legislation’.

Her Honour explained that no comparative sentences, in a commercial context, were presented to the Court.⁹⁷ It seems that since this *was* a novel case, as indicated by the lack of comparative cases, and because a purpose of the statute is to ‘*promote* the responsible care and use of animals’,⁹⁸ that general deterrence *should* have been taken into account in sentencing. As already mentioned, the Minister, in the second reading speech, had expressed that particularly in relation to the cruelty offence, the fines must not to be so low that they are ‘considered an acceptable business risk’.⁹⁹

10.3.6 Gravity, ‘objective seriousness’ and culpability

Bradley DCJ stated that ‘[t]he Magistrate’s sentencing remarks indicate that he took into account the gravity of the offending’. As decided by the plurality of the High Court, an appropriate sentence is one which is proportionate to the gravity of the crime and where the

⁹³ Queensland, *Parliamentary Debates*, Legislative Assembly, 31 July 2001, 1987 (Henry Palaszczuk, Minister for Primary Industries and Rural Communities).

⁹⁴ *Ibid* 1988 (highlighting not in original).

⁹⁵ *Ibid* 1989.

⁹⁶ *P&S Act* s 9(1)(c).

⁹⁷ *Schloss* [2012] QDC 30, 11.

⁹⁸ *ACPA* s 3(a) (italics not in original).

⁹⁹ Queensland, *Parliamentary Debates*, Legislative Assembly, 31 July 2001, 1988 (Henry Palaszczuk, Minister for Primary Industries and Rural Communities):

The maximum penalties are deliberately severe. The maximum penalty for cruelty is \$75,000 or two years’ jail for an individual. Such high penalties are necessary where cruelty offences occur in high-value commercial animal enterprises, where smaller penalties may be considered an acceptable business risk. These high penalties will send a signal to the community that the government is not prepared to tolerate animal cruelty.

circumstances of the case are considered.¹⁰⁰ It appears that gravity (as well as ‘objective seriousness’ as part of determining ‘just punishment’ as described above),¹⁰¹ is also demanded as a consideration under *P&S Act* s 9(1)(a) ‘to punish the offender to an extent or in a way that is just in all the circumstances’. The connection is highlighted by Freiberg who recounts the position of the High Court, that under the doctrine of proportionality, ‘the gravity of a crime is to be considered in light of its objective circumstances’.¹⁰² The Australian Law Reform Commission summarised that the objective circumstances ‘include the maximum penalty for the offence, the degree of harm caused by the offence, the method by which the offence was committed and the degree of culpability of the offender’.¹⁰³ The ALRC also clarified that *P&S Act* s 9(2)(d) includes ‘culpability and degree of responsibility for the offence’.¹⁰⁴ Freiberg indicates that gravity can be:

measured by the legislative penalty attached to it or by its social danger, the harm done (particularly having regard to its mode of execution and its effect on the victim), the prevalence of the offence and the degree of participation by the person charged.¹⁰⁵

A key element in determining gravity, is the culpability of the offender. Markham suggests that:

[t]he gravity of an offence is conventionally analysed as a function of two components: the offender’s culpability (which includes matters of knowledge, motive and intention), and the harm caused by the offender’s conduct.¹⁰⁶

In *R v Way*,¹⁰⁷ in the New South Wales Court of Criminal Appeal, it was held that objective circumstances under that jurisdiction’s sentencing statute,¹⁰⁸ were to include ‘the actus reus,

¹⁰⁰ *Veen v R (No 2)* [1988] HCA 14 [7]-[8] (Mason CJ, Brennan, Dawson and Toohey JJ). See also Kelley Burton, Thomas Crofts and Stella Tarrant, *Principles of Criminal Law in Queensland and Western Australia* (Thomson Reuters, 2011) 354 citing *Veen v R (No 2)* [1988] HCA 14; *Hoare v The Queen* (1989) 167 CLR 348, 354.

¹⁰¹ See above nn 87-89 and accompanying text.

¹⁰² Arie Freiberg, *Fox & Freiberg’s Sentencing: State and Federal Law in Victoria* (Lawbook, 2014) 239 citing *Muldock v The Queen* [2011] HCA 39; *R v Rushby* [1977] 1 NSWLR 594; *R v Dodd* (1991) 57 A Crim R 349, 354; *R v Ellis* (1993) 68 A Crim R 449, 40 (Kirby P).

¹⁰³ Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) [5.3] (*‘Same Crime, Same Time’*). See also Freiberg, above n 102, 240.

¹⁰⁴ Australian Law Reform Commission, *Same Crime, Same Time*, above n 103, [6.42] n 56: The report confirms that *P&S Act* s 9(2)(d) includes ‘culpability and degree of responsibility for the offence’, at [6.44]:

An offender’s culpability for the offence is a relevant consideration in applying the proportionality principle and may also be relevant to a number of sentencing purposes such as denunciation, retribution and rehabilitation.

¹⁰⁵ Freiberg, above n 102, 219.

¹⁰⁶ Markham, above n 91, 222.

¹⁰⁷ [2004] NSWCCA 131. See also Freiberg, above n 102, 240-41 n 155.

the consequences of the conduct, and those factors that might properly have been said to have impinged on the mens rea of the offender'.¹⁰⁹ It does not appear absolutely clear what 'impinged on ... *mens rea*' means in that context. However, it does not appear that it is to stretch to factors that were within the reasonable control of the defendant. The Court mentioned the following 'relevant circumstances which can be said "objectively" to affect the "seriousness" of the offence':¹¹⁰

... mental illness or intellectual disability, where that is causally related to the commission of the offence, in so far as the offender's capacity to reason, or to appreciate fully the rightness or wrongness of a particular act, or to exercise appropriate powers of control has been affected ... Other matters which may be said to explain or influence the conduct of the offender or otherwise impinge on her or his moral culpability, for example, youth or prior sexual abuse, are more accurately described as circumstances of the offender and not the offence.¹¹¹

Additionally, the Court seems to have indicated that the 'culpability' in sentencing, is to be determined through a legal definition, since the term *mens rea* was employed.¹¹² In highlighting that, the Court explained that 'intention is more serious than recklessness' and also confirmed that motivation was a factor.¹¹³ That however does not resolve the issue where the crime is one of strict liability where *mens rea* is irrelevant and not proven. Hence, sentencing remarks and guidelines in relation to strict liability offences turn to deciding whether the offending was 'deliberate' or a result of 'neglect'. That terminology of 'neglect' can be confusing. It appears to erroneously invite consideration of inadvertence, at least where a duty of diligence is imposed in a strict liability omissions offence that is not concerned with consequences. As I suggest in this chapter, that can lead to error.

So far, 'gravity' would appear to leave little for a court to consider in regard to 'objective circumstances' for breaches of *ACPA* ss 17-18. That is because they are summary offences with low penalties, and because it seems unlikely that the law properly recognises the consequential harms to the nonhuman animal victims. What is left is the degree of culpability of the offender, motive(s), and elements that may 'impinge' on *mens rea*. In regard to

¹⁰⁸ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A 'Purposes of sentencing'. The purposes were similar to the *P&S Act*.

¹⁰⁹ *R v Way* [2004] NSWCCA 131 [85] (Spigelman CJ, Wood CJ at CL and Simpson J).

¹¹⁰ *Ibid* [86].

¹¹¹ *Ibid*. See also New South Wales Law Reform Commission, *Sentencing*, Discussion Paper No 33 (1996) [5.24] which confirms that the New South Wales provision is to take into account the level of participation of a particular defendant in a crime; at [28.53]: blameworthiness may also be reduced by mental illness or intellectual disability.

¹¹² *R v Way* [2004] NSWCCA 131 [85].

¹¹³ *Ibid* [85].

Schloss,¹¹⁴ the reasoning of the sentencing Magistrate was reported as including the statement that ‘... were you of means and had there been no compelling extenuating circumstances to weigh *against* the gravity of your offending ...’¹¹⁵ Given the facts as they are presented in the ‘judgment’, it appears that the gravity of the offending, particularly in relation to motive and *mens rea* may not have been considered in full. That seems to be the case even though it was reported that the Magistrate ‘acknowledged that the offending was “a bad case of animal cruelty and failure to comply with directions and breaches of duty of care”’, and that he had:

noted that the 246 dogs the respondents had on their property “far exceeded the number of dogs that you had the ability to care for” and that theirs was a “commercial concern to generate profit.”¹¹⁶

In reading the ‘judgment’, it is difficult to isolate what factors in *determining* gravity were considered in relation to *both* defendants, other than it was claimed that Kenneth Schloss suffered from depression at least during the period from which the animal welfare direction had been issued.¹¹⁷ It appears that the ‘compelling extenuating circumstances’ weigh[ing] ‘*against* the gravity of [the] offending’ as the Magistrate was reported as having articulated it, included the guilty pleas and the fact that the Schloss’s had created ‘no impediments to the investigation’.¹¹⁸ They of course were not elements that could have contributed to the offending itself since they occurred after the fact. The Magistrate was also reported as having made reference to other factors as to their personal, and mainly financial circumstances. As I suggest below, what appears to have been erroneously concluded in determining gravity, was the degree of culpability of both defendants.

Before exploring that issue further, it is necessary to consider a challenge in sentencing in regard to culpability in context to strict liability offences. Freiberg explains that as a procedural matter in sentencing:

[o]n a plea of guilty, the sentencing facts are less developed, as the plea only establishes the basic factual elements of the offence charged. However, the prosecution and the defence can enlarge upon them by an agreed version of the facts and, again, reference can be made to material sworn to as part of the committal proceedings ... [a] dispute may arise because there are simply insufficient sentencing facts implied in the verdict. For example, for a strict liability

¹¹⁴ [2012] QDC 30.

¹¹⁵ Ibid 10-11.

¹¹⁶ Ibid 10 (Bradley DCJ quoting the sentencing Magistrate).

¹¹⁷ Ibid 9.

¹¹⁸ Ibid 10 (*italics not in original*).

offence carries no implication regarding the accused's state of mind with regard to the *actus reus*.¹¹⁹

Freiberg also clarifies that for strict liability offences, 'evidence of **lack of** knowledge or intention – which is irrelevant at the adjudicatory stage – is a proper matter to be taken into account in sentencing'.¹²⁰

In *Schloss*,¹²¹ the parties agreed on a Statement of Facts.¹²² Assuming the elements above constitute 'gravity' in Queensland law, then it must also be recognised that in context to the *ACPA*, culpability, may be diluted by 'motive' (or intention in regard to the conduct), since the *ACPA* legitimises some harms in context to the utilisation of the animals by the offenders.¹²³ The gravity is diluted by the status of s 17 as a summary offence¹²⁴ with a low maximum penalty of either three hundred penalty units or 12 months imprisonment.¹²⁵ The cruelty offence is also a summary offence¹²⁶ with a maximum penalty of 1000 penalty units or 2 years imprisonment.¹²⁷ Since *ACPA* ss 17-18 are strict liability offences, in *Schloss*,¹²⁸ there had been no determination made at adjudication as to culpability. Hence, it was appropriate in the appeal, that her Honour considered evidence of it. Her Honour's determination needed to take into account these constitutive and diluting elements of gravity, and the objective circumstances.

10.3.6.1 Gravity and culpability in *Schloss*

I suggest that a problem in the *Schloss*¹²⁹ 'judgment' was the effect of the defence counsel's submission that: 'the cruelty was as a result of neglect rather than deliberate',¹³⁰ in that it was accepted.¹³¹ It appears that the Court was not assisted by that submission, nor by any

¹¹⁹ Freiberg, above n 102, 132.

¹²⁰ *Ibid* 220 (highlighting not in original).

¹²¹ [2012] QDC 30.

¹²² *Ibid* 15.

¹²³ *ACPA* s 3: a purpose of the act is to 'achieve a reasonable balance between the welfare of animals and the interests of persons whose livelihood is dependent on animals; *ACPA* s 17: only 'reasonable steps' are required to provide for the animal's needs, and in deciding what is appropriate in regard to meeting the minimum standards of care, regard must be had to 'the species, environment and circumstances of the animal'. Under the cruelty offence *ACPA* s 18(2)(a), as an example, the 'circumstances' permit consideration of the use of the animal, and only pain that is 'unjustifiable, unnecessary or unreasonable' is prohibited.

¹²⁴ *Ibid* s 178(1).

¹²⁵ *Ibid* s 17.

¹²⁶ *Ibid* s 178(1).

¹²⁷ *Ibid* s 18(1).

¹²⁸ [2012] QDC 30.

¹²⁹ *Ibid*.

¹³⁰ *Ibid* 9.

¹³¹ *Ibid*.

related opposing arguments of the appellant. Another factor that may not have assisted the Court, was that the many breaches of provisions were not individually particularised, leading to a less-than-full articulation of the extent of the offending.

As explained above, evidence may be admitted in sentencing of a *lack of knowledge* or intention as input to determination of gravity. Here, however, in applying *P&S Act* s 9(2)(d) as to extent of blame, it seems legally erroneous to import a lack of intention (or that the offending was not deliberate), or ‘neglect’ (however that is defined) as the actual form of culpability in this case. I suggest that the facts are inconsistent with a finding of ‘neglect’. Rather, it appears that the appellant could have argued that the omissions were deliberate and did not involve any form of inadvertence or lack of knowledge. The ‘judgment’ does not indicate that the defendants claimed any lack of knowledge and neither did they raise a defence of mistake of fact at adjudication time. Additionally, the offences are not concerned with consequences, and so to argue that the *consequences* were not deliberate would be an irrelevancy. It appears that the issue of culpability should have been argued on the basis that the myriad breaches were deliberate.

Even if the defence counsel had argued that there was a lack of knowledge as to perhaps the dental and ear infections that were relevant to the cruelty charges because the Schloss’s may not have noticed them, to suggest that *any* excuse of inadvertence should be permitted, *defeats* the purpose of the offence. It also defeats the purpose of the statute in *protecting* nonhuman animals. The strict liability offences that can be made out through omission, demand a duty of diligence. By way of analogy, this was not a case of ‘well intentioned but incompetent care’ as indicated in the UK sentencing guideline to constitute ‘low level’ of offending.¹³² The defendants did not take any reasonable actions to remedy the breaches. It was a case of ‘[p]rolonged or deliberate ill treatment or neglect’ and ‘[i]ll treatment in a commercial context’, which under the UK sentencing guideline would constitute ‘high culpability’.¹³³ Appropriate diligent action, by taking reasonable steps, was required in law for both offences. The articulation of less-than-deliberate offending as ‘neglect’ for the purpose of determining culpability in these types of omissions offences appears confusing, and in this case, confused. It seems that the defence counsel’s submission that the culpability of the defendants was to be determined as less-than-deliberate was erroneous and it did not assist her Honour. Further, it unjustly diluted the effect of the provisions and the statute. What could have further added to the weight of the gravity of the offending was that it had been

¹³² Sentencing Council, *Animal cruelty* (Revised 2017) <<https://www.sentencingcouncil.org.uk/offences/item/animal-cruelty-revised-2017/>>. See also Chapter 9, section 9.6.2.

¹³³ Ibid.

recognised that the defendants were motivated by profit,¹³⁴ and that they did not take meaningful steps toward the requirements stipulated in the animal welfare direction. Additionally, the Department reported that the defendants 'had little to no regard for the welfare of the dogs'.¹³⁵ On the facts as they are presented in the 'judgment', it appears that it would have been justified to suggest that the defendants had callous disregard as to the effects of the breaches.

10.3.7 Precedent vs promises

In justifying *not* imposing a higher fine than what the sentencing Magistrate had ordered, Bradley DCJ made the statement that:

The business could not be described as a "high value commercial enterprise", which is a quote taken from the second reading speech when the Act was introduced to Parliament as the sort of enterprise particularly targeted by the offence provisions.¹³⁶

What was stated in the second reading speech in relation to 'high-value commercial animal enterprises' was:

The maximum penalties are deliberately severe. The maximum penalty for cruelty is \$75,000 or two years' jail for an individual. Such high penalties are necessary where cruelty offences occur in high-value commercial animal enterprises, where smaller penalties may be considered an acceptable business risk. These high penalties will send a signal to the community that the government is not prepared to tolerate animal cruelty.¹³⁷

The Minister was clarifying that the highest penalty for cruelty should apply to 'high-value commercial animal enterprises' that may intentionally risk lesser fines as a cost of doing business. *Schloss*¹³⁸ is now listed as a precedent in the *Benchbook*¹³⁹ as to interpretation of *ACPA* s 17(3)(a) and 'providing appropriate accommodation at a dog breeding facility',¹⁴⁰ and 'in relation to providing treatment for dogs'.¹⁴¹ It is unfortunate that the affect may be that businesses that are *more* likely to harm a greater number of animals, and that are *more* likely to inflict intentional harm, and where they are doing *less* well financially, and therefore are *less* likely to be able to afford appropriate care for their animals, will *benefit* from this precedent where *lower* penalties are indicated as sufficient. This does not support the

¹³⁴ *Schloss* [2012] QDC 30, 10.

¹³⁵ *Ibid* 6.

¹³⁶ *Ibid* 15.

¹³⁷ Queensland, *Parliamentary Debates*, Legislative Assembly, 31 July 2001, 1988 (Henry Palaszczuk, Minister for Primary Industries and Rural Communities).

¹³⁸ [2012] QDC 30.

¹³⁹ Queensland Supreme Court Library, *Benchbook*, above n 4.

¹⁴⁰ *Ibid* 2 n 13.

¹⁴¹ *Ibid* 3 n 14.

protective purposes of the provisions or the *ACPA* more broadly, it does not deter the mischief indicated by the Minister, and neither does it support the appropriate punishment of deliberate acts and omissions under either *ACPA* ss 17-18. Whereas, a properly instituted *duty* of care, even if only expressed as ‘owed’ to each nonhuman animal,¹⁴² would require that business owners *do* take appropriate steps to reduce the *risk* of breaches of ss 17-18, and thereby reduce the *risk* of prohibited harms to *every* nonhuman animal, and of course, do so *before* the harms eventuate. That *is* what ***was promised***, that the *ACPA* ***would deliver***.

The Bill imposes a duty of care on all persons having charge of animals to properly attend to the welfare needs of the animals.

This is the key proactive aspect of the Bill. Positively providing for the welfare needs of animals is at the opposite end of the welfare continuum to the mere absence of being cruel, the focus of the current Act.¹⁴³

PART TWO: DECONSTRUCTIVE READING OF *SCHLOSS*

10.4 Introduction

This deconstructive reading of the ‘judgment’ *Department of Employment, Economic Development and Innovation v Schloss & Schloss*¹⁴⁴ delivered *ex tempore*, unveils trace, différance, supplementarity, and economies, all functioning within legal constructs and thinking, and as they are reflected in the text. This deconstructive reading cannot be read otherwise than through the Derridean lens. As such, it is a criticism of the metaphysics of presence, and of Western culture, of carnophallogocentrism and other metaphysical productions, in the workings of Western thought and law. The case of *Schloss*¹⁴⁵ is merely one example of all-of-that at work, the violence that it generates, and simultaneously veils. Therefore, this deconstructive reading should not be interpreted, and neither is it intended as, criticisms in legal or rational senses of her Honour’s ‘judgment’ or of her Honour herself. Neither is it intended to be in any way disrespectful to the difficult role of the Judge or of the Court. For that reason, I do not refer to her Honour by name, but rather use the terminology ‘the Judge’. This deconstructive reading is a textual reading and whilst it focusses on the workings of the metaphysics of presence, it is out-of-context to ‘real’ life as we live in it, and all of its difficulties and constraints. In that sense this reading must also be read as a creative

¹⁴² The duty is owed to the State. See Chapter 7, sections 7.6-7.7.

¹⁴³ Animal Care and Protection Bill 2001 (Qld) 4 (italics in original).

¹⁴⁴ [2012] QDC 30 (‘*Schloss*’).

¹⁴⁵ Ibid.

work, that *is* out-of-context and that is lacking in its appreciations of the realities facing the Court.

This deconstructive reading of *Schloss*¹⁴⁶ is assisted by Derrida's exposition of the *pharmakon* as he described it *Plato's Pharmacy*.¹⁴⁷ *Pharmakon* is another of Derrida's non-concepts that exposes the metaphysics of presence at work. It makes sense to apply the *pharmakon* specifically in this reading since it is a returning to the scene of the crime, so to speak. One reason for this framing is that in Appendix 1 of this thesis, I discussed the nature of presence(s) in relation to Platonic Forms.¹⁴⁸ The metaphysics of presence was also briefly elucidated in Chapter 2 of this thesis.¹⁴⁹ Derrida posited that as a result of Forms-thinking, presences ensure the closing, that is, the self-containment of, the metaphysics of presence.¹⁵⁰ That is the closure that Derrida demanded we should challenge through deconstructions. The *pharmakon* is also the scene of the crime since it continues to set the scene, to provide the stage for presence(s).

In *Plato's Pharmacy*, Derrida deconstructively revealed, through Plato's *Phaedrus*, that writing (in the narrow, alphabetical sense) as an instance of a *pharmakon*, stood in opposition to the good of present speech.¹⁵¹ This was also revealed as a common feature of various mythologies and within various of Plato's works.¹⁵² Writing was simultaneously suggested as perceivable as both a poison and a remedy.¹⁵³ *Pharmakons* as particular instances of particular [non]idealities, for example writing or medicine, are embodied, in that they are signified as presences, as forms of graspable [non]beings, as concepts, as actual [non]things. The *pharmakon*, then taken up as a Derridean non-concept, reveals [non]idealities (as [non]things, such as medicine as an instance of a *pharmakon*), as self-infecting, ambiguous, and cross-contaminating in meaning and logic or reason.¹⁵⁴ The deconstructing *pharmakon* as non-concept unravels what are thought to be insides and outsides, goods and evils, truths and falsities, and other metaphysical constructs that enable thought.¹⁵⁵ They are *structural* phenomena within the metaphysics of presence.

¹⁴⁶ Ibid.

¹⁴⁷ Jacques Derrida, 'Plato's Pharmacy' in Jacques Derrida, *Dissemination* (Barbara Johnson trans, Bloomsbury, 2016) 65-181 [trans of: *La Dissémination* (first published 1972)] ('*Plato's Pharmacy*').

¹⁴⁸ See Appendix 1, Part A, sections A26-A2.7.

¹⁴⁹ See Chapter 2, sections 2.2 and 2.3. See also Appendix 1, section A2.

¹⁵⁰ See, eg, Chapter 2, section 2.2.3; Appendix 1, Part A, sections A27-A28.

¹⁵¹ See, eg, Derrida, *Plato's Pharmacy*, above n 147, 103-110.

¹⁵² Ibid 79-116.

¹⁵³ Ibid. See especially at 101.

¹⁵⁴ See, eg, ibid 161-63.

¹⁵⁵ Ibid 163.

In *Plato's Pharmacy*, Derrida highlighted the play of Platonism, that is, metaphysics-at-work, or rather at-play, constituting a *playground* of presence(s). Through the bringing to presence(s) of non-beings as beings, of non-beings effecting and affecting beings, Derrida found that Plato's 'pharmacy' was the playground of the *pharmakon*. The 'pharmacy' is the metaphysics of presence.¹⁵⁶ My deconstructive reading of *Schloss*¹⁵⁷ situates that 'judgment' within the 'pharmacy', where, I suggest, a *pharmakon* remains at-work and at-play.

The 'judgment' of *Schloss*¹⁵⁸ is populated by a pair of axioms, that is, a pair of 'statement[s] or proposition[s] which [were] regarded as being established, accepted, or self-evidently true'.¹⁵⁹ This reading employs those axioms, as deconstructive levers to open the text and unveil its carnophallogocentric violence. In the process, this reading recharacterizes the axioms as contortions, and as levers: as 'projecting arm[s] or handle[s] that [are] moved to operate a mechanism', and as; '[a] means of pressurizing someone into doing something'.¹⁶⁰ I examine each of the axioms to identify what they *do*, and not just what they say, in the text. In the process, I highlight their roles as products of *pharmakon*-thinking, using my own non-non-concept¹⁶¹ of *pharmakon*.

This section proceeds with an explanation of the metaphysical structural phenomena of the *pharmakon*. Following that, each of the *pharmakons* are elaborated. Then, the *pharmakon* in *Schloss*¹⁶² is exposed. It leads to the unveiling of the double duplicities of the *pharmakons*. What I interpret as a confession within the 'judgment' is also examined. It was at that point that the economy of interests of nonhuman animals, in the form of general deterrence, could have been recognised, yet it was sacrificed.

The analysis within this chapter highlights that within law is a network of, or a series of nested, anthropocentric economies at work. They include the economy of interests of sovereign power, the economy of interests of the community, the economy of interests of the legal actors, and the economy of interests of the parties to the case. *Pharmakons* may get to work in each of these economies. What the deconstructive reading reveals is that in this

¹⁵⁶ See, eg, *ibid* 161-63.

¹⁵⁷ [2012] QDC 30.

¹⁵⁸ *Ibid*.

¹⁵⁹ Oxford University Press, *British & World English: axiom* English Oxford Living Dictionaries <<https://en.oxforddictionaries.com/definition/axiom>>.

¹⁶⁰ Oxford University Press, *British & World English: lever* English Oxford Living Dictionaries <<https://en.oxforddictionaries.com/definition/lever>>.

¹⁶¹ It is not a concept since it describes, and does not comfortably sit within, the metaphysics of presence, as I describe it in section 10.3.3 below. It is not a non-concept in the Derridean sense because it does not describe functions of the metaphysics of presence at work (such as trace, difference, supplementarity etc). Rather, it describes products of that working that Derrida already proposed.

¹⁶² [2012] QDC 30.

case at least, there was no recognition of the economy of interests of nonhuman animals. That is despite the fact that anthropocentrically constructed limits are placed on their mistreatment. It is also despite the fact that *ACPA* s 17 provides that a 'duty' is 'owed' to them. The final conclusions emanating from this chapter that bring together the themes and findings of this research, are articulated in the following and final chapter of this thesis.

10.5 Derrida's *pharmakon*

In ancient Greece, it was apparently a practice to sacrifice two men, to lead them out of the city, as scapegoats.¹⁶³ The men were seen to act as purifiers of the city. They were *pharmakoi* that, on their journey, had their genitals beaten with plant matter¹⁶⁴ thought to contain pharmaceutical properties.¹⁶⁵ The beating was to draw out the evils from their bodies.¹⁶⁶ In one account cited by Derrida, the *pharmakoi* were burnt and their ashes dispersed in the wind and the sea.¹⁶⁷ Derrida explained that the unified *body* of the city was believed to be reconstituted through the acts of:

violently excluding from its territory the representative of an external threat or aggression ... that represents the otherness of evil that comes to affect or infect the inside by unpredictably breaking into it. Yet the representative of the outside is nonetheless *constituted*, regularly granted its place by the community, chosen, kept, fed, etc., in the very heart of the inside. These parasites were as a matter of course domesticated by the living organism that housed them at its expense.¹⁶⁸

[Posited as] [t]he origin of difference and division, the *pharmakos* represents evil both introjected and projected. Beneficial insofar as he cures – and for that, venerated and cared for – harmful insofar as he incarnates the powers of evil – and for that, feared and treated with caution.¹⁶⁹

Pharmokos is the rite, and *pharmakoi* the scapegoats.¹⁷⁰ In Plato's *Phaedrus*, Derrida reveals *pharmakon* as the instance of the power (there as writing or medicine), as both remedy and poison. Derrida turned *pharmakon* into a non-concept to show that it housed a power of making differences, that is, of *différance*, and of *supplementarity* that gets to work

¹⁶³ Derrida, *Plato's Pharmacy*, above n 147, 129.

¹⁶⁴ Ibid 129.

¹⁶⁵ See, eg, ibid 176 n 58.

¹⁶⁶ Ibid 129.

¹⁶⁷ Ibid citing Tzetzes (no citation provided by Derrida).

¹⁶⁸ Derrida, *Plato's Pharmacy*, above n 147, 129-30.

¹⁶⁹ Ibid 130. 'Introjection' is the 'unconscious adoption of the ideas or attitudes of others': Oxford University Press, *British & World English: introjection* English Oxford Living Dictionaries <<https://en.oxforddictionaries.com/definition/introjection>>.

¹⁷⁰ See, eg, Derrida, *Plato's Pharmacy*, above n 147, 129-31.

in economies of interests, in thought and in texts.¹⁷¹ Derrida found it at work in *Phaedrus*, where writing was posited as the *pharmakon* of speech. As Derrida described, writing, was posited by mythical sovereign power, in its *essence*, as a poison that ‘dulls the memory’, ‘a debilitating poison for memory’, with a ‘power of maleficent penetration, [with] its ability to affect or infect what lies deepest inside’.¹⁷² It was said to give merely the *appearance* of an aid, of being good.¹⁷³ As such, it was thought to be a ‘dangerous supplement’.¹⁷⁴ Writing was perceived as enabling mere memory, as sophistry, whereas it was as *if* living speech retained the connection to truth.¹⁷⁵ The danger was perceived that what would be recalled as life as a past present, as reality, as truth, would be supplanted by the archive.¹⁷⁶ Speech was truth, good, internal. Writing was less-than-truth, less-than-good, external. It was thought to come from the outside to infect living memory. Plato’s positioning of writing (through the already existing arguments situated in various myths), was contrasted to the purity of speech. This positioning, as described by de Ville, ‘imposes a *prior* matrix, that is, the opposition between inside and outside’.¹⁷⁷ For writing to *be* external, to come from the outside, there must already ‘be’, in thought, an inside and an outside.¹⁷⁸ Derrida exposed this movement (of inside/outside etc) as a function of *différance*, of supplementarity, of the *pharmakon* as non-concept.¹⁷⁹ Further what the *pharmakon* represents as an instance of the phenomena, as writing for example, is a parasite, a supplement, that comes from the outside, that must, in metaphysical logic, be expelled to restore the presumed purity of the inside.

The purity of the inside can then only be restored if the *charges are brought home* against exteriority as a supplement, inessential yet harmful to the essence, a surplus that *ought* never to have come to be added to the untouched plenitude of the inside. The restoration of internal purity must thus reconstitute, *recite* – and this myth as such, ... to which the *pharmakon* should not have had to be added and attached ... and to *distort* ... the pure ... In order to cure

¹⁷¹ See, eg, *ibid* 124-26.

¹⁷² See, eg, *ibid* 103, 110.

¹⁷³ See, eg, *ibid* 103. See also Jacques de Ville, ‘Revisiting Plato’s Pharmacy’ (2010) 23 *International Journal for the Semiotics of Law* 315 (*‘Pharmacy’*) 325.

¹⁷⁴ Derrida, *Plato’s Pharmacy*, above n 147, 109-10.

¹⁷⁵ *Ibid* 107-109.

¹⁷⁶ *Ibid* 109.

¹⁷⁷ de Ville, *Pharmacy*, above n 173, 325 (*italics not in original*).

¹⁷⁸ Derrida, *Plato’s Pharmacy*, above n 147, 103.

¹⁷⁹ See, eg, *ibid* 124-26, at 124 (*italics in original*):

The *pharmakon* has no ideal identity ... [t]his medicine is not a simple thing ... [i]t is rather the prior medium in which differentiation in general is produced, along with the opposition between the *eidos* and its other ...

‘Eidos’ is ‘[t]he distinctive expression of the cognitive or intellectual character of a culture or social group’: Oxford University Press, *British & World English: eidos* English Oxford Living Dictionaries <<https://en.oxforddictionaries.com/definition/eidos>>.

... of the *pharmakon* and rid it of the parasite, it is thus necessary to put the outside back in its place. To keep the outside out. This is the inaugural gesture of “logic” itself, of good “sense” insofar as it accords with the self-identify of *that which is*: being is what it is, the outside is outside and the inside inside ... The cure by ... exorcism, and catharsis will thus eliminate the excess.¹⁸⁰

In contrast with the proposition that writing is a *pharmakon*, Derrida’s deconstructive inversions proposed that writing comes before speech. That writing in the broader sense, is *of* life, is constitutive of life, and is *not* any form of externality as such. That reality, re-presented in speech is already mediated through the logos, through writing. Writing is *of* life itself, of all life, that is beyond just us, as human animals.¹⁸¹ Similarly, medicine can be either restorative or poisonous. It is always poisonous to the pure being of the parasite that it targets.¹⁸² The *pharmakon* as function, already revealed as remedy *and* poison, the inside and the outside, demonstrates contamination of meaning and the controvert-ability of inside/outside ‘logic’. Yet, this working, as a metaphysical construction that enables thought through difference, that works to justify the mental, physical and linguistic acts of casting out and sacrifice to restore what is thought to *be* purity, persists.

The writing/speech difference is but one instance of a metaphysically posited *pharmakon* that institutes difference and value through an inside and an outside. At the level of economies of interests of sovereign states, war, according to George is ‘pharmacotic’.¹⁸³

‘Pharmacotic war’ refers to protracted exchanges of onto-theo-political violence (violence associated with defining, constructing, asserting, and policing political identities that are conceived in religious terms), organized and carried out either by state or non-state actors, and targeted simultaneously against religiously and politically constructed and demonized internal scapegoats and external enemies, in order to stabilize or restore sacred political order.¹⁸⁴

... the impulses driving the pharmacotic war are carthartically resolved for the victorious polity, at least temporarily ...¹⁸⁵

¹⁸⁰ Derrida, *Plato’s Pharmacy*, above n 147, 126-27.

¹⁸¹ See, eg, *ibid* 101. See also Chapter 2, section 2.3; Appendix 1, Part A, section A3.

¹⁸² See, eg, Derrida, *Plato’s Pharmacy*, above n 147, 101.

¹⁸³ Larry N George, ‘Pharmacotic War and the Ethical Dilemmas of Engagement’ (2005) 19(1) *International Relations* 115 (‘*Dilemmas*’); Larry N George, ‘9:11 Pharmacotic War’ (2001) 5(4) *Theory & Event*.

¹⁸⁴ George, *Dilemmas*, above n 183, 115.

¹⁸⁵ *Ibid* 116.

De Ville confirms that Derrida's deconstruction of Plato's *Phaedrus* was another of Derrida's unveiling of the metaphysics of presence at work within the text, and that metaphysics is the *law of texts*:

Différance, which can, as we will see, also be named the *pharmakon*, dissemination, the trace, general writing, etc, in other words points to the representation of that which cannot be represented as such. This 'notion' lies at the heart of *Plato's pharmacy* and Derrida ... introduces it on the first page when he remarks on this law – the law of the composition of texts. In 'untangling' Plato's texts, this law will compel him to point to that spot in the texts, which, as in the case of dreams, cannot be untied, which resists analysis and an identifiable meaning.¹⁸⁶

Beyond identifying a *pharmakon* as evidence of trace/différance/supplementarity, and then using *pharmakon* as another non-concept, *Plato's Pharmacy* also bridges the gap between this working of beingness as presence and our own ultimate economies of death. Through various of Plato's works, Derrida identifies that trace/difference/supplementarity presented by Plato as a *pharmakon*, through languages, works as a protective cloak to enable the security we feel in believing in 'truth' and 'knowledge'.¹⁸⁷ It makes some of us feel closer to a God as the source of truth and goodness, protects us from the fear of the unknown and of death, and through different forms of laws, protects us from excess that leads to death. The differentiation of the body and the soul in language and belief, opens the 'possibility' of the immortality of the soul. Therefore, through a God and 'truth', death becomes acceptable.¹⁸⁸ It is the possibility of oppositions in meaning and value, that can be inverted, that enables belief, 'knowledge' and through the *pharmakon*, the possibility of salvation.

The inverted *pharmakon*, which scatters all the hobgoblins, is none other than the origin of the *epistémé*, the opening to truth as the possibility of repetition and the submission of that "greed for life" ... to law (the good, the father, the king, the chief, the capital, the sun, all of which are invisible).¹⁸⁹

De Ville highlights the connection between the logic of the *pharmakon* as elucidated by Derrida and Derrida's demand for justice:

A close reading of *Plato's pharmacy*, with its investigation via 'writing' of the foundations of metaphysics, and thus also of the Western concept of law, is obligatory should one wish to

¹⁸⁶ de Ville, *Pharmacy*, above n 173, 118 (italics in original).

¹⁸⁷ Derrida, *Plato's Pharmacy*, above n 147, 122-26.

¹⁸⁸ Ibid 121-22.

¹⁸⁹ Ibid 122 (italics in original).

comprehend how Derrida attempts to exceed the restricted economy of metaphysics through his analysis of concepts such as justice and hospitality.¹⁹⁰

In my reading, what Derrida, (and Plato within Derrida), de Ville and George invite, is an ongoing investigation of how law institutes the phenomena of the *pharmakon* as a metaphysical and constraining structure and mechanism of thought. Derrida also invited this in *Force of Law* where he suggested that law is *not* external to force and dominant power, rather, is part of it, internal to it.¹⁹¹ Additionally, his proposition of justice is not servile to political power, but is, and must remain *external* and separate to it.¹⁹² That law is deconstructible, as ultimately *without* ground,¹⁹³ as it needs to be, to permit a working toward a differentiated future.¹⁹⁴ Whereas Derridean justice, beyond law, outside of law, is not deconstructible.¹⁹⁵ As such, Derridean justice may also come from the outside, as a remedy. Of course, it also retains the danger that it may also come as a poison, perhaps in the form of the risky business of absolute hospitality that always invites the worst of the other.¹⁹⁶ Nevertheless, to understand how we work, to have the potential to escape capture within the metaphysics of presence, and the violence it maintains, it seems we must employ his incarnation of this particular *pharmakon*. Justice demands deconstruction, or, in his words: ‘deconstruction is justice’.¹⁹⁷ It is in this spirit, haunted by the [im]possibility of justice, that I tackle this deconstructive reading.

10.6 On location: ‘Tremors in Gravity’

... it is quite obvious here, the stated intention of Theuth (invoked as author of difference: of differentiation) being precisely to stress the worth of his product, that he turns the word on its strange and invisible pivot, presenting it from a single one, the most reassuring, of its poles.¹⁹⁸

¹⁹⁰ de Ville, *Pharmacy*, above n 173, 315 (italics in original) (capitalisation is as it appears in the original).

¹⁹¹ Jacques Derrida, ‘Force of Law: The “Mystical Foundation of Authority” (1990) 11 *Cardozo Law Review* 919, 941 (*‘Force of Law’*).

¹⁹² Ibid.

¹⁹³ Ibid 943.

¹⁹⁴ Ibid 945.

¹⁹⁵ Ibid.

¹⁹⁶ See Appendix 1, Part B, section B3; Chapter 2, sections 2.4 and 2.6.

¹⁹⁷ Derrida, *Force of Law*, above n 191, 945.

¹⁹⁸ Derrida, *Plato’s Pharmacy*, above n 147, 96.

10.6.1 Exposition

In *Schloss*,¹⁹⁹ the Judge accepted two pithy axioms of the defence. They were expressed vigorously by the defence and were *reiterated* in the 'judgment'. They were posited as relevant to the reasoning. However, the axioms are, under this deconstructive reading, anything but *expressive* in terms of rigor and clarity. I suggest the axioms are powered by a shared *pharmakon*. They both employ oppositions that expose the metaphysics of presence, *différance* and supplementarity at work. Both axioms were a means to ends, each working to shore up the [non]decision (in the Derridean sense), each working on, and through, different axes.²⁰⁰ Both were expressed as relevant to the culpability of the defendants and the gravity of their offending. The first axiom works on the axis of self-presence(s) in its differentiation of 'neglect' from 'deliberate cruelty' (intention). The second axiom, works on the axis of desire, in its differentiation of 'need' from 'greed'.

10.6.2 Diegesis²⁰¹

The two pithy axioms repeated by the Judge, are highlighted within the following sentence (or scene) which were stated in the concluding section of the 'judgment':

On the other hand, it was **a case of neglect rather than deliberate cruelty**, and the breeding and sale of the puppies was engaged in **more out of need than greed**.²⁰²

The axioms seek to express and to oppose the extremities (as poles), of what I suggest are the axes of self-presence(s) and desire. The deconstructive reading reveals that: mere 'neglect' as opposed to intention (as 'deliberate cruelty'), and; excusable, or even good 'need', as opposed to evil 'greed'; were *made* justifiable due to the posited effects of some *external* forces. The external forces are insinuated as poisoning the purportedly-otherwise-autonomous, present, good and lawful, decision-making powers of the defendants. The poisoning forces in this case, were coagulated from the elaborated financial circumstances of the defendants. This was admitted, whilst not directly connected, in the statement of the Judge that:

¹⁹⁹ [2010] QDC 30.

²⁰⁰ Relevant illusions that I force here include: 'An imaginary line about which a body rotates'; '[a]n imaginary straight line passing through the centre of a symmetrical solid, about which a plane figure can be conceived as rotating to generate the solid'; '[a]n imaginary line which divides something into equal or roughly equal halves ...'; '[a] straight central part in a structure to which other parts are connected'; '[t]he skull and backbone of a vertebrate animal': Oxford University Press, *British & World English: axis* English Oxford Living Dictionaries <<https://en.oxforddictionaries.com/definition/axis>>.

²⁰¹ Collins, *Definition of 'diegesis'* Collins English Dictionary <<https://www.collinsdictionary.com/dictionary/english/diegesis>>: 'the presentation of the facts by a narrator to the audience'; '(in narrative film or literature) the fictional setting, events and characters'.

²⁰² *Schloss* [2010] QDC 30, 15 (highlighting not in original).

The respondent's financial circumstances were very relevant to their criminality as well as to the assessment of the appropriate fines and compensation orders.²⁰³

Before elaborating the circumstances and the axes, I indulge here in a prologue, to highlight some depth and colour of the axioms, before they are put on stage. I present them here, as of the species: *pharmakon*. The axioms as *pharmacons*, although declared and accepted as decrees of truths, I suggest, were both constructed on slippery ground. Self-deconstructing, they continue to tremor (and spin). As products of the shared *pharmakon* (the background force) each *pharmakon* employs its own *apparent* opposition that simultaneously casts *and* defers [non]meaning. In the case of the pair neglect/intent (as 'deliberate cruelty'), 'neglect' is ungraspable. In the case of need/greed, 'need' is exposed as something other than need. In the face of the law, and in the face of the facts, the terms are controvertible and invertible. Yet, both *pharmacons* insist that what was at work was the *other* of intention, and the *other* of greed. They were served up by the defence and then by the Judge as justifications to reduce culpability, to constrain 'gravity'. However, when deconstructed, they can each be read as *highlighting* an excess of presence as intention, and an excess of desire, as greed. Further, the deconstruction suggests that when *taken* together, the *pharmacons* as posited in the 'judgment', are contradictory, cancel each other out, and provide a form of immunity or antidote, from the effect of the excuses they attempt to administer.

10.6.3 Prologue: The *pharmacons*

The purpose of the *pharmacons* are to highlight, and to impossibly chase away the species' own enabling mechanism: the metaphysics of presence. The 'con' in *pharmakon* is tendered to carry particular relationships in meaning. To elucidate, or better still hallucinate, through these traces, what the *pharmacons* *are*, which is indistinguishable from what they *do*. As performatives. To begin, *concision* in British language is 'the quality of being concise; brevity; terseness'.²⁰⁴ In American English it had also meant 'a cutting off; division'.²⁰⁵ 'Con', in opposition to a 'pro', also signifies '[a] disadvantage of or argument against something'.²⁰⁶ It also denotes a person as a convict,²⁰⁷ and hence in the Derridean sense that bears a relationship to a particular type of hostage of law. Someone, or something, that has been cast out from, and cut-off from, society. In this case, the *pharmacons* as they exist within the 'judgment', exile themselves from lawful, graspable meaning. They also act as supplements

²⁰³ Ibid (highlighting not in original).

²⁰⁴ Collins, *Definition of 'concision'* Collins English Dictionary
<<https://www.collinsdictionary.com/dictionary/english/concision>>.

²⁰⁵ Ibid.

²⁰⁶ Oxford University Press, *British & World English: con* English Oxford Living Dictionaries
<<https://en.oxforddictionaries.com/definition/con>>.

²⁰⁷ Ibid.

to law, to confirm the exclusion of nonhuman animals from the political community. 'Con' also has a nautical meaning to '[d]irect the steering of',²⁰⁸ and here, what was dogmatically driven through the language, was metaphysical thought. As a 'con', *pharmakon* involves persuasion 'to do something or believe something by telling [others] things that are not true',²⁰⁹ or more harshly: to '[p]ersuade (someone) to do or believe something by lying to them'.²¹⁰ Most significantly, 'con', as such, has a relationship to the application of a confidence trick, that is, '[a]n act of cheating or tricking someone by gaining their trust and persuading them to believe something that is not true'.²¹¹ The purpose of which is to, against the laws (in a general sense), trick the victim to give or disclose something of value. It is the *pharmakons* in language that are capable of all of this, as a function of language, beyond the control, and beyond the intention, of the speaker. As such, a confidence trick, a con, involves the intersections of various economies of interests. It involves satiating a desire. It belies 'eating well'.²¹² As products of their own shared *pharmakon*, the *pharmakons*, through their dissemination, working on the axes of self-presence and desire, instil a false belief in their own rigors of signification. As mere hauntings of actual meaning, they produce a cleansing of various palates.

10.7 Tremors in Gravity

... the *pharmakon* ... is thus presented to the King. Presented: like a kind of present offered up in homage by a vassal to his lord ... but above all as a finished work submitted to his appreciation. And this work is itself an art, a capacity for work, a power of operation.²¹³

10.7.1 Act One, Scene One: 'Neglect' and 'cruelty' on the axis of self-presence

In *Schloss*,²¹⁴ the Judge relied on the defence's submission that the offending was a case of 'neglect rather than deliberate cruelty'.²¹⁵ The statement offered a purported measure of the

²⁰⁸ Ibid.

²⁰⁹ Collins, *Definition of 'con'* Collins English Dictionary <https://www.collinsdictionary.com/dictionary/english/con_1>.

²¹⁰ Oxford University Press, *British & World English: con* English Oxford Living Dictionaries <<https://en.oxforddictionaries.com/definition/con>>.

²¹¹ Oxford University Press, *British & World English: confidence trick* English Oxford Living Dictionaries <https://en.oxforddictionaries.com/definition/confidence_trick>.

²¹² Jacques Derrida in "'Eating Well" or the Calculation of the Subject' in Elisabeth Weber (ed), *Points... Interviews, 1974-1994* (Peggy Kamuf et al trans, Stanford University Press, 1995) 255-87, 282 [trans of: *Points de suspension, Entretiens* (first published 1992)] ('*Eating Well*):

[T]hen as concerns "Good" [*Bien*] of every morality, the question will come back to determining the best, most respectful, most grateful and also most giving way of relating to the other and of relating the other to the self ... "One must eat well" ...

See also Appendix 1, Part B, section B4.2; Chapter 2, especially section 2.8.

²¹³ Derrida, *Plato's Pharmacy*, above n 147, 78.

²¹⁴ [2012] QDC 30.

gravity of the offending pertinent to culpability. Repeated, virtually verbatim, the submission reappeared as part of the reasoning. It appears this *pharmakon* involved thinking beyond legal thinking. It appears impossible to grasp the intended meaning of ‘neglect’ in the context of the case. It was not a declaration of *mens rea*,²¹⁶ but rather indicated less-than-deliberate offending. In common English usage, ‘neglect’ means either to ‘fail to care for properly’²¹⁷ or to ‘fail to do something’,²¹⁸ and both of those definitions, similarly, pertain to actions and not a state of mind. Alternatively, in common English usage, ‘neglect’ can mean to ‘not pay proper attention to; disregard’,²¹⁹ and therefore connotes, at the least, some form of unintentional inadvertence that is not proper. It indicates some form of lack of knowledge as to the true state of affairs. It seems the defence counsel must have intended to suggest a degree of [non]presence, that is a lack of mental attention that the defendants purportedly experienced in relation to their offending. That must also be the case since ‘neglect’ was opposed to ‘deliberate’.

This *pharmakon*, also implied a nonlegal definition of ‘cruelty’, since the statement was used in context to *both* offences (the cruelty offence and the duty of care offence). ‘Deliberate cruelty’ seems to be employed to dismiss the possibility that the defendants *themselves* intended to *be* ‘cruel’. As such, this ‘cruelty’ is not a descriptive signifier for the acts and omissions that *caused* the suffering (as cruel acts/omissions), and neither is it a signifier for the suffering *of the dogs* at all (which was the consequence). What was stated was that it ‘was a case of ...’, and therefore it pertains to purportedly not *being* deliberately cruel. It intimates that the defendants *themselves* did not *mean to be* deliberately cruel, or to put it another way, that they were not *hosts of* deliberate cruelty. To *be* deliberately cruel would be to host the intention to be so, which would demand *full presence* as to one’s actions. In this way, the employment of ‘neglect’ and ‘deliberate cruelty’ within the *pharmakon* work on the axis of **self**-presence. There was *no* recognition of the economy of interests of individual nonhuman animals as victims, since that was not required under law. Sentencing was more concerned with whether the defendants themselves intended to *be* cruel, rather than recounting harms to individual victims. The *individual* suffering of the dogs as animots, was *not* made present, as relevant to sentencing. The law did not demand it.

²¹⁵ Ibid 15.

²¹⁶ See Part One, section 10.3.6 of this chapter.

²¹⁷ Oxford University Press, *British & World English: neglect* English Oxford Living Dictionaries <<https://en.oxforddictionaries.com/definition/neglect>>.

²¹⁸ Ibid.

²¹⁹ Ibid.

10.7.2 Act One, Scene Two: '*Neglect*' *insinuating benumbment*

... repetition is the very movement of non-truth: the presence of what *is* gets lost, disperses itself, multiplies itself through mimemes, icons, phantasms, simulacra, etc ... And this type of repetition is the possibility of becoming-perceptible-to-the-senses: nonideality.²²⁰

With the repetition of the submission of the defence, (the *pharmakon*), the reasoning offered a performative decree, that the actions of the defendants were that of mere 'neglect'. As such, the reasoning suggests that the circumstances and suffering of the dogs arose due to the defendants' *inadvertence* of some kind. That has to mean that the defendants were not fully aware of, were not fully alive to, were not fully mentally present to, the conditions that they had created and maintained, that resulted in the suffering of the dogs. That was *even* despite the fact that Ruth Schloss had been served an animal welfare direction that *stipulated* the inadequacy of the conditions of the dogs, and that by law, she *had to* address to those conditions within a specific timeframe.

As part of the reasoning, it appears the Judge forced a devastating cleavage in the differentiated streams of thinking about the offending, and the facts that were relevant in determining the degree of culpability. That cleavage was revealed as it was prefaced in the concluding paragraphs with: '[o]n the other hand...' after describing the 'disturbing cruelty'²²¹ that the defendants had inflicted.

On the side of appreciating and acknowledging the extent, effects and affects of the offending, the Judge had already explained that:

I have viewed that video. It does demonstrate very poor living conditions of the dogs; including a number of cages stacked on top of each other, dog faeces around the property and much bare dirt. Drinking water is stagnant and there is little shade or shelter. Most dogs look badly groomed.²²²

The sentencing Magistrate acknowledged that the offending was "a bad case of animal cruelty and failure to comply with directions and breaches of duty of care," which was obvious from the conditions displayed on the video.²²³

This is a case of disturbing cruelty to animals, the respondents grossly breached their duty of care. The conditions demonstrated on the video are most concerning, and the evidence of the suffering of particular dogs is distressing.²²⁴

²²⁰ Derrida, *Plato's Pharmacy*, above n 147, 162.

²²¹ Schloss [2012] QDC 30, 14.

²²² Ibid 7-8.

²²³ Ibid 10 (Bradley DCJ quoting the sentencing Magistrate)

²²⁴ Ibid 14 (Bradley DCJ).

It seems there was a forcing of a past-present reality, into a now-present[ly recalled] and seductive simulacra and inscription of 'neglect'. In law, the Judge was limited by the evidence put before the Court. Yet, it seems incongruous that the offenders, who were on the scene for many months, did *not* see what was evidenced in the video, and did *not* see what was witnessed by the Department on their visits to the site. Inadvertence or lack of knowledge as to the conditions would also mean that each defendant had been deaf to the complaints of the dogs, since I assume the dogs were not silent for months, if not years, on end. Each defendant must also have then been deadened to the odours emitted from the detritus and illnesses. They must also have been blinded to the scratching and irritation of the dogs infested by parasites. To be in such a state of 'neglect'[ing] would be for *the defendants* to be *living*, in state of sensory and cognitive benumbment, without response. Dead to the calls of two hundred and forty-six dogs, but *not* dead to the drive to carry on. Actual neglect[ing], even in a nonlegal sense, when not effected by some serious, actual impairment in recognising the physical reality, does not stretch to benumbment.

10.7.3 Epilogue to Act One: *The haunting work of the pharmakon on presence*

The value of ... the *pharmakon* – has of course been spelled out to the King, but it is the King who will give it its value, who will set the price of what, in the act of receiving, he constitutes or institutes.²²⁵

For there to *be* this benumbment, that results in mere 'neglect', there must have *been* a cause or causes. Without a cause, there would be no basis for deciding between 'neglect' and 'deliberate cruelty'. Given the defendants were physically present to the suffering of the dogs, and present enough to make and maintain the conditions of the dogs over an extended period of time, what 'neglect' imports, is that there must have been something else going on to have infected and undermined the *full* mental presences of the defendants. This 'neglect' by the defendants, as declared in the *pharmakon*, can be read as the defendants *being* haunted by *something* else. It was that haunting force that underpinned the decision regarding culpability, that made them *less* responsible. What the Judge did say, was that:

The respondent's financial circumstances were very relevant to their criminality ...²²⁶

What is presented in the 'judgment' is a coagulation of what is posited as ameliorating circumstances, that I imagine works as an instance of a *pharmakon*. This *pharmakon*, it seems, overwhelmed the otherwise-autonomous-as-human decision-making powers of the defendants. Working on one level, this *pharmakon*, as a poisonous force, *caused* the benumbment to undermine presence. Working on another level, as a remedy in the

²²⁵ Derrida, *Plato's Pharmacy*, above n 147, 78.

²²⁶ Schloss [2012] QDC 30, 15.

‘judgment’, this *pharmakon* was taken to erase the possibility of full-presence(s), and hence the possibility of finding culpability of the highest degree. Before examining the embodiment of the *pharmakon*, and how its value was equivocal, I now turn to its second body of work: the second *pharmakon*.

10.7.4 Act two: ‘Need’ on the axis of desire

The Judge had earlier recounted what the defence had argued:

It was submitted that when in 2009 they found themselves with 246 dogs, the breeding enterprise was too much for them to manage properly. The respondents engaged in the breeding enterprise out of need rather than greed ...²²⁷

As part of the concluding reasons, The Judge stated that ‘... the breeding and sale of the puppies was engaged in **more out of need than greed**’.²²⁸ Enter, the second *pharmakon*. Another product of the coagulated *pharmakon*. Another repetition (or regurgitation in a Derridean sense), of what was served up by the defence.

What this *pharmakon*: ‘more out of need than greed’ institutes, is that the defendants were subject to some external forces that created the ‘**need**’ to breed the dogs. What the *pharmakon* proclaims as a justification, was that the defendants *needed*, that is, were actually *required* to undertake the breeding ‘because it [was] essential or very important rather than just desirable’.²²⁹ It was a matter of ‘necessity or obligation’.²³⁰ It broadcasts that their choices were *not* a matter of desire. It testifies that they had other obligations or necessities to meet that were beyond the law, and that they prioritised above their obligations *to* the law. In opposing ‘greed’, the *pharmakon* institutes that the defendants’s did **not** have ‘[a] strong feeling of wanting to have something or wishing for something to happen’.²³¹ Yet, the ‘judgment’ makes it clear the defendant’s *did* have a *desire* to make a profit from the breeding and the sale of the dogs. That was their motivation. It was ‘a “commercial concern to generate profit”’.²³² The desire was so strong that they did continue to breed the dogs until they had two hundred and forty-six dogs, which “far exceeded the number of dogs that [they] had the ability to care for”,²³³ and where the expert evidence suggested that one person could not have properly cared for more than thirty dogs on that

²²⁷ Ibid 9.

²²⁸ Ibid 15 (highlighting not in original).

²²⁹ Oxford University Press, *British & World English: need* English Oxford Living Dictionaries <<https://en.oxforddictionaries.com/definition/need>>.

²³⁰ Ibid.

²³¹ Oxford University Press, *British & World English: desire* English Oxford Living Dictionaries <<https://en.oxforddictionaries.com/definition/desire>>.

²³² *Schloss* [2012] QDC 30, 10 (Bradley DCJ quoting the sentencing Magistrate).

²³³ Ibid (Bradley DCJ quoting the sentencing Magistrate).

property.²³⁴ It seems impossible not to view this deliberate generation and accumulation of profit-making 'assets' as a consequence of an unbounded desire, thus *greed*: an '[i]ntense and selfish desire for something, especially wealth, power, or food'.²³⁵ In the case of the defendants it was posited that they felt compelled to do so because of the dire circumstances that they were in. Yet, the *pharmakon* substitutes the defendants' motivation toward profit (where the evidence demonstrates greed), with motivation infected by the *pharmakon*: the external force that came to overwhelm their otherwise-autonomous decision-making powers. The *pharmakon* suggests that the *pharmakon* produced their excesses of desire.

The risk-taking behaviour of the defendants was applied as an amelioration of culpability rather than to *elevate* it. It is a strange reversal of common-sense logic. The defendants clearly exercised a lack of *good* judgment albeit in difficult circumstances. Their culpability involved creating and maintaining conditions in circumstances (about which they had no lack of knowledge), that made it practically impossible for them to adequately care for the great population of living beings that they held as hostages. In addition, from the time the defendants made the decision to commence breeding, they owed duties to the State, not to breach the laws under the ACPA. The defendants clearly did not 'need' to engage in the breeding and sale of dogs. They *chose* to do so. It was a decision that was made as an effort to improve their financial circumstances. It was shown to be caused by a series of poor decisions that were unsupported by the circumstances that continued to *deteriorate* whilst they continued to *increase* the number of dogs. It was a result of faulty logic and irresponsibility toward the dogs, and toward the law. It was not a case of 'need'.

10.7.5 Epilogue to Acts One and Two: *The Pharmakon*

[T]he Stranger, threatens the paternal *logos*. And which by the same token threatens the domestic, hierarchical interiority of the pharmacy, the proper order and healthy movement of goods, the lawful prescription of its controlled, classed, measured, [labelled] products, rigorously divided into remedies and poisons, seeds of life and seeds of death, good and bad traces, the unity of metaphysics, of technology, of well computed binarism.²³⁶

In justifying the non-decision that rejected the grounds of appeal, The Judge made the financial circumstances of the defendants relevant not only to the fines, but also their criminality:

²³⁴ Ibid 7.

²³⁵ Oxford University Press, *British & World English: greed* Oxford Living Dictionaries <<https://en.oxforddictionaries.com/definition/greed>>.

²³⁶ Derrida, *Plato's Pharmacy*, above n 147, 161.

The respondent's financial circumstances were very relevant to their criminality as well as to the assessment of the appropriate fines and compensation orders.²³⁷

It was the 'financial circumstances' of the defendants that constituted the haunting *pharmakon*. The Magistrate and the Judge, within the law, went *behind* the simple financial *status* of the defendants to examine what was posited as *its* causes. The Judge declared the *existence* of 'the detrimental financial impact of the long-term drought'.²³⁸ It was intimated that *as a result of* the drought, and other circumstances, further decisions, were made by the defendants. They included: that the numbers of the dairy cattle herd had been reduced to 40;²³⁹ that the defendants were 'forced to buy feed for the cows and were paying a considerable amount for their water allocation despite there effectively being no water',²⁴⁰ and; that '[t]he annual income from the dog breeding, which was between 25 and 50 thousand dollars, was used for living and farm expenses'.²⁴¹ As an additional seemingly *external* cause of financial circumstances: 'no profit was made as a number of puppies had acquired a disease which the respondents worked with a vet to overcome'.²⁴² A further *external* cause, was that the efforts to comply with the animal welfare direction 'were hampered by Kenneth Schloss suffering from depression'.²⁴³

After re-presenting these *external* causes, the Judge reiterated, in what I assume was the language of the defence counsel, that:

It was submitted that when in 2009 they **found themselves** with 246 dogs, the breeding enterprise was too much for them to manage properly.²⁴⁴

They had been breeding dogs for some time, but the detrimental financial impact of long-term drought on their farm and a demand for particular types of dogs **led to** the growth of the breeding concern.²⁴⁵

The choice of language as I have highlighted it, and as I assume was offered by the defence counsel, positions the defendants as something other than *directly* responsible for creating the situation that the facts indicate that they did deliberately create. Yet, the defendants did choose to continue the breeding until they were in possession of two hundred and forty-six dogs that they could not adequately care for. The drought and the demand for puppies did

²³⁷ Schloss [2012] QDC 30, 15 (highlighting not in original).

²³⁸ Ibid 8.

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ Ibid 9.

²⁴⁴ Ibid 9 (highlighting not in original).

²⁴⁵ Ibid 8 (highlighting not in original).

not lead to the growth of the breeding. It was the deliberate actions of the defendants, albeit in difficult circumstances, to breed the dogs that 'led to' the increasing numbers. The drought and the demand were *not causes*, they were reasons. To suggest that the defendants 'found themselves' only when they had accumulated and produced two hundred and forty-six dogs, is to insinuate that they were somehow otherwise disturbed as to, or distracted from, the growing number of dogs in the period leading up to the '[finding of] themselves'. It insinuates that the defendants were not themselves. That they were *only* awakened when the law intervened. As such, these *perpetrators-as-victims-making-words* of 'led to' and 'found themselves', and the *pharmakon*s are connected. 'Led to' connotes 'need'. 'Found themselves' is commensurate with 'neglect'. Both subjugate intention and both hint toward some purported *impinged* mental awareness as affecting motivation. The posited causes *behind* the financial status are revealed as the coagulated *pharmakon* that infected and overtook the defendants' purported good and human decision-making autonomies.

10.7.5.1 Doubled duplicity

In suggesting a lower degree of culpability, it seems that 'neglect rather than deliberate cruelty' was to buttress 'need not greed' and vice versa. The *pharmakon* that dispensed with 'greed', and instituted 'need', became the co-conspirator of the *pharmakon* that eliminated intention. The denial of an excess of desire was testimony for the case of non-presence as mere 'neglect'. Yet that testimony should have been thrown out. The *pharmakon*s should have been exposed in their doubled duplicities: in their singular non-senses as already described, *and* in their befuddled conspiracy. Without some greater impairment to decision-making ability, 'need' cannot sensibly be the cause of 'neglect'. Cognisance of need imports intention.

10.7.5.2 The final work of *the pharmakon* in law

Through the intervention of *the law*, the *pharmakon*'s powers to infect the decision-making autonomies of the defendants, were to be cast out with punishment. That casting out and exorcism was to cleanse the defendants of their already-ameliorated-by-the-*pharmakon* culpabilities. It was to force a break between their fault that caused the suffering of the dogs, thought only to exist in the past, with an uninfected future. It was to awaken the defendants from their neglectful benumbment, and to restore their good and pure decision-making powers and autonomies.

The defence counsel, the Magistrate, and the Judge all gave life to the *pharmakon* as a remedy, as an immunising force against finding a higher level of culpability within the body of the case. I read the *pharmakon* as a poisoning embrocation that undoes the logic of the [non]decision. I also read the *pharmakon* as a successful parasite. It escaped the cadaver of

the case. Through the *pharmacons*, it jumped hosts into the decision-making powers of the Court. Zoonosis.

10.7.6 Act Three: '*Such things of course are hard to judge*': general deterrence

One of the grounds of appeal was that the sentencing Magistrate had placed 'too little weight on general deterrence'.²⁴⁶ The Judge recounted that the sentencing Magistrate had:

... conceded that general deterrence **may not** be achieved by the penalty that he intended to impose, but he noted that sentencing is a complex exercise to be applied to the particular circumstances of each individual case.²⁴⁷

The Judge conceded that '[c]learly, general deterrence *is* an important factor in sentencing these respondents'.²⁴⁸ However, the Judge decided not to address it directly. That was despite the fact that the Minister, in the second reading speech, stated that a purpose of the statute and the maximum penalties for the cruelty offences were to deter businesses from risking prosecution as an acceptable business risk.²⁴⁹ Additionally, under the *ACPA*, a purpose of the Act is to '*promote* the responsible care and use of animals'.²⁵⁰ It would seem that if any interests of nonhuman animals were to be considered in law, there should be a focus on general deterrence. That seems to be particularly so in cases such as this, in a commercial context, where large numbers of nonhuman animals are made to suffer for extended periods. For some of the dogs in this case, it was too late. I imagine that if nonhuman animals were capable of expressing their interests through law, they *would* desire prioritisation of general deterrence, just as we do, when it comes to deterring harms to our own individual and collective physical and mental wellbeing. In law, our interests in that way *are* properly considered, and *that* form of economies of interests of individual *human* animals, as future potential victims, factors in law through the recognition of 'harm' and general deterrence. It also factors in the interests of the community as a whole, and the interests of sovereign power that is motivated to deter victims' own forms of retribution. By not mandating general deterrence in the case of harms to nonhuman animals, for example in cases such as *Schloss*,²⁵¹ the law broadcasts its *disregard* of the economies of interests of nonhuman animals, at least in this respect.

The Judge, facing the difficult task of sentencing, *was* necessarily selective as to the reasoning and equivocal about general deterrence. Despite acknowledging that 'general

²⁴⁶ *Schloss* [2012] QDC 30, 4.

²⁴⁷ *Ibid* 11 (highlighting not in original).

²⁴⁸ *Ibid* 14 (*italics* not in original).

²⁴⁹ See above n 99.

²⁵⁰ *ACPA* s 3(a) (*italics* not in original).

²⁵¹ [2012] QDC 30.

deterrence *is* an important factor in sentencing these respondents'²⁵² the Judge left the matter floating:

The respondent's financial circumstances were very relevant to their criminality as well as to the assessment of the appropriate fines and compensation orders. The combined financial burden imposed on the respondents as a family is \$35,000. Given the respondents' particular financial circumstances, that is a considerable amount. It is also an amount which *may well* deter others in similar situations from breaking the law. *Such things are of course hard to judge.*²⁵³

Yet to be critical would be unjust. It has to be recognised that the Judge was in a difficult position faced with the various aporias in the statutes. The *ACPA* required the impossible 'balancing' of 'the welfare of animals and the interests of persons whose livelihood is dependent on animals'.²⁵⁴ Clearly, this involves sacrifice of animals' interests, if not lives in total, for merely the *economic* benefit of defendants, and possibly the community and the State. This is not a 'balancing' that can be achieved without sacrifice. It is a *command* to [not] deal with what appears to be an aporia involving the conflict of incommensurable interests of nonhumans and humans. Additionally, the *P&S Act* required balancing of: punishment with fairness; punishment with personal and general deterrence; parity of sentencing in regard to past sentences (in past cases that had been reduced to simple descriptions); mitigating and aggravating factors, and; the interests of the State, the Department, the Court, the community, and the defendants.²⁵⁵ Highly directed in law, the [non]decisions are left to be justified within particular bounds. Perhaps the Judge's statement: '[s]uch things are of course hard to judge'²⁵⁶ can be read differently. I imagine it could also be a form of confession that it was 'hard to [*be a*] judge' in this matter.

10.8 Conclusions

The difficulties in the 'judgment' of *Schloss*²⁵⁷ highlight the many aporias facing decision makers in having to 'balance' the multiple conflicting objectives under the relevant statutes. Nevertheless, that decision making appears to be highly directed through the law to prioritise consideration of the interests of offenders, both when considering the reasonableness of the actions of the defendant, and when considering their interests in context to sentencing. Those directions also conflict with the purposes of the *ACPA* particularly as they are

²⁵² Ibid 14 (italics not in original).

²⁵³ Ibid 15 (italics not in original).

²⁵⁴ *ACPA* s 3.

²⁵⁵ *P&S Act* s 9.

²⁵⁶ [2012] QDC 30, 15.

²⁵⁷ [2012] QDC 30.

expressed in its long title 'to promote the responsible care and use of animals and to protect animals from cruelty'. The 'responsible care' and the definition of 'cruelty' in the title are ameliorated by what is determined as 'reasonable'. The possibility of their promotion is undermined when priority is not given to general deterrence.

The 'judgment' also appears to highlight a lack of appreciation of the *duty* that demands diligence as to provision of the minimum standards of care under *ACPA* s 17. The fact that it is a duty in the context of a strict liability offence should make it clear in law that excuses of inadvertence should not be accepted to the extent that they undermine the strength of the provision. What is particularly disturbing about this 'judgment' is that the Court was not assisted in identifying that the facts of the offending, as they were recounted, were inconsistent with the defendants being inadvertent to the failures to meet the duties. Further, the judgment is an example of *ACPA* s 17 not delivering what was promised. The low punishments and lack of attention to general deterrence in this case does not reflect the Minister's claims that *ACPA* s 17 '[was] the key **proactive** aspect of the Bill', that it would implement a greater focus on more than 'the mere absence of being cruel', or that it would '[impose] a duty of care ... to **properly** attend to the welfare needs of the animals'.²⁵⁸ Most critically, in terms of limiting harms to greater numbers of victims, the 'judgment' of *Schloss*²⁵⁹ does not provide any significant form of deterrence for business enterprises that may risk fines as a cost of doing business. I suggest that for all of these reasons, the 'judgment' should be removed from the *Benchbook*²⁶⁰ in its indication that it is helpful to interpretation of *ACPA* s 17.

²⁵⁸ Animal Care and Protection Bill 2001 (Qld) 4 (highlighting not in original).

²⁵⁹ [2012] QDC 30.

²⁶⁰ Queensland Supreme Court Library, *Benchbook*, above n 4.

**PART 6: CONCLUSIONS - COULD ACPA SECTION 17 REPRESENT A
DERRIDEAN JUSTICE-BASED APPROACH TO ANIMAL PROTECTIONS?**

CHAPTER 11: CONCLUSIONS

Could s 17 of the Animal Care and Protection Act 2001 (Qld) represent a Derridean justice-based approach to animal protections?

Derrida's justice has grounded this research. Derrida's justice is uncompromising in its concern for others, in its impossible demand for absolute hospitality, and its giving without return. It demands that duties *are* owed to others, to each animot, nonhuman or human. Derrida's justice is not polluted by conceptions of rationality. It highlights the compromises and sacrifices in all systems of 'ethics'. Derrida did not shy away from the aporias in true decision making. He demanded recognition of the sacrifices in every decision. As Derrida confirmed, this stripping bare of decision making and systems of rules that are employed to make decisions, can equally be applied to law. Law that is conceived within, and that operates within, the confines of the metaphysics of presence. Law that embodies the elevation of the human animal. Law that purports to deliver justice in the present, for wrongs committed in the past. Law that deals in human economies of interests. Law that remains an instrument of carnophallogocentrism. Law that is dogmatically and wilfully blinded to the injustices it condones for the vast majority of nonhuman animots that are fuel for human consumption.

This research has contrasted legal duties, and particularly the duty in s 17 of the *Animal Care and Protection Act 2001* (Qld), with Derrida's justice. *ACPA* s 17 provides that '[a] person in charge of an animal owes a duty of care to it'. That law demands that *some* nonhuman animals, in *some* circumstances, be provided with minimum standards of care. This research has traced the development of that law, and has examined its context and its limitations. It has highlighted some of the challenges in its interpretation.

The new knowledge provided by this research is a rich legal characterisation of *ACPA* s 17 which was necessary to determine how *ACPA* s 17 differs from an implementation of Derridean justice. *ACPA* s 17 was also found to be a form of Derridean supplement, in that rather than actually adding to the animal protection regime, the effect of the offence is that it, in the majority of cases, replaces prosecutions under *ACPA* s18 which is the cruelty offence. The analysis of the RSPCA Queensland data also revealed that s 17 is the most prosecuted offence in the animal protection regime. As such, it seems erroneous to classify it as a subordinate offence to s 18. It appears that the predominant form of offending in the community, in context to the nonhuman animals to which ss 17-18 apply, is by way of omission(s). RSPCA Queensland prosecutes most omissions offending under s 17 as it appears, in law, to be the most appropriate offence for omissions. Yet, the suffering caused by omissions to nonhuman animal victims may be protracted and worse than what may be

inflicted by singular, positive acts of cruelty. One problem is that s 17 provides for lower maximum penalties. Another problem is that the courts are not required to be attentive to general deterrence, even in cases where the gravity of the offending is severe. There is no sentencing principle that requires that harm to nonhuman animals be taken into account. This was demonstrated in the case of *Schloss*,¹ analysed in Chapter 10. Perhaps the greatest benefit of *ACPA* s 17 is that it makes it easier for authorities to prosecute omissions offending. It provides some punitive measures for offending in breach of the limited minimum standards of care. However, it is rarely applied in the case of animals in industrial or commercial contexts. That is of course, the realm in which the vast majority of domestic animals suffer at the hands of humans.

To help remedy some of the deficiencies in the *ACPA* regime, another form of new knowledge provided in this research is the three law reform suggestions. The first suggestion, in concert with similarly structured offences under the harmonised work health and safety regime, is that courts could *demand* that charges under *ACPA* s 17 *must* include specification of the reasonable steps that the defendant ought to have taken. This will improve fairness for defendants in their ability to defend the charges. It will also encourage prosecuting agencies to articulate the full gravity of the offending with attention to every breach for every victim. That is, to recognise and to document, the failures in the duties as they have been inflicted for each animal. Secondly, I suggest that the *ACPA* should be recognised as ‘social legislation’ where attention *must* be given in sentencing to general deterrence. Thirdly, I argue that a new offence that prohibits reckless conduct in relation to the minimum standards of care be enacted. It would address more serious offending involving aggravating factors. It should provide for higher penalties. It would better deter offending in the context of commercial activities. As the law currently stands, the deprioritising of general deterrence in the case of *Schloss*,² has *not* assisted addressing this grievous form of offending where intentional breaches of the minimum standards of care assist profitability. An unexpected outcome of this research is my recommendation that the *Schloss*³ ‘judgment’ be removed from the Benchbook⁴ as relevant to interpretation of *ACPA* s 17.

¹ [2012] QDC 30.

² Ibid.

³ Ibid.

⁴ Supreme Court Library of Queensland, *Magistrates Court Criminal Law Benchbook: Animal Care and Protection Act 2001 Breach of duty of care prohibited – s 17 Animal Care and Protection Act 2001 (Qld)* <<https://www.sclqld.org.au/benchbooks/criminal-law-benchbook/#Animal%20Care%20and%20Protection%20Act%202001>>.

Another area of clarification offered in this research, is that *ACPA* s 17 should not be confused with implementing any conceptions of 'negligence'. This research has traced the problematics of negligence in law. Law appears haunted by it, as a problem of presence(s). I discuss this further, below. *ACPA* s 17 should be properly applied as a strict liability omissions offence. It *demand*s a duty of diligence. Excuses without any reasonable mistake of fact, or any reasonable claims of actual due diligence, or without any other permitted defence, should not be accepted at adjudication. Neither should arguments for amelioration of sentences on the basis of 'neglect' be accepted, particularly where the facts show that the omissions were intentional. To accept 'neglect' as inadvertence as an excuse, undermines the force of the provision and the protective purposes of the *ACPA*. Its purposes include the responsible care and protection of nonhuman animals. 'Neglect' should not serve as a supplement, as a substitute, for fully articulated reasoning that decides that human failings can excuse harms to nonhuman animals.

Another area of clarification that will enhance interpretation of animal law omissions offences and related literature is provided in Chapter 8. It provides clarification on the differences in terminology between the English and Australian jurisdictions in regard to 'negligence' and 'strict liability'. That is useful because if those differences are not understood, that could lead to error particularly when an Australian reader interprets Professor Smith's⁵ and Radford's⁶ descriptions where those influential authors use those terms in the English context.

The Derridean lens has highlighted the anthropocentricity of *ACPA* s 17 in its implementation, and the anthropocentricity of the Queensland legal regime more generally. What is re-instituted through the law and the regime is the culture of sacrifice that Derrida described as carnophallogocentrism. The layers of anthropocentricity of the regime permit and condone this sacrifice to different degrees. Sacrifice is embraced in the regime that perpetually reinstitutes liberal notions to prioritise the needs or desires of the nonhuman animal owner. Sacrifice is enveloped in the regime more generally as it limits recognition of 'moral' breaches through the anthropocentrically-focussed harm principle. Sacrifice is condoned through *ACPA* s 17 itself, since it only requires that 'reasonable' steps be taken in the circumstances to comply with the limited minimum standards of care. Sacrifice is instituted through the purposes of the *ACPA* that requires what I suggest is an impossible 'balancing' of the incommensurable interests of the nonhuman animal and the owner. Sacrifice persists in the application of sentencing law that does not recognise harm to nonhuman animal victims as it does for human victims. Future sacrifices are made more inviting, where general deterrence, as a sentencing principle, is not mandated or prioritised.

⁵ See Chapter 8, section 8.3.1.2.

⁶ Ibid.

Against this acknowledgment of the sacrifices instituted through *ACPA* s 17 and the regime more generally, a number of assumptions should be dismantled. It is appropriate to start with the promises that were made about what the law would deliver. The Minister in the *ACPA* Bill declared an optimistic forecasting of its affects and effects:

The Bill imposes a duty of care on all persons having charge of animals to properly attend to the welfare needs of the animals.

*This is the key proactive aspect of the Bill. Positively providing for the welfare needs of animals is at the opposite end of the welfare continuum to the mere absence of being cruel, the focus of the current Act.*⁷

This duty, and this ‘proactive aspect’ of the *ACPA* of course, is not absolute. It is not absolute in that codes of practice and other excuses undermine the duty. Neither is it absolute since what constitutes ‘welfare’ are the already-recognised limitations of the minimum standards of care that do not provide for all that an animot requires to live a full and good life.⁸ Additionally, this research has found that *ACPA* s 17 cannot be said to offer a *significantly* different form of protection from the cruelty offence. What s 17 does demand is particular minimum standards of care. However, it provides for significantly lower maximum penalties. As already mentioned, more prolonged or greater suffering can result from deprivation of the minimum standards of care in comparison to discrete episodes of cruelty. From this perspective, *ACPA* s 17 appears to reflect an entirely anthropocentric focus on justification for punishment through what is perceived to be ‘moral’ wrongdoing. What persists is the perception that the causing of harm through omission, or through mere ‘neglect’, is a less culpable form of fault that warrants lesser penalties. It is as *if* harm through neglect is *not actual* cruelty. It is as *if* this form of cruelty should not be perceived as properly moral wrongdoing, and not properly criminal. The Minister’s articulation of the eradication of the possibility of cruelty in law, in cases where the minimum standards of care are met,⁹ was prophetic. That should not be confused with the possibility of actual cruelty in those circumstances, in the reality of the victims. Neither should the declaration of the ‘proactive aspect of the Bill’ be accepted on face value. The *ACPA* cannot be described as properly ‘proactive’ in instituting ‘welfare needs’ if it excuses great harms to nonhuman animals and if its penalties are, in some circumstances, less than deterrent.

Carnophallogocentrism, the metaphysics of presence and the economies of interests of human animals are so much at work in the law and the regime more generally, that courts

⁷ Animal Care and Protection Bill 2001 (Qld) 4 (italics in original).

⁸ See Chapter 6, section 6.4; Chapter 3, section 3.4.2.

⁹ Ibid: ‘Positively providing for the welfare needs of animals is at the opposite end of the welfare continuum to the mere absence of being cruel, the focus of the current Act’.

and advocates can suggest and believe in the possibility of mere 'neglect'. It is possible in law, that a human animal as a perpetrator of intentional harms to nonhuman animals, without good intentions, and without being mistaken, can be characterised as less culpable, and not properly alive to the suffering that they inflict. As being present without presence. As autonomous but absent. This possibility should shake us. It should awaken us to the problems of the closures of metaphysical thinking, and the closures of dogmatic rationalities that blind us to the realities of suffering. We should question why this is more likely to happen in the context of harms to nonhuman animals. We should ask why the law does not demand recognition of those harms, for every animot, just as it would if the harms had been inflicted on human animals. This should motivate courts *not* to sacrifice general deterrence. It should motivate reform of the law.

Yet of course, the law reforms that I suggest will not solve the problems of the law. It will not undo the culture of sacrifice. It can only help to address some forms of abuses on the small scale. For what the regime and the *ACPA* condones are forms of harms on the grand scale. Through the codes of practice and regulations that exempt application of *ACPA* s 17 and the cruelty offence, the vast majority of domesticated nonhuman animals are not provided in law, with the privilege to experience a full and good life. As I write this, and as you read this, to different degrees, they continue to suffer at the hands of 'humanity'. The limited 'duty' under *ACPA* s 17 does not protect these animots. The 'duty' in *ACPA* s 17 is infected and cross-contaminated. The minimising of the protections, and the legitimising of forms of harms to the nonhuman animals that it purports to protect, institutes privileges and a form of license for various harms to be inflicted on them. The *ACPA* institutes immunities to liability. The duty that is said to be 'owed to' nonhuman animals under *ACPA* s 17 cannot be taken literally. It is a duty that is limited. It is a duty that is merely owed to the State. It is a duty that operates *within* human animals' economies of interests.

Powerful human interests remain at work in limiting the protective effects of laws. It is neoliberalism, and presumed philosophically-thought limitations about nonhuman animal suffering, that continue to fortify the particular rationality behind the *ACPA*. This is despite the facts that as recounted in Chapter 3, there does appear to be a narrowing of philosophically-thought human-animal differences, and that there is a growing concern for nonhuman animals' suffering. It is also despite the fact that the Minister acknowledged that the Queensland public had voiced concern for reform of some animal protections laws.¹⁰

¹⁰ Queensland, *Parliamentary Debates*, Legislative Assembly, 31 July 2001, 1989 (Henry Palaszczuk, Minister for Primary Industries and Rural Communities).

The false distinctions imposed between farmed animals and pet animals, the false distinctions between welfare and legal cruelty, and thinking of actual cruelties perpetrated on the small and the grand scale, invites the unveiling of *pharmakons*¹¹ at work in the various economies of interests. The metaphysically-bound human animal, as a collective, as a society, needs to find a way to drive evil out of the city. Perhaps it is those offenders, those perpetrators of actual cruelties on the *small* scale, those offenders that *are* subject to prosecution under ACPA s 17, that are the *pharmakoi*.¹² *They* are sacrificed, *they* are brought to public shame as symbols of exorcism. Symbolism employed through law. Symbolism as cleansing catharsis. Symbolism offered up as law in ACPA s 17. *As if*, the s 17 duty could be taken literally. *What* remains hidden, are actual cruelties, and the denial of good and full lives for nonhuman animals on the *grand* scale. Behind closed doors, beyond the edifices of corporatisation, enveloped in the protections of the exempting laws, and ensconced in the comforts of regulatory capture. The *who* remain hidden. The powerful are not sacrificed. *That* cruelty is embraced by the city. *As if* it is something entirely different. *That* cruelty that feeds the city. From this perspective, ACPA s 17 does not provide any undoing of the Western inheritance, which through rationality justifies using, mistreating, and slaughtering nonhuman animals for human animal ends.

Derrida's work also highlights that this Western culture of sacrifice, that is, carnophallogocentrism, actually underpins conceptions of human animal 'dignity' and 'rights'. The *reason* that human animals award themselves dignity is precisely because they perceive of differences between human and animal. As briefly explored in Chapter 4, this appears to be so embedded in cultural thinking that arguments for 'rights' and 'dignity' for nonhuman animals do not seem to address this foundational problem. Some of the most well-known constructs of ethics that purport to protect the interests of nonhuman animals either continue to elevate human interests, or propose to award nonhuman animals with 'rights' or 'dignity'. Through Derrida I have come understand that this involves a less-than-sufficient addressing of the problem. It does not consider our own writtenness, in that new traces and an absolutely new future would have to be imagined and worked towards if there were to be any security in properly protecting nonhuman animals. Both protective laws and conceptions of 'rights' are always at the mercy of sovereign power. For there to be any stability of protections on this point, the community that is concerned for nonhuman animals must become, and must act as, host and not hostage of sovereign power that continues to elevate collective human animal economic interests. As explained within, the reality is that structurally, law *could* implement stronger protections for nonhuman animals without the

¹¹ See Chapter 10, section 10.5.

¹² Ibid.

need for 'rights'. What is required is cultural change, education, enforcement and continued focus on general deterrence. I suggest that the proper implementation of general deterrence may be the only feature of law that can provide an opening toward Derridean justice for nonhuman animals who have no interest in our logos or our metaphysical constructions of logic and punishment. I imagine that what nonhuman animals desire, is that they stop being subject to the many forms of violence that we inflict.

The inexplicability of 'dignity' seems to me, to be a metaphysical mechanism to defer the full definition of what it is to be 'human'. That includes the denial of the full force of our violent and consuming natures, and the full extent of our decision-making infected by self-interest. After all, there must be a motivation for the human animal *not* to institute any moral ground that would affect proper protections for others. Those others that need protection from us. We need to move away from metaphysical assumptions about 'dignity' and become awakened to the true destructive nature of the human animal.

The "unrecognizable" is the awakening. It is what awakens, the very experience of being awake.¹³

Human animals that are concerned for nonhuman animals, have a duty not to succumb to unjust rational arguments and unjust constructions of logic. We must not accept weasel words within and surrounding the law. What needs to be exposed through deconstructions and other means, are the insidious workings of language, culture and laws, that continue to mask the actual violence that they perpetually reinstitute. We should also learn to accept and deal with our own vulnerabilities, our own faults, our own writtenness that leads us to violence.

This research finds that *ACPA* s 17 does not implement what *it* promises: that a duty is actually 'owed to' nonhuman animals. The answer to the question: *could s 17 of the Animal Care and Protection Act 2001 (Qld) represent a Derridean justice-based approach to animal protections?* must be 'no'. *ACPA* s 17 does not require consideration of all that is sacrificed, and all beings that are sacrificed, in every decision. In fact, the individual beingness of each victim need not be recalled in any judgment at all.

I hope that this research will help to avoid misinterpretations of *ACPA* s 17, and that it will help to avoid overstatements about the effects of that law. I hope it will help to substantiate reforms that will strengthen the effects of the 'duty'. I hope the reforms will bring renewed

¹³ Jacques Derrida in Michel Lisse, Marie-Louise Mallet and Ginette Michaud (eds), *The Beast & the Sovereign Volume I* (Geoffrey Bennington trans, University of Chicago Press, 2009) 108 [trans of: *Seminaire: La bete el le souverain Volume I (2001-2002)* (first published 2008)].

focus on the suffering of each victim, each animot. I hope the reforms could serve as an opening toward greater protections, if not greater justice, for them.

I also hope that this research will open interest for further research into the practical implications and effects of prosecutions under *ACPA* s 17. This will be important if other jurisdictions plan to adopt a form of this law. This research has *not* confirmed that this form of law is a beneficial supplement to the animal protection regime. This is an important question that should be addressed in subsequent research, taking into account, I hope, the effects and affects for nonhuman animals.

APPENDICES

APPENDIX 1

APPENDIX 1, PART A: DERRIDEAN PROPOSITIONS: PRESENCE(S), COGNITION AND CONSCIOUSNESS

A1 Introduction

A1.1 Chapter overview

This Part A of Appendix 1 explores Derrida's proposition that the Western philosophical tradition¹ has not accurately described 'beingness', for human or nonhuman animals. The traditional assumption about human animals is reflected in the Cartesian construction: 'I think therefore I am'. It institutes the notion of a united self-presence with a capability of autonomous decision making. Further, languages have traditionally been thought to merely reflect what we think. Derrida consistently attacked these assumptions throughout his oeuvre. He argued that we must consider the degree to which language is constitutive of thought, 'truth' and culture. He sought to explain how we experience beingness, how Western languages are constructed, and how languages and what he described as logocentrism construct and limit thought and, as a result, also underpin Western epistemology.² These limitations, according to Derrida, apply to Western philosophies, including that which is reflected in sciences and law. As part of all of that, these limitations have continued to subordinate nonhuman animal lives to human interests. That aspect is further explored in Appendix 1, Part D: *Derrida's Animot*.

The driving force of Derrida's work was a working toward his notion of justice that takes into account our dependence on others and otherness. Derrida's method of exposure was deconstructions of texts that revealed the embeddedness of the Western philosophical inheritance. He claimed to reveal: the workings of our not-properly-thought leap into a 'metaphysics of presence', our constructions of cultures and experience through logocentrism, and our not-properly-thought decision making that is riddled with aporias. He argued that all of these, are products of a lack of constant self-presence in beingness, and a lack of a full self-presence in regard to our employment of language and its affects. He sought to put on stage:

¹ Refer to the following subsection for clarification of Derrida's 'Western philosophy'.

² See, eg, Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak trans, John Hopkins University Press, 1997) 92-93 [trans of: *De la Grammatologie* (first published 1967)] ('*Of Grammatology*'). See also Jacques Derrida in 'Positions: Interview with Jean-Louis Houdebine and Guy Scarpetta' in Alan Bass (ed), *Positions: Jacques Derrida* (Alan Bass trans, Athlone Press, 1981) 37-96, 51 [trans of: *Positions* (first published 1972)] ('*Positions Interview*').

... the conditions for the emergence and the limits of philosophy, of metaphysics, of everything that carries it on and that it carries on.³

This Part A examines Derridean contentions related to the metaphysics of presence and relies on a number of his texts. Key are *Voice and Phenomenon*⁴ (the original English title was *Speech and Phenomena*),⁵ *Writing and Difference*,⁶ *Of Grammatology*⁷ and *Différance*.⁸ I also reference the interviews within him in *Positions*.⁹ This chapter also provides approximations of key Derridean propositions including what were sometimes, by him, called arché-writing, trace and différance. Those propositions are fundamental to understanding Derrida's broader ideas and the bases for deconstructions. Appendix 1, Part B: *Elements of Deconstructions*, explores possible elements in deconstructions. Appendix 1, Part C: *Derridean Justice*, brings together the key points of the preceding Parts of Appendix 1 and highlights aporias in logocentric decision making.

I note that Derrida demanded that understanding his works, and his propositions, is only possible with a reading of the foundational theories that influenced him,¹⁰ and an appreciation of the workings of the metaphysics of presence.¹¹ Whilst it is not possible in this thesis to undertake a detailed review of Derrida's influencers, that preliminary work has been undertaken to a degree, that I believe is sufficient for this research. The key influencers that I briefly reference throughout this research include Parmenides, Plato, Descartes, Nietzsche,

³ Derrida, *Positions Interview*, above n 2, 51.

⁴ Jacques Derrida, *Voice and Phenomenon: Introduction to the Problem of the Sign in Husserl's Phenomenology* (Leonard Lawlor trans, Northwestern University Press, 2011) [trans of: *La Voix et le phénomène: introduction au problème du signe dans la phénoménologie de Husserl* (first published 1967)] ('*Voice and Phenomenon*').

⁵ Jacques Derrida, *Speech and Phenomena: and Other Essays on Husserl's Theory of Signs* (David B Allison trans, Northwestern University Press, 1973) [trans of: *La Voix et le phénomène phénomène: introduction au problème du signe dans la phénoménologie de Husserl* (first published 1967)] ('*Speech and Phenomena*').

⁶ Jacques Derrida, *Writing and Difference* (Alan Bass trans, Routledge, 1978) [trans of: *Writing and Difference* (first published 1967)] ('*Writing and Difference*').

⁷ Derrida, *Of Grammatology*, above n 2.

⁸ Jacques Derrida, 'Différance' in *Margins of Philosophy* (Alan Bass trans, Harvester Wheatsheaf, 1982) 1-27 ('*Différance*') [trans of: *Marges de la philosophie* (first published 1972)] ('*Margins*').

⁹ Alan Bass (ed), *Positions: Jacques Derrida* (Alan Bass trans, Athlone Press, 1981).

¹⁰ '[A]bove all it is necessary to read and reread those in whose wake I write ...': Jacques Derrida in 'Implications: Interview with Henri Ronse' in Alan Bass (ed), *Positions: Jacques Derrida* (Alan Bass trans, Athlone Press, 1981) 1-14, 4 ('*Implications*').

¹¹ See, eg, Derrida, *Implications*, above n 10: It is clear that Derrida's project of deconstruction raises the question of meaning, and that is meaning as constructed through 'presence', and différance. Jacques Derrida, 'Afterword: Toward an Ethic of Discussion' in Gerald Graff (ed), *Limited Inc* (Samuel Weber trans, Northwestern University Press, 1988) 111-54 ('*Limited Inc*'): Derrida explains how deconstruction has been misunderstood without reference to différance and trace. See also Jacques de Ville, *Jacques Derrida: Law as Absolute Hospitality* (Routledge, 2011) 13.

Freud, Hegel, Husserl, Heidegger, Levinas and Lacan. This Appendix is also guided by works of Spivak,¹² Lawlor,¹³ de Ville¹⁴ and Anderson.¹⁵

Subsequent to some clarification of terminology utilised in this research, the following section briefly introduces 'presence' in its assumed roles in the construction of self-consciousness, in language, and in the construction of meaning and values. Then, Derridean terms and ideas are approximated. Finally, I introduce the Derridean connection between auto-affection and its dependence on otherness that leads to Derridean notions of responsibility and justice.

A1.2 Derrida's 'Western philosophy'

Derrida's propositions apply to all languages, and disciplines including philosophies, sciences and law that he claims are captive to the metaphysics of presence and logocentrism. Nevertheless, it is important to appreciate the influences within *the* 'Western philosophy' that are key to his contentions. Peperzak clarifies that Western philosophy is not a homogenous dialogue that runs from the early Greeks through to modern times.¹⁶ European thinking is an amalgam including influences from Greek, Roman, Jewish, Christian, medieval, Slavic, and Germanic cultures.¹⁷ Peperzak notes that the education system in Levinas' time, ignored certain periods of philosophy and the philosophies of some medieval theologians and Christian thinkers up until Descartes and Pascal.¹⁸ Peperzak claims that the philosophy educations of Heidegger, Levinas and Derrida were 'roughly the same'.¹⁹ Levinas was a contemporary of Derrida, although some thirty years older, and they both studied and taught in France.²⁰ As demonstrated in this research, and as can be found in readings across his oeuvre generally, key influences that Derrida repeatedly referenced from the 1960s to his death in 2004, included Plato, Aristotle, Descartes, Montaigne, Nietzsche, Kant, Freud, Hegel, Husserl, Marx, Heidegger, Saussure, Rousseau, Lacan and Levinas. Derrida also noted the influences on Western philosophy of various religions.

¹² Gayatri Chakravorty Spivak, 'Translator's Preface' in Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak trans, John Hopkins University Press, 1997) ix-lxxxvii ('*Spivak in OG*').

¹³ Leonard Lawlor 'Translator's Introduction: The Germinal Structure of Derrida's Thought' in Jacques Derrida, *Voice and Phenomenon: Introduction to the Problem of the Sign in Husserl's Phenomenology* (Leonard Lawlor trans, Northwestern University Press, 2011) xi-xxviii ('*Lawlor in VP*').

¹⁴ de Ville, above n 11.

¹⁵ Nicole Anderson, *Derrida: Ethics Under Erasure* (Continuum, 2012) ('*Ethics*').

¹⁶ Adriaan Peperzak, 'The One for the Other' in *To the Other: An Introduction to the Philosophy of Emmanuel Levinas* (Purdue University Press, 1993) 8 ('*The One for the Other*').

¹⁷ Ibid 8.

¹⁸ Ibid 10.

¹⁹ Ibid 10 n 30.

²⁰ Ibid 2-3: Levinas studied and taught in France and studied and wrote papers about the philosophies of Husserl and Heidegger.

Whilst he did not claim to be religious, he did admit to identifying with his Jewish heritage at times.²¹

A1.3 Terminology employed in this research

For clarity, and because readers of this thesis may not have considered terms relevant to ontology, that is, 'the branch of metaphysics that studies the nature of being',²² here I provide a glossary of some of the related terms employed throughout this thesis.

The terms essence, ipseity,²³ consciousness, self-presence, auto-affection and beingness all refer to a sense of self-presence. The term 'subject' may also be used in this sense. Derrida did not claim that an experience of self is exclusive to human animals.²⁴ Different beings may experience self-presence in different degrees, or not at all. As explored within this Part A, according to Derrida, self-presence whilst appearing perpetual, is experienced differentially during the course of life.

For Derrida the metaphysical assumption of a united self-presence must be questioned. For him, beingness as presence, is an affect of an internal otherness in the working of 'différance'.²⁵ Following Derrida, I use the terms hetero-affection, alterity, and multiplicity in reference to that internal otherness. To reflect the idea, in simple terms, that I, can think of me.²⁶

²¹ Jacques Derrida, *Learning to Live Finally: The Last Interview Jacques Derrida An Interview with Jean Birnbaum* (Pascale-Anne Brault and Michael Naas trans, Palgrave Macmillan, 2007) 39-40 [trans of: *Apprendre à vivre enfin: Entretien avec Jean Birnbaum* (first published 2005)].

²² Oxford University Press, *British & World English: ontology* English Oxford Living Dictionaries <<https://en.oxforddictionaries.com/definition/ontology>>.

²³ Ipseity is defined as: 'individual identify: selfhood': Merriam-Webster, *ipseity*, Dictionary <<https://www.merriam-webster.com/dictionary/ipseity>>. There is no definition of ipseity listed in the online Oxford dictionary.

²⁴ Jacques Derrida, "Eating Well" or the Calculation of the Subject' in Elisabeth Weber (ed), *Points... Interviews, 1974-1994* (Peggy Kamuf et al trans, Stanford University Press, 1995) 255-87, 268-69, 274, 285 [trans of: *Points de suspension, Entretiens* (first published 1992)] ('*Eating Well*'); Jacques Derrida, 'And Say the Animal Responded? to Jacques Lacan' in Marie-Louise Mallet (ed), *The Animal That Therefore I Am* (David Wills trans, Fordham University Press, 2008) 119-40, 94-95, 124 ('*And Say*') [trans of: 'Et si l'animal répondait?' (first published 2004)] ('*The Animal That Therefore I Am*'): '... it is difficult, as Lacan does explicitly, to reserve the differentiality of signs for human language only, as opposed to animal coding.' That essay was first published as Jacques Derrida, 'Et si l'animal répondait?' (2004) 83 *Cahier de L'Herne* 117. It was also translated and published in Cary Wolfe (ed), *Zoontologies: the Question of the Animal* (David Wills trans, University of Minnesota Press, 2003) 121-46.

²⁵ See, eg, Derrida, *Voice and Phenomenon*, above n 4, 71.

²⁶ See, eg, Jacques Derrida in Michel Lisse, Marie-Louise Mallet and Ginette Michaud (eds), *The Beast & the Sovereign Volume I* (Geoffrey Bennington trans, University of Chicago Press, 2009) 181 [trans of: *Seminaire: La bete el le souverain Volume I (2001-2002)* (first published 2008)] ('*The Beast & the Sovereign Vol I*):

Différance is approximated in a following section of this Part A. In short, by way of introduction only, différance is the internal not-conscious process of presence-making, in regard to meaning and self-presence. It involves differentiation and the deferring of both meaning and full presence(s). Différance is a non-concept. As I explain below, Derrida did not want this proposition of his, or others, to become entirely graspable and made 'present'.

The terms ideality and ideal are used in reference to the desire or belief, and the assumed possibility of capturing fullness of meaning in a word or other form of symbolisation that signifies a thing, a being, or a concept. Ideality, refers to both this idealisation of a subject, object or concept, and the belief that it is possible. In taking on Derrida's perspective, it is necessary to remain alert to his proposition that language *cannot* fully capture everything about any thing or any being. That is, that otherness, that is always an element, is excluded from the presences that we cognise.

Derrida's use of the word 'economy' commonly reflects a return, usually to the self, of some benefit, of some meaning, or of presence, and usually it is a result of the workings of the metaphysics of presence (which is facilitated by the workings of différance). For clarity, it does not connote an economy in a monetary sense, and neither was it articulated by Derrida in terms of physics.

A1.4 Non-conceptualisation of Derridean terms

Derrida referred to his key propositions such as trace and différance by different, and sometimes interchangeable names. He did not want them to become subject to the metaphysics of presence and idealised.²⁷ For example, the word 'différance' was invented by Derrida to signify the difficult-to-think aspects of meaning-making (and subject-making) for which he claimed there is no name in Western languages.²⁸ He did not want his key propositions, including différance, to be fully conceptualised, or their meanings to settle or be

it suffices to admit that the living being is divisible and constituted by a multiplicity of agencies, forces and intensities that are sometimes in tension or even in contradiction ... what is at stake [is] this ego-logics of "I" and "Me".

²⁷ See, eg, Derrida, *Positions Interview*, above n 2, 40: Différance 'cannot be elevated into a master-word or a master-concept, since it blocks every relationship to theology' and it is part of chain of 'other textual configurations'.

²⁸ Jacques Derrida, 'Linguistics and Grammatology' in Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak trans, John Hopkins University Press, 1997) 27–73, 71 ('*Linguistics*'): he argued that logocentrism has repressed the possibility of word-concepts for trace or différance because the connotations of less than full self-presence is in opposition to classical and ontotheological notions of 'being' for human animals. See also Derrida, *Différance*, above n 8, 23–27; 23: he did note that intimations of the idea of trace or différance resonate in the works of Nietzsche, Freud, Heidegger and Levinas.

appropriated.²⁹ It was a pedagogic strategy.³⁰ Derrida wanted his audience to consider life beyond presence(s)³¹ so that we might learn to think and live differently,³² with increased openness toward otherness and Derridean justice.³³ He described his terms as '[analogous to] undecidables',³⁴ as 'unities of simulacrum',³⁵ as 'focal points of economic condensation',³⁶ or a 'chain of substitutions'.³⁷ It was his desire that they stimulate '*unheard of thoughts*' and motivate his readers to 'indefinitely ... interrogate presence within the closure of knowledge'.³⁸ His terms are to deliver the 'experience of the indefinite drift of signs as errancy and change of scenes ... linking the re-presentations ... to one another, without beginning or end'.³⁹ Their purpose is to demonstrate, that contrary to traditional and Husserlian phenomenological belief, fullness of meaning, that is presence or ideality of meaning, is never achieved, rather, 'the thing itself always steals away'.⁴⁰ Spivak notes that the terms themselves '[reflect] the structure of difference'.⁴¹ Others have referred to these enigmatic Derridean terms as 'quasi-concept[s]',⁴² 'new concepts',⁴³ 'unclassical concepts',⁴⁴ 'neologisms',⁴⁵ and 'paleonyms'.⁴⁶

It is impossible, and it would offend Derrida's propositions to offer any full explanation of his terms including *différance*, trace, arché-writing, supplement or play. Due to his purposeful equivocality, it is important to note that some of my explanations of those terms, whilst they appear to concur with Derrida's intimations in some of his texts, may well contrast in some respects with his articulations and the words he used to describe them elsewhere. Following

²⁹ See, eg, Derrida, *Implications*, above n 10, 8.

³⁰ See, eg, Derrida, *Positions Interview*, above n 2, 71; Derrida, *Implications*, above n 10, 14.

³¹ See, eg, Derrida, *Implications*, above n 10, 7: Derrida's 'writing' aims to expose the symptoms of the metaphysics of presence and at the same time, not become present itself.

³² See also Lawlor in *VP*, above n 13, xii.

³³ See, eg, Derrida, *Eating Well*, above n 24, 261-62. See also Lawlor in *VP*, above n 13, xii. I take up the connection to justice and ethics in Appendix 1, Part C: *Derridean Justice*.

³⁴ Derrida, *Positions Interview*, above n 2, 42-43.

³⁵ Ibid 43.

³⁶ Ibid 40.

³⁷ Derrida, *Implications*, above n 10, 14.

³⁸ Derrida, *Voice and Phenomenon*, above n 4, 88 (*italics in original*).

³⁹ Ibid 89.

⁴⁰ Ibid.

⁴¹ Spivak, *Spivak in OG*, above n 12, lxxi (different spelling of *différance* in original). See also Jacques Derrida in 'Semiology and Grammatology: Interview with Julia Kristeva' in in Alan Bass (ed), *Positions: Jacques Derrida* (Alan Bass trans, Athlone Press, 1981) 15-36, 28-29 ('*Semiology and Grammatology*').

⁴² Geoffrey Bennington, 'Derridabase' in Geoffrey Bennington and Jacques Derrida, *Jacques Derrida* (Geoffrey Bennington trans, University of Chicago Press, 1993) 3-316, 273 ('*Derridabase*').

⁴³ de Ville, above n 11, 194; Lawlor in *VP*, above n 13, xi.

⁴⁴ Lawlor, *Lawlor in VP*, above n 13, xvii.

⁴⁵ Anderson, *Ethics*, above n 15, 9.

⁴⁶ Ibid; Lawlor, *Lawlor in VP*, above n 13, xii.

Spivak, what I can achieve is an approximation.⁴⁷ I have reduced the risk of erroneous interpretations by quoting English translations of Derrida's descriptions, by canvassing a number of his texts, and by referring to explanations of other commentators that have substantiated their own wide and deep readings of Derrida's works.⁴⁸ In any case, if we let Derrida's propositions and pedagogy work in us, we should come to realise that all significations are, more precisely, only ever likely to be: unique rather than universal, and approximations rather than encapsulations.

A2 The classical preference for presences

A2.1 The metaphysics of presence

It was traditionally thought that through speech, and by hearing oneself speak, humans recognise and experience their own self-presence.⁴⁹ Derrida deconstructed the voice-sound-meaning-presence link to argue that writing in its fullest sense⁵⁰ precedes speech and that there is no direct relationship between signs and thoughts.⁵¹ Rather, he argued that we have a desire for presences, as it enables auto-affection (and serves to deny death).⁵² He suggested that language is merely a technology that delivers the metaphysical experience of presence.

The metaphysics of presence denotes that preference for presences, rather than absences. Spivak suggests that 'Derrida [used] the word "metaphysics" very simply as shorthand for any science of presence'.⁵³ Derrida demonstrated that presence is foundational to Western thought. In contrast to Hegel⁵⁴ and Husserl,⁵⁵ and in differentially following Heidegger,⁵⁶ he

⁴⁷ Spivak noted that Derrida's terms 'do not remain consistently important conceptual master-words in subsequent texts' and explained that she offered 'approximate descriptions' of them: Spivak, *Spivak in OG*, above n 12, lxxi.

⁴⁸ Predominantly I rely on Spivak, Lawlor, de Ville and Anderson.

⁴⁹ See, eg, Derrida, *Voice and Phenomenon*, above n 4, 27-43: Derrida traces the views of Husserl and Saussure; Derrida, *Of Grammatology*, above n 2, 7-8, 20, 33-34: Derrida traces the traditional view in Plato's *Phaedrus*. See also Wolfgang Teubert, *Meaning, Discourse and Society* (Cambridge University Press, 2010) 47-48: Teubert traced the voice-meaning-presence link to Aristotle.

⁵⁰ Derrida's 'writing' is described in section A3.2 below.

⁵¹ See, eg, Derrida, *Of Grammatology*, above n 2, 20, 60.

⁵² See section A3 below.

⁵³ Spivak, *Spivak in OG*, above n 12, xxi. The Oxford online definitions of metaphysics are: '[t]he branch of philosophy that deals with the first principles of things, including abstract concepts such as being, knowing, identity, time, and space' and '[a]bstract theory with no basis in reality': Oxford University Press, *British & World English: metaphysics* English Oxford Living Dictionaries <<https://en.oxforddictionaries.com/definition/metaphysics>>.

⁵⁴ See, eg, Derrida, *Of Grammatology*, above n 2, 11-12, 19, 24-26; Derrida, *Voice and Phenomenon*, above n 4, 87.

⁵⁵ See, eg, Derrida, *Voice and Phenomenon*, above n 4, 7-8, 87.

argued that Western ideas of human-animals' beingness has been perceived merely as presence.⁵⁷ Derrida objected to this metaphysical presupposition as he claimed it masked what he proposed was the *actual* condition of 'beingness'.⁵⁸ For Derrida, beingness for human and nonhuman animals is not metaphysical at all, but rather a consequence of the fullest sense of writing, and of the workings of what he called trace and *différance*.⁵⁹ Lawlor attests to Derrida's fixation on deconstructing this 'auto-affection' aspect of the metaphysics of presence: 'it is possible to say without exaggeration that every deconstruction Derrida has ever written targets auto-affection'.⁶⁰ In his final series of lectures, in 2002, Derrida explained that his question was always, beyond and before, what had already been *assumed* about the nature of Being:

... what we have tried to think ... was always ... that which stands back a little at the very place where the question "What is living in life?" holds its breath before the problematic legitimacy of a subjection of the question of life to a question of Being, of life to Being.⁶¹

The preference for presence seems to emanate from its assumed proximity to the notions of the Christian God, 'truth' and 'meaning'.⁶² With the link of languages to the 'Word of God',⁶³ that is, the Logos,⁶⁴ and therefore to 'truth' and 'meaning', Derrida argued (following

⁵⁶ See, eg, Derrida, *Of Grammatology*, above n 2, 17-23; Martin Heidegger, *Being and Time* (Joan Stambaugh trans, State University of New York Press, 1996) 46 ('*Stambough Being and Time*'): Traditional anthropology, Greek and theological definitions 'indicate that, over and above the attempt to determine the essence of "human being" as a being, the question of its being has remained forgotten: rather, this being is understood as something "self-evident" in the sense of the *objective* presence of other created things ... where the ... consciousness, and the context of experience, serve as the methodical point of departure', at 3: "'Being" is the self-evident concept. "Being" is used in all knowing and predicating, in every relation to beings and in every relation to oneself'.

⁵⁷ See, eg, Derrida, *Of Grammatology*, above n 2, 18, 23.

⁵⁸ See, eg, *ibid* 23-24.

⁵⁹ See, eg, *ibid*. See especially Derrida, *The Animal That Therefore I Am*, above n 24, 104.

⁶⁰ Leonard Lawlor, 'Auto-Affection' in Claire Colebrook (ed), *Jacques Derrida: Key Concepts* (Routledge, 2015) 130-38, 130.

⁶¹ Derrida, *The Beast & The Sovereign Vol I*, above n 26, 219.

⁶² See, eg, Derrida, *Of Grammatology*, above n 2, 10-15.

⁶³ The Gospel of John declared: 'In the beginning was the Logos, and the Word was with God, and the Word was God': John 1:1.

⁶⁴ Logos is both 'the Word of God, or principle of divine reason and creative order, identified in the Gospel of John with the second person of the Trinity incarnate in Jesus Christ', and the origin of Logos is stated as 'Greek, word, reason': Oxford University Press, *British & World English: Logos* English Oxford Living Dictionaries <<https://en.oxforddictionaries.com/definition/logos>>. See also Marc S Cohen, *Aristotle's Metaphysics* (15 June 2016) Stanford Encyclopedia of Philosophy <<http://plato.stanford.edu/entries/derrida/>>: [14]: Aristotle used the term in the sense of account, definition or formula, at [6] quoting *Topics* 102a3: Aristotle also linked essence to definition: 'a definition is an account (*logos*) that signifies essence'.

Heidegger), that our mode of being is logocentric.⁶⁵ Derrida suggested that because of the assumed, voice-sound-meaning-presence link, that this aspect of logocentrism can also be thought of as phonocentrism that represents ‘absolute proximity of voice and being, of voice and the meaning of being, of voice and the ideality of meaning’.⁶⁶ Derrida sometimes used the term ontotheology to describe this predominant perspective of beingness.⁶⁷ For him, metaphysics always had the function of assigning ‘the origin of truth in general to the logos’.⁶⁸

A2.2 Logocentrism

Logocentrism is a both an extension of the metaphysics of presence and a mechanism that sustains it.⁶⁹ Derrida explained that his definition of logocentrism suggests ‘the matrix of [a wider] idealism’.⁷⁰ That is, a broader idealism than is normally thought, and ‘the most constantly dominant force’.⁷¹ His use of the term ‘idealism’ is in relation to ideality constructed through language, that through signification and conceptualisation, affects mastery and power, and is enabled through writing (in his fullest sense).⁷² Logocentrism and its metaphysics of text is ‘nothing but the most original and powerful ethnocentrism, in the process of imposing itself upon the world, controlling in one and the same *order*’.⁷³ At a mechanistic or technological level, logocentrism includes the operation of linguistic and conceptual constructs which are recognised as hinging on binary oppositions:⁷⁴ such as good/bad or human/animal. Following Nietzsche,⁷⁵ Derrida concurred, and his

⁶⁵ Derrida, *Of Grammatology*, above n 2, 12.

⁶⁶ Ibid 11-12.

⁶⁷ See, eg, ibid 12, 73: there Spivak translates the term as ‘onto-theology’; Jacques Derrida, ‘Of Grammatology as a Positive Science’ in Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak trans, John Hopkins University Press, 1997) 74-100, 89 (*‘Positive Science’*); Derrida, *Différance*, above n 8, 6. Hart explains that the term ‘onto-theology’ had also been used differentially by Kant and Heidegger: Kevin Hart, ‘Religion’ in Claire Colebrook (ed), *Jacques Derrida: Key Concepts* (Routledge, 2015) 31-40, 31-32 (*‘Key Concepts’*).

⁶⁸ Derrida, *Of Grammatology*, above n 2; see also at 10-11.

⁶⁹ See, eg, ibid 12: ‘Logocentrism would thus support the determination of the being of the entity as presence.’

⁷⁰ Derrida, *Positions Interview*, above n 2, 51. See also Derrida, *Of Grammatology*, above n 2, 92-93.

⁷¹ Derrida, *Positions Interview*, above n 2, 51.

⁷² See especially Derrida, *Positive Science*, above n 67, 93.

⁷³ Derrida, *Of Grammatology*, above n 2, 3 (italics in original).

⁷⁴ See, eg: Jacques Derrida, ‘Signature Event Context’ in *Margins of Philosophy* (Alan Bass trans, Harvester Wheatsheaf, 1982) 307-30, 329 (*‘Signature’*): Derrida discusses the role of deconstruction in its displacement of the logocentric hierarchy of oppositions and mentions the pairs of ‘speech/writing, presence/absence’.

⁷⁵ Friedrich Wilhelm Nietzsche, ‘First Essay: Good and Evil – Good and Bad’ in *The Genealogy of Morals* (Boni and Liveright, 1918) 1-39, 3-11: Nietzsche linked sovereign power with the institution of binary oppositions that reflect cultural values. He questioned the basis of rational thought and objectivity. Friedrich Nietzsche, in Walter Kaufmann (ed), *Basic Writings of Nietzsche* (Walter

deconstructions demonstrated, that each opposition plays a role in inescapably defining the other of the pair in the opposition,⁷⁶ and in cementing cultural values. Derrida explained that the resonating voice, (or any form of signifier)⁷⁷ is a mechanism that brings forth *iterations* of past 'presences', as a 'supplement', that both recalls and produces the sensation of presence(s).⁷⁸ Some of the key elements of the metaphysics of presence, logocentrism, and the implications for epistemology are briefly described below.

A2.3 Contributors to Western epistemology

This section traces some assumptions within Western epistemology. It highlights some links with ancient and early beliefs. Western epistemology has for example, in some practices, adopted the notion that there can be, or is, shared commonality in meaning of words and concepts, and that ideas are perfectible. That is, that ideas can develop toward, and become full and universal, as ideals, without recourse to difference(s). Whilst I can only refer to them briefly here, Derrida did consider early influencers of Western thought including Parmenides⁷⁹ and Plato.⁸⁰

Kaufmann trans, Modern Library, 1992): It was 'possible that ... they are insidiously related ... [or] maybe even one with them in essence'. See also Derrida, *Of Grammatology*, above n 2, 19; Jacques Derrida, 'Structure, Sign and Play' in Jacques Derrida, *Writing and Difference* (Alan Bass trans, Routledge, 1978) 351-70, 354 ('*Structure, Sign and Play*').

⁷⁶ See, eg, Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' (1990) 11 *Cardozo Law Review* 919, 995-1003 ('*Force of Law*'): Derrida highlighted the confounding of origins and repetitions, and the denial of cross contamination in what is accepted to be oppositional meanings in Benjamin's text *Critique of Violence*.

⁷⁷ Derrida, *Of Grammatology*, above n 2, 65-70, at 60 (italics in original):

This arche-writing would be at work not only in the form and substance of graphic expression but also in those of nongraphic expression. It would constitute not only the pattern uniting form to all substance, graphic or otherwise, but the movement of the *sign-function* linking a content to an expression, whether it be graphic or not.

⁷⁸ See, eg, Derrida, *Voice and Phenomenon*, above n 4, 88-89. Lawlor described that: '[t]he trace really resembles a memory. Insofar as it continues to function as a memory does, it also resembles something *written* (an outline, a drawing, a tracing ...)': Lawlor, *Lawlor in VP*, above n 13, xxiv (italics in original).

⁷⁹ Derrida refers to Parmenides in context to differentiations between meaning and non-meaning, and in his discussion of reason and madness in Jacques Derrida, 'Cogito and the History of Madness' in Jacques Derrida, *Writing and Difference* (Alan Bass trans, Routledge, 1978) 36-76, 76 ('*Cogito*'). See also David Gallop, *Parmenides of Elea: Fragments: A Text and Translation with an Introduction* (University of Toronto Press, 2013) 7: Gallop argues that Parmenides appreciated that human experience was constructed through contrasts and oppositions.

⁸⁰ Derrida is well known for his deconstruction of Plato's *Phaedrus*: Jacques Derrida, 'Plato's Pharmacy' in *Dissemination* (Barbara Johnson trans, Bloomsbury, 2016) 65-181 [trans of: *La Dissemination* (first published 1972)] ('*Plato's Pharmacy*'). However, that 'deconstruction' should not be construed that he had any opposition to Plato generally, see, eg: Jacques Derrida in John D Caputo, 'The Villanova Roundtable: A Conversation with Jacques Derrida' in *Deconstruction in a Nutshell* (Fordham University Press, 1994) 3-28, 9 ('*Villanova Interview*').

Parmenides of Elea was an early Greek philosopher in the 5th century BCE.⁸¹ His ontological approach, concerned with 'what is', has, according to Gray, 'held sway in Western philosophy' and influenced representationalist epistemologies.⁸² Those epistemologies include the assumption that entities can become stable and can then be accurately represented linguistically and conceptually.⁸³ Some related approaches to knowledge, include objectivism and positivism.⁸⁴ Positivism includes the assumption that scientific observation should be separate to 'philosophical speculation'.⁸⁵ Other branches of epistemology such as constructivism,⁸⁶ and interpretivism (which includes phenomenological approaches),⁸⁷ account for the effects of the application of meaning differently,⁸⁸ but yet remain, and Gray phrases it tautologically, 'based upon a *being* ontology'.⁸⁹

This research follows Derrida's proposition, that due to the pervasive metaphysics of presence, *all* application of language to knowledge is ontological and hence grounded in the philosophical arché, despite claims to any pure scientificity.⁹⁰ Derrida also highlighted false beliefs in direct, and therefore unmediated relationships between thoughts, and words in their representation of things.⁹¹ That is, between ideas or ideals as signifieds, and signifiers in their representations of actual referents. Another constriction on knowledge has been

I have constantly tried to read and to understand Plato and Aristotle and I have devoted a number of texts to them ... So I think we have to read them again and again and I feel that, however old I am, I am on the threshold of reading Plato and Aristotle. I love them and I feel I have to start again and again and again.

⁸¹ John Palmer, *Parmenides: 3.1 The Strict Monist Interpretation* (2 August 2016) Stanford Encyclopedia of Philosophy <<https://plato.stanford.edu/entries/parmenides/>>. Parmenides was also fictionalised as an interlocutor in Plato's dialogue: *Parmenides*. His beliefs were a subject of discussion in Plato's *Sophist*.

⁸² David E Gray 'Theoretical Perspectives and Research Methodologies' in David E Gray, *Doing Research in the Real World* (Sage Publications, 2004) 15-34, 16-17.

⁸³ Ibid 17.

⁸⁴ Ibid.

⁸⁵ Ibid 18.

⁸⁶ Ibid 17.

⁸⁷ Ibid 20-22.

⁸⁸ Ibid 17, 21.

⁸⁹ Ibid 17 (italics in original) citing Robert Chia, 'The Production of Management Knowledge: Philosophical Underpinnings of Research Design' in David Partington (ed), *Essential Skills for Management Research* (Sage, 2002) 21-37. Gray does not cite a page number in Chia, however the statement '[phenomenology] remains committed to a *being* ontology' is found in Chia, above n 89, 29 (italics in original), at 27: positivism has been '[naïve in] regarding the impact of language on perception and thought'.

⁹⁰ Derrida, *Of Grammatology*, above n 2, 3; Derrida, *Semiology and Grammatology*, above n 41, 35-36: Derrida discusses the goals of his grammatology in opposition to logos-bound disciplines.

⁹¹ See, eg, Derrida, *Linguistics*, above n 28, 30: Derrida highlighted Saussure's assumed direct connection between the spoken word and the signified concept; Derrida, *Semiology and Grammatology*, above n 41, 31: Derrida discussed Husserl's contention that meaning as cognised is independent of the signifier.

rejection of sensory perceptions in the determination of rationality and objectivity.⁹² Before exploring the related, deeper connections between beingness and epistemology, it is necessary to explicate Derrida's notion of arché-writing that serves to explain *why* we seek ideologies as foundations for beliefs and thoughts, and its connection to, and implementation through, logocentrism.

A2.4 The ontotheological arché as signifying structure

Derrida argued that the metaphysics of presence reflects our need to establish signifying structures.⁹³ He identified that we have a *desire* for presence, for certitude, for fixity and avoidance of anxiety.⁹⁴ We seek centres upon which we can articulate 'truths' and by which we can avoid the terror of the unknown or of the future.⁹⁵ In *Positive Science*, Derrida explained that this centring arché-writing enables 'solidarity among ideologies, religious, scientific-technical systems and the systems of writing'.⁹⁶ Arché-writing extends beyond mere appellation or signification in that sense, and affects mastery through ideology.⁹⁷ In Western cultures, this is manifest through logocentrism and its system of binary oppositions, influenced by ontotheology.⁹⁸ Arché-writing fuels emergence of power and ascendance within, and of, societies through religions, common languages and therefore laws: legal and formal or informal,⁹⁹ and in the forms of rules, customs or conventions. It is ascendance through transcendence of the transcendental signified.¹⁰⁰ It also incorporates repression of 'the myth of the simplicity of [that] origin'.¹⁰¹

⁹² See, eg, Palmer, above n 81, citing W K C Guthrie, *A History of Greek Philosophy, ii: The Presocratic Tradition from Parmenides to Democritus* (Cambridge University Press, 1965) 4-5: Palmer claims that Parmenides argued that reason should prevail, and that sensory perceptions should be rejected, as the senses provide a deceptive view of reality. See also René Descartes, *Discourse on Method and the Meditations* (F E Sutcliffe trans, Penguin Classics, 1968) 58-59, 65-74 ('*Meditations*'): Differentially following Aristotle's idea of the human as the rational animal (traced in this research, in Appendix 1, Part D: *Derrida's Animot*), Descartes also claimed to reject the sensory in 'truth'. His assumption was linked to his affirmation of presumed human and animal differences and his determination that animals act only through 'the disposition of their bodies' (at 74) and are 'devoid of reason' (at 65).

⁹³ Derrida, *Structure, Sign and Play*, above n 75, 352-55.

⁹⁴ Ibid 352.

⁹⁵ Ibid.

⁹⁶ Derrida, *Positive Science*, above n 67, 93.

⁹⁷ Ibid. As an example of Derrida's equivocality in his use of terminology, see also *Voice and Phenomenon* where he used the terms archi-writing and trace in the sense of the movement of *différance*: Derrida, *Voice and Phenomenon*, above n 4, 73.

⁹⁸ Derrida, *Positive Science*, above n 67, 92.

⁹⁹ Ibid 92-93.

¹⁰⁰ Derrida, *Linguistics*, above n 28, 70. 'Transascendence' is also relevant to formation of self-presence, through the making of self-identity for Levinas. His focus was the role of the 'other' and alterity and how that is accomplished through language: Emmanuel Levinas, *Totality and Infinity: An*

For those centring roots or beginnings to operate as stabilizing cores, they must *not*, themselves, be a part of the structure that they designate.¹⁰² Upon these outside (but yet inside) centres, signifying structures are built on binary, logocentric oppositions of meaning.¹⁰³ At the same time, the designated centre, the genesis, is unshakable and must remain so to avoid the collapse of the signifying structure that it supports.¹⁰⁴ The links between cognition and beingness, and belief in 'truth' as emanating from, and being anchored to, the Christian God, had been affirmed in Descartes' *Meditations*¹⁰⁵ and his assumption: 'I think therefore I am'.¹⁰⁶ Derrida argued that in the West, our centre, our arché has been presence, whether of God, subject, essence, existence or consciousness.¹⁰⁷ It is theological, ontotheological and encapsulated in the logos.¹⁰⁸ It is the structure and the condition of the 'epistēmē'.¹⁰⁹

A2.5 The drive to conceptualisation as affirmation of presence and life

Derrida, following his influencers, highlighted connections between the drive to knowledge and life itself. The making of knowledge involves the development of concepts (ideals). Concepts are a means by which human animals, at least, seek to perfect knowledge. In a non-Derridean, metaphysical and Husserlian interpretation: knowledge is perceived as realised in idealisation, where a concept is made present in its fullness, to consciousness.¹¹⁰ Any particular concept is also believed to be distinguishable from other concepts and is therefore appreciated as an identity in itself that is repeatable.¹¹¹ Following this Western

Essay on Exteriority (Alphonso Lingis trans, Duquesne University Press, 1969) 35-37 [trans of: *Totalité et Infini* (first published 1961)] ('*Totality and Infinity*').

¹⁰¹ Derrida, *Positive Science*, above n 67, 92; Derrida, *Linguistics*, above n 28, 61.

¹⁰² Derrida, *Structure, Sign and Play*, above n 75, 352.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Descartes, *Meditations*, above n 92, 49: 'For God having given each of us some light of reason to discern true from false ...', at 32: the 'revealed truths' of 'our theology' are 'beyond our understanding, I would not have dared submit them to my weak powers of reasoning', to do so would require 'some special grace from heaven and to be more than a mere man'.

¹⁰⁶ Ibid 53, at 54: Descartes argued that the mind was distinct from the body.

¹⁰⁷ Derrida, *Structure, Sign and Play*, above n 75, 353.

¹⁰⁸ Derrida, *Linguistics*, above n 28, 71-73.

¹⁰⁹ Derrida, *Structure, Sign and Play*, above n 75, 351. In *Of Grammatology* the term 'epistēmē' is used more generally in the sense of knowledge: Derrida, *Of Grammatology*, above n 2, 10. Elsewhere, 'episteme' is defined as: '[s]cientific knowledge, a system of understanding; specifically (Foucault's term for) the body of ideas which shape the perception of knowledge in a particular period': Oxford University Press, *British & World English: episteme* English Oxford Living Dictionaries <<https://en.oxforddictionaries.com/definition/episteme>>.

¹¹⁰ See, eg, Derrida, *Voice and Phenomenon*, above n 4, 45, 65; G Berns, *Kringloop en Woekering* (Boom, 1988) 60 ('*Kringloop*') quoted in de Ville, above n 11, 18 (de Ville's own translation).

¹¹¹ Derrida, *Voice and Phenomenon*, above n 4, 45, 65; Berns, *Kringloop*, above n 110, 60 quoted in de Ville, above n 11, 18 (de Ville's own translation).

tradition, Husserl's phenomenology supported the possibility and notion of a 'pure meaning' of a signified (an ideal or concept) as merely *represented* in a sign (a word).¹¹² That the meaning could be cognised, made present, and repeated, without recourse to any *process* of differentiation, and independently of the sign.¹¹³ Language was perceived as merely *reflecting* 'meaning' rather than as ultimately entwined in the *making* of meaning.¹¹⁴ Derrida found that the metaphysics of presence denies the workings of difference and what he describes as *différance*¹¹⁵ (which I describe in following section of this Part A). In contrast to Husserl, Derrida argued that the derivation of 'pure meaning' is impossible as:

"[M]eaning" (to be "expressed") is already, and thoroughly, constituted by a tissue of differences, in the extent to which there is already a *text*, a network of textual referrals to *other* texts, a textual transformation in which each allegedly "simple term" 'is marked by the trace of another term, the presumed interiority of meaning is already worked upon by its own exteriority'.¹¹⁶

Therefore, there is no necessary relation between any particular sign (word or other) and its meaning as 'there is no signification unless there is synthesis, syntagm, *différance*, and text'.¹¹⁷ Derrida's assumptions were built on his deconstructions of texts of other philosophers and linguistics theorists.¹¹⁸ In *Voice and Phenomenon* Derrida identified Husserl's determined weddedness to presence and presence-making in Husserl's text *Logical Investigations*.¹¹⁹ Derrida argued it unveiled that Husserl's thinking, and the practice of phenomenology in general, remained captured in the telos of language(s) and conceptualisation.¹²⁰ That it was constrained within the structure of the logos, without questioning its bounding of 'rationality'.¹²¹ Since Derrida mentioned both Platonic and

¹¹² Derrida, *Semiology and Grammatology*, above n 41, 31 citing T N Edmund Husserl, *Ideas* (W R Boyce Gibson trans, Collier Books, 1962) 319 ('*Ideas*'). See also Derrida, *Voice and Phenomenon*, above n 4, 35-36; Lawlor, *Lawlor in VP*, above n 13, xiv.

¹¹³ Derrida, *Semiology and Grammatology*, above n 41, 31 citing Husserl, *Ideas*, above n 112, 319.

¹¹⁴ Derrida, *Semiology and Grammatology*, above n 41, 31-32; Derrida, *Voice and Phenomenon*, above n 4, 26.

¹¹⁵ Derrida, *Semiology and Grammatology*, above n 41, 32.

¹¹⁶ Ibid 33 (*italics in original*).

¹¹⁷ Ibid.

¹¹⁸ See, eg, Derrida, *Plato's Pharmacy*, above n 80; Derrida, *Of Grammatology*, above n 2, 50 (and throughout in which he discusses texts of Descartes, Nietzsche, Hegel, Husserl, Saussure, Lévi-Strauss, Rousseau and others).

¹¹⁹ Derrida, *Voice and Phenomenon*, above n 4, 8. Lawlor as editor, cites both volumes of the English version of Dermot Moran (ed), *Logical Investigations* (J N Findlay trans, Routledge, 2001). Lawlor notes that Derrida sometimes referred to a French translation and at other times translated into French himself: Derrida, *Voice and Phenomenon*, above n 4, 96, nn 4, 11.

¹²⁰ Derrida, *Voice and Phenomenon*, above n 4, 7-8.

¹²¹ Ibid 7.

Kantian thoughts in reference to Husserl's propositions,¹²² it is useful to very briefly mention them here as relevant to Derrida's critical point of the teleology of language, in its reaffirmation of presences, and the relationship to conceptuality and iterability. In regard to Plato's Ideas in the next paragraph, Derrida does not explicate these problems directly, in detail in the texts that I referenced, however I recite them here as they are relevant to the analysis within this research, and to what he states in *Voice and Phenomenon*.¹²³

A2.6 Iterability in making knowledge and masking epistemological challenges

According to Silverman, Plato suggested that Forms are descriptive properties that *cause* physical change, that 'exist outside of space and time' and that Forms are themselves, 'objects of knowledge'.¹²⁴ 'Justice' is an example.¹²⁵ An epistemological problem appears to have been recognised in Plato's texts. That is, whilst it is possible for example, to claim that 'Justice is just', it does not address the content of the Form 'Justice': it is 'self-predicational'.¹²⁶ One consideration is that the Form, 'Justice' will remain a complex and inexhaustively-defined idea, perhaps a 'non-definition' dependent on other attributes and yet-to-be-discovered knowledge.¹²⁷ Silverman indicates that the problem in itself, perhaps recognised by Plato, was that a statement such as 'Justice is just' is a promise that through philosophical or scientific investigation remains to be discovered.¹²⁸ That in itself points toward another issue in that there is an underlying *assumption* that philosophy and science *will* progress toward discovery of 'truth'. Silverman suggests that Plato recognised that *that* will or can occur based on a method of testing hypotheses that go toward proving what is *already* perceived in relation to a Form, or rather, what is justified as *believed* as being 'true'.¹²⁹ Perhaps that indicates that at times, otherness, unknowns and unknowables may, as a result, not be a focus or priority, and that we should be wary that 'knowledge' could be

¹²² Ibid 8. See also Jacques Derrida, "'Genesis and Structure" and Phenomenology' in Jacques Derrida, *Writing and Difference* (Alan Bass trans, Routledge, 1978) 193-211, 198-209 ('Genesis and Structure').

¹²³ See below nn 141-150 and accompanying text.

¹²⁴ Allan Silverman, *Plato's Middle Period Metaphysics and Epistemology* (14 July 2014) Stanford Encyclopedia of Philosophy <<https://plato.stanford.edu/entries/plato-metaphysics/>> [1]: Silverman explains that this interpretation is possible in relation to Plato's 'middle period works' including *Phaedo*.

¹²⁵ Ibid [2]-[4] citing Plato, *Phaedo*.

¹²⁶ Silverman, above n 124, [3]-[4].

¹²⁷ Ibid [4], [9]: Some interpretations of Plato suggest that 'one who knows Forms can also acquire knowledge of the physical world', and that knowledge of Forms must have been acquired by souls prior to embodiment of the soul.

¹²⁸ Ibid [4].

¹²⁹ Ibid [2], [9] citing Plato, *Phaedo*; Plato, *Republic*.

based in belief.¹³⁰ These problems bear relation to some of the problems of metaphysics and epistemology that Derrida identifies in his deconstructions that I take up in subsequent chapters of this research.

According to Rohlf, Kant's 'transcendental realism' includes the notion that 'things in themselves' are things (including living beings) that exist external to us and our thoughts, and even though we think of things in terms of space and time, space and time are not 'things in themselves'.¹³¹ However, according to Rohlf, Kant argued that we cannot think about 'things in themselves', that is external objects other than by application of already thought, 'objectively valid' categories that are forms of intuition, that is, forms of space and time.¹³² For Kant, that conceptuality provides for the possibility of experience.¹³³ As recounted by Rohlf, Kant stated a conclusion in regard to self-consciousness:

[it] does not yet come about by my accompanying each representation with consciousness, but rather by my adding one representation to the other and being conscious of their synthesis. Therefore it is only because I can combine a manifold of given representations in one consciousness that it is possible for me to present the identity of the consciousness in these representations.¹³⁴

There is at least one commonality in Plato's Forms and Kant's Ideas in that they highlight epistemological challenges. Both Plato and Kant determined that we do not think of external things and beings as they really are, as they exist in themselves, but rather that we can only do so by application of attributes and descriptors of which we are already familiar. For Derrida, space and time are, another way of describing presences, as repeatable idealities.¹³⁵ His definition of presence includes both the proximity of meaning and the 'proximity of the temporal present'.¹³⁶ What he describes as the 'form' of space and time, is

¹³⁰ See, eg, Silverman above n 124, [9] citing Plato, *Republic*: Silverman suggests that Plato may have been sceptical about the possibility of 'knowledge of the physical, sensible world', and that Plato may have thought that '[h]umans can only have beliefs about [knowledge].'

¹³¹ Michael Rohlf, Stanford Encyclopedia of Philosophy, *Aristotle's Metaphysics* (25 May 2016) <<https://plato.stanford.edu/entries/kant/>>: [3] citing Immanuel Kant in P Guyer and A Wood (eds), *Critique of Pure Reason* (P Guyer and A Wood trans, Cambridge University Press, 2nd ed, 1998) 59-60. Rohlf also acknowledges that interpretations of Kant's transcendental idealism have been subject to controversy. I apply the most simplistic interpretation here as it appears to suffice for the purpose of explicating Derrida's reference to what he indicated in relation to Kant's Ideas.

¹³² Rohlf, above n 131, [4]. See also, Derrida, *Voice and Phenomenon*, above n 4, 72 (and the unnumbered note); Lawlor, *Lawlor in VP*, above n 13, xiv:

Western philosophy exhibits schemas [in the Kantian sense] such as the substance-attributes relation, where substance is the present being which the attributes modify; of the subject-object opposition, where the subject is presence and the object is relative to the subject.

¹³³ Rohlf, above n 131, [4] citing Guyer and Woods, above n 131, 126.

¹³⁴ Rohlf, above n 131, [4.1] quoting Guyer and Woods, above n 131, 133.

¹³⁵ Derrida, *Voice and Phenomenon*, above n 4, 8.

¹³⁶ Ibid.

presence, that enables repeatability of non-existent idealities/concepts.¹³⁷ Derrida explained that what makes the presence in ideality work, is the possibility of an ideal's repetition.¹³⁸ In fact, ideality or conceptuality itself, is *only* enlivened with the possibility of infinite repetition.¹³⁹

There is no *ideality* unless an Idea in the Kantian sense is at work, opening the possibility of an indefinite, the infinity of a prescribed progress, or the infinity of permitted repetitions. This ideality is the very form in which the presence of an object in general can be indefinitely repeated as the *same* ... the non-reality of the ideal object, the non-reality of the inclusion of the sense or of the noema in consciousness ... will provide therefore the security that the presence to consciousness will be able to be repeated indefinitely: ideal presence to an ideal or transcendental consciousness.¹⁴⁰

A2.7 The telos of languages and the closure in the metaphysics of presence

Since ideality is the making of presences, in making non-existents come into 'being', the exercise of ideality is 'the transmission and reactivation of the origin': that is, the perpetual reinstitution of presences as the 'originary decision of philosophy in the Platonic form'.¹⁴¹ Lawlor explains that the decision relates to the relationships of signs and language, to logic and presence, as posited in Western philosophy.¹⁴² Lawlor elaborates, as pieced together from Derrida's text, that it relies on the Cartesian reaffirmation of a united self-presence and that we desire, and are motivated by the experience of presence.¹⁴³ That desire is met by the technology of the sign and mastery of the sign as means to ends, 'so that the sign functions as nothing more than a detour through which presence returns to itself'.¹⁴⁴

¹³⁷ Ibid 5-8.

¹³⁸ Ibid 8. See also, Derrida, *Positive Science*, above n 67, 91.

¹³⁹ Derrida, *Voice and Phenomenon*, above n 4, 45.

¹⁴⁰ Derrida, *Voice and Phenomenon*, above n 4, 8 (*italics in original*). Noema is 'an object of perception or thought, as opposed to a process or aspect of perceiving or thinking': Oxford University Press, *British & World English: noema* English Oxford Living Dictionaries <<https://en.oxforddictionaries.com/definition/noema>>.

¹⁴¹ Derrida, *Voice and Phenomenon*, above n 4, 45. See also Derrida, *Of Grammatology*, above n 2, 14-15; Jacques Derrida, 'Freud and the Scene of Writing' in Jacques Derrida, *Writing and Difference* (Alan Bass trans, Routledge, 1978) 246-291, 246 (*italics in original*) ('*Freud and the Scene of Writing*'): Derrida explains that 'since Plato' there has been a repression of writing to a mere secondary role in meaning-making, and that '[t]his repression constitutes the origin of philosophy as epistēmē, and truth as the unity of *logos* and *phonē*'. See also Lawlor, *Lawlor in VP*, above n 13, xiv-xv: citing Derrida, *Voice and Phenomenon*, above n 4, 44.

¹⁴² Lawlor, *Lawlor in VP*, above n 13, xiv.

¹⁴³ Ibid citing Derrida, *Voice and Phenomenon*, above n 4, 7, 46, 89.

¹⁴⁴ Lawlor, *Lawlor in VP*, above n 13, xv citing Derrida, *Voice and Phenomenon*, above n 4, 65, 69, 43.

Derrida explained that even though Husserl denied it, Husserl's text did reveal that Husserl and phenomenology generally, had, similarly to Plato, falsely claimed that ideality is *not* a form of fictionalization.¹⁴⁵ The fiction of concepts, the bringing into being of non-existents through signs and repetition in ideality, ensures presence(s),¹⁴⁶ and therefore, as Lawlor explains, in Derrida's words, institutes the 'closure of metaphysics'.¹⁴⁷ That is, not the end of metaphysics, but rather the closing of the system of the metaphysics of presence to alternative thought.¹⁴⁸ Lawlor explains that by instituting the perpetuation of presence(s) we can live in the sense of 'the security of the answer – the only answer given so far – to the question of the meaning of being: presence'.¹⁴⁹ According to Derrida, that is the telos of (at least) Western languages.¹⁵⁰

It is also possible to approach the 'closure of metaphysics' another way, through Derrida's introduction in *Of Grammatology*. There, he explained that the Western philosophical relationship of signs to meaning includes the subordination of writing to speech as reflected in Plato's *Phaedrus*.¹⁵¹ The relationship and the presupposition of the working of text, is 'preceded by a truth or a meaning already constituted by and within the element of the logos'.¹⁵² That is, that 'truth' precedes writing, and that signs merely reflect that which already 'is'.¹⁵³ By deconstructing that relationship, Derrida sought to demonstrate that writing (in its fullest sense which I describe below), is *prior to* thought and that language is the 'medium' and 'machine' of presence(s) in ontotheology and its logocentrism.¹⁵⁴

What is also critical to this research, is that Derrida claimed that the metaphysical 'determination of being as ideality is really a *valuation*, an ethico-theoretical act'.¹⁵⁵ Derrida continued to dispute the logocentric construction of 'truth' through signification and its

¹⁴⁵ Derrida, *Voice and Phenomenon*, above n 4, 45. See also the unnumbered note at the bottom of that page: Lawlor as translator cites Husserl in Dermot Moran (ed), *Logical Investigations Volume I* (J N Findlay trans, Routledge, 2001) 243, 249.

¹⁴⁶ Derrida, *Voice and Phenomenon*, above n 4, 44.

¹⁴⁷ Lawlor, *Lawlor in VP*, above n 13, xv quoting Derrida, *Voice and Phenomenon*, above n 4, 44.

¹⁴⁸ See, eg, Derrida, *Voice and Phenomenon*, above n 4, 88; Derrida, *Positive Science*, above n 67, 93; Derrida, *Of Grammatology*, above n 2, 4-5. See also Lawlor, *Lawlor in VP*, above n 13, xxvii-xxviii.

¹⁴⁹ Lawlor, *Lawlor in VP*, above n 13, xv.

¹⁵⁰ Derrida, *Voice and Phenomenon*, above n 4, 7-8; Derrida, *Of Grammatology*, above n 2, 8, 10 (italics in original): 'History and knowledge, *istoria* and *epistémè* have always been determined (and not only etymologically or philosophically) as dexterous *for the purpose of* the reappropriation of presence.'

¹⁵¹ Derrida, *Of Grammatology*, above n 2, 15.

¹⁵² Ibid 14.

¹⁵³ Ibid 15-18.

¹⁵⁴ See, eg, Derrida, *Voice and Phenomenon*, above n 4, 14: Derrida expresses his claims of deconstructions in that the metaphysical concept of the sign provides an opening beyond 'the closure' of the metaphysics of presence.

¹⁵⁵ Derrida, *Voice and Phenomenon*, above n 4, 45 (italics in original).

infection of all disciplines of 'knowledge', which of course must include sciences and law.¹⁵⁶ As explained above, he argued that Western thought, and therefore epistemology, involves a continual seeking and reaffirmation of presences.¹⁵⁷ It has a benefit to human animals at least, as the experience of presences is also the mechanism of auto-affection. The perpetual tautological cycle, or economy, is the seeking of the concurrent presences of concepts and self-affirmation. As Derrida described it, 'language is really the medium of this play of presence and absence'.¹⁵⁸ The issue for Derrida is that the metaphysics of presence can remain habitually blind to non-metaphysical constructions of thought and beingness. As Lawlor clarifies, Derrida demanded that '[w]e must abandon the metaphysical desire for presence and abandon the will to the mastery of repetition', to see beyond beingness as it has been conceived, so that we can be open to a new future.¹⁵⁹ With this in mind, it is possible to appreciate Derrida's extraordinary pedagogy. His equivocal, non-concepts such as trace and *différance* not only offer a differentiated explanation of life, they also invite us, and begin to teach us, to 'think' outside of presence, and outside of our own presupposed transcendental conception of beingness.

A2.8 Summary

In summary, so far, presence is the form (in terms of the mode) of which things come before me, to me, as I can cognise them through what I already know. In Derridean terms, what we are tracking toward, and sniffing out here, indicates that we come to 'know' through traces we have already accumulated. Traces that have already been left within us. As just two of the contributors to Derridean thought, Plato and Kant appear to have realised, that this points to the epistemological problem that our striving for knowledge encompasses the potential for denial of otherness, and acknowledgment of that which we can make present in our minds. The Derridean argument is that the metaphysics of presence habitually excludes otherness, that is what we don't (perhaps yet, or even cannot) 'know', it falsely institutes the notion of full and universal meanings and concepts, and it erroneously relies on a notion of fully conscious differentiation. It saves us from the insecurity and terror of an unknown future – which Derrida described as a 'sort of monstrosity' that lies beyond our 'closure of knowledge'.¹⁶⁰

¹⁵⁶ Derrida intimates this in his differentiation of his grammatology: Derrida, *Positive Science*, above n 67, 83; Derrida, *Semiology and Grammatology*, above n 41, 35-36. See also Derrida, *Force of Law*, above n 76, 929-35; Derrida, *Implications*, above n 10, 13.

¹⁵⁷ See, eg, Derrida, *Of Grammatology*, above n 2, 10.

¹⁵⁸ Derrida, *Voice and Phenomenon*, above n 4, 9.

¹⁵⁹ Lawlor, *Lawlor in Voice and Phenomenon*, above n 4, xxviii. See also Derrida, *Of Grammatology*, above n 2, 4-5; de Ville, above n 11, 192, 194, 197.

¹⁶⁰ Derrida, *Of Grammatology*, above n 2, 4-5.

A3 Undoing presence(s): writing, trace and différance

A3.1 Our desire for presence as denial of death

In *Voice and Phenomenon*, Derrida highlighted the traditional and phenomenological belief in presence, as a continuation of now moments, and as perpetual beyond, and independent of any existence(s).¹⁶¹ In that view, this 'universal form of transcendental life', as a universal presence or temporality, has always been, and will continue, after we die.¹⁶² As explained above, Derrida and others proposed that we experience presence through ideality of signs, things, beings and concepts.¹⁶³ Ideality is the belief in the fullness and repeatability of concepts re-presented in signs.¹⁶⁴ Derrida explained that in the traditional phenomenological view: 'ideality is the movement by which I transgress empirical existence' and it is that continual experience of presences, which is unique to each of us, that we believe is perpetual until death.¹⁶⁵ In that sense, the experiences of presences through ideality that delivers consciousness, masks our own relationships to our own deaths.¹⁶⁶ Here, death relates to the cessation of life, *and* moments of not-consciousness, which Derrida claimed is part of the process of signification, consciousness as self-presence, and therefore life (I explain that further below).

Derrida, on another approach, in following the trace laid by Freud, argued that we have a desire for presence that is a result of our relationship with our own death.¹⁶⁷ We seek presence(s) to affirm life and to deny death. The making of meaning, through the making of presences and the conscious/not-conscious process involved in that, Derrida describes as an 'economy of death'.¹⁶⁸ Freud described a 'dynamic' process at work between the unconscious, preconscious and conscious states.¹⁶⁹ Spivak clarified that Freud predicted an 'economy of energy'¹⁷⁰ between the 'two primal instincts – Eros [the pleasure principle]¹⁷¹

¹⁶¹ Derrida, *Voice and Phenomenon*, above n 4, 46.

¹⁶² Ibid.

¹⁶³ Ibid 44-45.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Derrida, *Linguistics*, above n 28, 69.

¹⁶⁸ Ibid.

¹⁶⁹ Spivak, *Spivak in Of Grammatology*, above n 12, xli citing Sigmund Freud, 'Beyond the Pleasure Principle' in James Strachey (ed), *The Standard Edition of the Complete Psychological Works of Sigmund Freud* (James Strachey and Anna Freud trans, Hogarth Press, 1959) ('*Freud Complete Works*') vol V, 610-11.

¹⁷⁰ Spivak, *Spivak in Of Grammatology*, above n 12, xlii.

¹⁷¹ Sharpe explains that the 'pleasure principle orients the psyche towards a maximization of its pleasure (which involves releasing or lowering levels of excitation), and the minimising of pain':

and the death-instinct'.¹⁷² What Derrida saw in Freud's explanation of the competing forces is both an advancing and a returning.¹⁷³ Yet, in our metaphysical predisposition, Derrida argued that we think of death as 'an accident of life' affected by 'external' forces.¹⁷⁴ A continual differing movement (or an economy)¹⁷⁵ is at work, making our 'presence' in opposition to what we perceive is our own proper deaths.¹⁷⁶ According to Derrida, this occurs through *différance*, which constitutes 'desire' for presence as an automated, written, perpetual process until death.¹⁷⁷ Derrida uses his broader concept of 'writing', trace and *différance*, to identify this capability and possibility, as life force (for human and nonhuman animals – albeit, perhaps, to different degrees). For him, and here subjectivity refers to auto-affection: '[s]ubjectivity – like objectivity – is an effect of *différance*, an effect inscribed in a system of *différance*'.¹⁷⁸

A3.2 Writing in its fullest, Derridean sense

Derrida posited a broader proposition of 'writing', in its fullest sense, that is beyond what we normally think of as the written form of alphabetical languages.¹⁷⁹ Derrida suggested that a reconstitution of the understanding of life and experience through 'writing' had already begun as the metaphysics of presence was being exposed in philosophy, science and literature, at least.¹⁸⁰ Derrida's suggestion, was that writing, including the laying down of 'knowledge' (and here we can read idealisation), is a function of any life form.¹⁸¹ Johnson confirms that

Matthew Sharpe, 'Psychoanalysis' in Jack Reynolds and Jonathan Roffe (eds), *Understanding Derrida* (Continuum, 2004) 63-73, 71.

¹⁷² Spivak, *Spivak in Of Grammatology*, above n 12, xlii citing Strachey, *Freud Complete Works*, above n 169, vol XXIII, 242-43.

¹⁷³ Jacques Derrida, 'To speculate – on "Freud"' in Jacques Derrida, *The Post Card: From Socrates to Freud and Beyond* (Alan Bass trans, University of Chicago Press, 1987) 257- 409 [trans of: *La Carte Postale: De Socrate à Freud et au-delà* (first published 1980)] ('*On Freud*').

¹⁷⁴ Ibid 355.

¹⁷⁵ See also, Derrida, *Implications*, above n 10, 8 (italics in original): *Différance*, as the process of differing, of meaning making, it 'is *the* economical concept, and since there is no economy without *différance*, it is the most general structure of economy'.

¹⁷⁶ Derrida, *On Freud*, above n 173, 359; see also de Ville, above n 11, 32.

¹⁷⁷ Derrida, *On Freud*, above n 173, 359.

¹⁷⁸ Derrida, *Semiology and Grammatology*, above n 41, 28 (italics in original).

¹⁷⁹ See, eg, Derrida, *Of Grammatology*, above n 2, 8-10.

¹⁸⁰ Derrida, *Positive Science*, above n 67, 87; 82-84: He argued that writing, or the 'grammè', spans: the 'genetic inscriptions' and 'short programmatic chains' of amoeba; the functions of all our senses; the writing which has already been discovered within sciences such as genetics and biology; and that which is at work in technologies such as computing.

¹⁸¹ Ibid 84. It is of interest that in *Plato's Pharmacy*, Derrida notes that Plato, in the *Sophist*, through his interlocutor Socrates, referred to the Logos as a living being. Plato himself seemed to consider the Logos, writing as 'living discourse', which is analogous to what Derrida described as a biological 'or rather zoological' organism: Derrida, *Plato's Pharmacy*, above n 80, 82 citing Plato, *Sophist*, 264b-c.

Derrida's propositions about 'writing' arose as an 'effect of a more general transformation of the modern episteme'.¹⁸²

Derrida proposed that writing needed to be reconsidered in its presumed role as mere instrument of language.¹⁸³ The subordination of writing and language was seen by Derrida as a result of the logocentric oppositions of soul and body, consciousness and unconsciousness, and the sensible and the intelligible.¹⁸⁴ Derrida was also influenced by Freud's thinking of the unconscious mind that is not empty, and that it works with what is already 'written' within it.¹⁸⁵ That it is active, whether we feel presence or not.¹⁸⁶ In my interpretation, reading across his texts, Derrida was suggesting that signification and languages in their many forms, are not secondary instruments of the transcendental soul that supplement speech,¹⁸⁷ but that consciousness, rationality, objectivity and subjectivity are a *result* of expression and experience enabled *by* 'writing', that is, what is already, and what becomes, written within us.

A3.3 Trace and Différance

Derrida often used the word 'movement' to describe the process of meaning making that connotes his non-concept *différance*. At times he used the word trace in context to this movement.

¹⁸² Christopher Johnson, *System and Writing in the Philosophy of Jacques Derrida* (Cambridge University Press, 1993) 5, 1-5: From the 1940s and with the influence of Heidegger, French philosophy had taken into account interdisciplinary discoveries and influences from, for example, information theory, molecular biology, genetics, and cybernetics.

¹⁸³ Derrida, *Positive Science*, above n 67, 82-83.

¹⁸⁴ Ibid 82; 86: He also suggested that the force of logocentrism and the privileging of presence also acted to suppress other forms of expression such as the mythogram that provide 'pluri-dimensional' modes of thought and expression that were not dependent on presence to deliver meaning, at 84-89: the effect of mythograms, metaphors, poetry and molecular and other sciences were already exposing the possibility that comprehension and life itself exists beyond our idea of presences as a necessary aspect of phenomenon and therefore selfhood.

¹⁸⁵ See, eg, Derrida, *Freud and the Scene of Writing*, above n 141, 262. See also Johnson, above n 182, 88.

¹⁸⁶ See, eg, Derrida, *Freud and the Scene of Writing*, above n 141, 263; Derrida, *Positive Science*, above n 67, 89. See also Johnson, above n 182, 151:

In Derrida's analysis of Freud's model of the Mystic Writing-Pad, it becomes apparent that, as well as functioning as a useful analogy for the psychical system as Freud perceives it, the Mystic Pad – or indeed any archival technology – is not simply external to the psyche, but is a kind of prosthetic device continuous with the system it supplements.

¹⁸⁷ See, eg, Derrida, *Linguistics*, above n 28, 30-35 where Derrida discusses this assumption in relation to Plato's and Saussure's works.

The trace is the différance which opens appearance [l'apparaître] and signification ... [trace] is not more ideal than real, not more intelligible than sensible, not more a transparent signification than an opaque energy and *no concept of metaphysics can describe it*.¹⁸⁸

In further insisting that *différance* cannot be conceptualised, Derrida explained that it is 'not simply an activity'.¹⁸⁹ It is a not-conscious process, that is the automated and repetitive practice of differentiating between form(s) including signs whether it be letters, sounds, gestures, ideals or other forms of signification that are already written within us.¹⁹⁰ Derrida's use of the term 'form' here, includes the already written traces, including signified representations, and particular sensory experiences such as sounds (words, utterances), sights (such as optical recognition of letters, words or things) and scents that we experience and bring to presence. The 'passage through *form* is a passage through the *imprint*' of trace.¹⁹¹ To be clear, trace is not limited to graphic expressions.¹⁹² Trace is uniquely written in each of us, and Derrida did not limit the experience of trace/*différance* to human animals.¹⁹³ Through the processing of differences in forms, we also experience the determination (the result of that processing) as presence: '[d]ifférance is therefore the formation of form ... [and] the being-imprinted of the imprint'.¹⁹⁴ The newly experienced form/presence that is determined, is written into trace.

[I]t is in the specific zone of this imprint and this trace, in the temporalization of a *lived experience* which is neither *in* the world nor in "another world," which is not more sonorous than luminous, not more *in* time than *in* space, that differences appear among the elements or

¹⁸⁸ Derrida, *Linguistics*, above n 28, 65 (italics in original, different spelling of *différance* is as it appears in the text).

¹⁸⁹ Derrida, *Différance*, above n 8, 11. See also Derrida, *Implications*, above n 10, 8-9: *Différance* is an economy, a movement that differentiates, it is 'also the element of the *same*'. It is also the production of differences that are not 'the activity of some speaking subject' and neither is it 'simply a concept'.

¹⁹⁰ Derrida, *Linguistics*, above n 28, 60-65. See also Hart, above n 67, 33 (italics in original): For clarity, Hart states that *différance* is the:

movement of textual self-differing ... [and that Derrida insisted that] it is not another, deeper name for being. It is the condition of possibility for anything to signify and, at the same time, the condition of possibility for anything to have a self-identical meaning ... it never appears as *such*: it is a trace, and has always already withdrawn when we notice its effects in a text.

See also Derrida, *Différance*, above n 8, 22 (italics in original): 'In a certain aspect of itself, *différance* is certainly but the historical and epochal *unfolding* of Being or of the ontological difference. The *a* of *différance* marks the *movement* of this unfolding.'

¹⁹¹ Derrida, *Linguistics*, above n 28, 62 (italics in original).

¹⁹² Ibid 60.

¹⁹³ See Derrida, *The Animal That Therefore I Am*, above n 24, 104.

¹⁹⁴ Ibid 63 (spelling of 'différance' is as it appears in the text).

rather produce them, make them emerge as such and constitute the *texts*, the chains, and the systems of traces.¹⁹⁵

In *Positive Science*, Derrida articulated that the power of archi-writing (and here he means cultural logocentrism and all that comes with it) is enlivened only through the possibility of ideality.¹⁹⁶ The possibility of *repetition* of concepts/ideals, as explained above, is what enables conceptuality. The link to trace is that those concepts become written in trace, which is what makes them repeatable. Therefore, it is the workings of trace and *différance* that enable repetition that make logocentrism, and any form of conceptuality possible.¹⁹⁷ It is the making, and the marking, of all kinds of significations within our own individual traces. Language is only one technology that is implicated in trace/*différance*.

A3.4 Less than full meaning

Working through the trace, according to Derrida, also involves the not-conscious thinking, as we perceive it, of one thing and another thing in an element of time, a minimal unit of time.¹⁹⁸ That moment of time is part of the movement or the possibility of discerning difference.

Without a retention in the minimal unit of temporal experience, without a trace retaining the other as other in the same, no difference would do its work and no meaning would appear. It is not the question of a constituted difference here, but rather, before all determination of the content, of the *pure* movement which produces difference.¹⁹⁹

What I understand that Derrida was proposing, through this and the surrounding text, is that by thinking of the two or more objects of comparison virtually at once, less than full 'meaning' is produced as a result of not-conscious cognition of differences.²⁰⁰ That we do not and perhaps cannot cognise anything fully. *Différance* incorporates a:

detour and postponement by which intuition, perception, consummation – in a word, the relationship to the present, the reference to a present reality, to a *being* – are always *deferred* ... [difference] takes on or conveys meaning, only by referring to another past or future element in an economy of traces.²⁰¹

Since *différance* is the *process* of deriving meaning and since there is *no* direct relationship between the sign, signifier and what it is deemed to signify, Derrida suggests that *full*

¹⁹⁵ Derrida, *Linguistics*, above n 28, 65 (italics in original).

¹⁹⁶ Derrida, *Positive Science*, above n 67, 92-93.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid 62; Derrida, *Différance*, above n 8, 24.

¹⁹⁹ Derrida, *Linguistics*, above n 28, 62 (italics in original).

²⁰⁰ Ibid 62-66. See also Derrida, *Voice and Phenomenon*, above n 4, 75; Derrida, *Différance*, above n 8, 9-11; Derrida, *Implications*, above n 10, 8; Lawlor, *Lawlor in VP*, above n 13, xxiii.

²⁰¹ Derrida, *Semiology and Grammatology*, above n 41, 29 (italics in original).

meaning is *always deferred*.²⁰² In addition, Derrida explains that it is impossible to recall, to '[reanimate] absolutely the manifest evidence of an originary presence',²⁰³ that is to summons what we perceive is a full past present. It is always a modification, constructed through our individual traces, and hence full meaning is impossible and always deferred.²⁰⁴

A3.5 Time, deferring of meaning and 'dead time' at work

In terms of temporality, *différance* is a continual movement across an experience of time where we differentiate between the past, the never graspable now moment, and the future.²⁰⁵ The end result is what 'appears' to be full meaning, yet according to Derrida, a limited cognition occurs, in a less-than-full presence, that is also, always transitory.²⁰⁶

[T]he trace is not a presence but the simulacrum of a presence that dislocates itself, displaces itself, refers itself, it properly has no site – erasure belongs to its structure ... which situates it as the change of site, and makes it disappear in its appearance, makes it emerge from itself in its production ...²⁰⁷

Derrida noted that Freud also contended that our recounting of past 'presences' is inescapably infected by pasts 'anterior to' that present.²⁰⁸ The trace leaves, and is, a 'text of metaphysics', in what we are left with, in what we comprehend as a presence.²⁰⁹ This appears to be a dimension of Derrida's famous claim that '[t]here is nothing outside of the text.'²¹⁰

With this complication of time, and with the acknowledgement that speech and language operates to an extent beyond the capabilities of the fully conscious mind, Derrida also identifies that there must be what he calls 'dead time' or 'spacing' at work.²¹¹

²⁰² See, eg, Derrida, *Linguistics*, above n 28, 62-66; Derrida, *Différance*, above n 8, 9-11.

²⁰³ Derrida, *Linguistics*, above n 28, 66.

²⁰⁴ Ibid 66-67.

²⁰⁵ See, eg, Derrida, *Différance*, above n 8, 13; Derrida, *Linguistics*, above n 28, 66-67.

²⁰⁶ See, eg, Derrida, *Différance*, above n 8, 24; Derrida, *Linguistics*, above n 28, 65-67; Derrida, *Voice and Phenomenon*, above n 4, 75-76, 89.

²⁰⁷ Derrida, *Différance*, above n 8, 24.

²⁰⁸ Derrida, *Linguistics*, above n 28, 67. Derrida did not cite any text of Freud's here.

²⁰⁹ Derrida, *Différance*, above n 8, 24.

²¹⁰ Derrida made this statement in another explanation of supplementarity and *différance* in his deconstruction of Rousseau's text: '*... That Dangerous Supplement ...*'. I take this up in Appendix 1, Part B: *Elements of Deconstructions*. My intention is not to use this quote in an erroneous context by supplanting it here, but I conclude that this is an important element of what he was indicating there in its use where he was alluding to trace. I also supplant it here because this is a key element that other commentators who have not read Derrida widely, have failed to comprehend. See, eg, Derrida, *Limited Inc*, above n 11, 136-37: Whilst Derrida states it means 'there is nothing outside context', at 137 he clarifies that *context* is of *différance*, is of trace. See also de Ville, above n 11, 4.

²¹¹ Derrida, *Linguistics*, above n 28, 68-69. See also Derrida, *Différance*, above n 8, 13.

This realisation is beyond 'simple *reversals* of the metaphysics of presence or of conscious subjectivity ... writing is other than the subject ... signification is formed only within the hollow of difference: of discontinuity and of discreteness, of the diversion and the reserve of what does not appear ... [it] marks the impossibility that a sign, the unity of a signifier and a signified, be produced within the plenitude of a present and an absolute presence.²¹²

To further clarify, in *Différance*, Derrida suggests that the unconscious of the mind is not a 'thing' that exists anywhere and neither is it 'a virtual or masked consciousness'.²¹³ Further, he stated that there is no such thing as 'conscious' traces.²¹⁴ What we perceive as something like the unconscious mind is what produces trace and traces. It is not a thing itself, but rather something that produces effects.²¹⁵ Dead time or spacing is what happens not-consciously to affect differentiation in trace/différance.

In contrast, and as taken up in Appendix 1, Part C, Kantian and other liberal humanist ideas (including those related to ethics) are based on the notion of a united self-presence of an autonomous decision maker. The traditional, and Kantian view of time is of 'a calculable sequence of nows', within the present, the past and the future to come.²¹⁶ Derrida consistently questioned these assumptions, proposing that our subjectivity, and our experience of time, is an affect of trace and différence.²¹⁷

A4 Otherness, auto-affection, and the intertwining in responsibility and ethics

A4.1 Hetero-affection and response-ability in auto-affection

Derrida suggested that living beings are not strictly autonomous or self-contained in their cognition and consciousness, and that cognition and consciousness may be experienced to different degrees,²¹⁸ and are inconstant.²¹⁹ In her text *Derrida: Ethics Under Erasure*,

²¹² Derrida, *Linguistics*, above n 28, 69 (italics in original).

²¹³ Derrida, *Différance*, above n 8, 21.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ See, eg, de Ville, above n 11, 118, citing Martin Heidegger, *On Time and Being* (Joan Stambough trans, University of Chicago Press, 2002) 11 [trans of: *Zur Sache des Denkens* (first published 1969)]. See also de Ville, above n 11, 16-18: de Ville discusses Derrida's analysis of Husserl's concept of the experience of time, at 17 citing Edmund Husserl, 'The Phenomenology of Internal Time-Consciousness' in Donn Welton (ed), *The Essential Husserl: Basic Writings in Transcendental Phenomenology* (John Barnett Brough trans, Indiana University Press, 1999) 186-221: de Ville disputes that Husserl insisted that that 'now moment' was uncontaminated by a thinking of the past and the future.

²¹⁷ See Derrida: Derrida, *Voice and Phenomenon*, above n 4, 45-46. See also de Ville, above n 11, 17: de Ville recalls Derrida's linking of the operation of signs to trace and différence that at once 'both fissures and retards presence'.

²¹⁸ See, eg, Derrida, *The Animal That Therefore I Am*, above n 24, 95.

Anderson considers Derrida's contentions through the influences of Husserl, Hegel, Kant, Freud and others. Anderson surmises:

... when Derrida puts the unity of consciousness into question it is not to deny unity altogether ... it is to affirm "hetero-affection in the system of auto-affection." In fact we could conclude that otherness comes to consciousness, awareness, as a result of another Other.²²⁰

For Derrida, selfhood is entirely dependent on otherness. There is no *différance* without difference. Therefore, we do not come to any perception of ourselves or of any thing or being, without the contrasts of differences. Derrida exposed what he suggested is our inherent openness to otherness. He suggested that before the application of thought, when confronted with others and otherness, we positively and automatically respond, are called to ourselves, and to thinking itself, in *différance*. That is, even *before* we appreciate or signify, conceptualise or idealise that other or otherness.²²¹ This responsiveness, or response-ability that Derrida and Levinas differentially described,²²² occurs not merely in our encounter with others and otherness, but within ourselves. It is not a choice or a power to host the other in that automated process. As de Ville describes '[t]he "I" is already in its structure inhabited by an alterity'.²²³

It appears there are at least three elements to this being-constituted by otherness. Firstly, beingness incorporates an internal otherness as explained previously in this chapter, that "I" can think of "me", and as highlighted as one element in de Ville's statement above. Secondly that 'dead time' or 'spacing' can be construed as otherness as part of the functioning of *différance* – as one element that Anderson explicates and that I follow in the next paragraph.

²¹⁹ This follows as a result of the workings of *différance* that includes 'dead time'/spacing.

²²⁰ Anderson, *Ethics*, above n 15, 98-99 quoting Jacques Derrida, *Resistances of Psychoanalysis* (Peggy Kamuf, Pascale-Anne Brault and Michael Naas trans, Stanford University Press, 1998) 28.

²²¹ See, eg, Derrida, *Eating Well*, above n 24, 275-76:

The origin of the call that comes from nowhere, an origin in any case that is not yet a divine or human "subject," institutes a responsibility that is to be found at the root of all ulterior responsibilities (moral, juridical, political), and of every categorical imperative.

²²² See, eg, Nicole Anderson, 'deconstruction and Ethics: An (ir)Responsibility' in Claire Colebrook (ed), *Jacques Derrida: Key Concepts* (Routledge, 2015) 48-57, 53 citing Jacques Derrida, *Writing and Difference*, (Alan Bass trans, University of Chicago Press, 1978) 111-12: Anderson differentiates similarities that had been posited by other theorists and notes that in Derrida's view: 'ethics is always already violent, and thus the other ... potentially brings the worst: violence and destruction to me or you', at 53, that Derrida, through his deconstructions, did not propose 'an alternate ethical system or theory'. These issues are taken up in Appendix 1, Part C: *Derridean Justice*. See also de Ville, above n 11, 143-45: de Ville highlights that Derrida did not simply reverse the hierarchy of singularity versus generality in decision making to ensure responsibility and justice focusses on the Other and otherness. Derrida highlights the aporias as an awakening through deconstructions.

²²³ de Ville, above n 11, 197 citing Jacques Derrida and Maurizio Ferraris, *A Taste for the Secret* (Giacomo Donis and Donn Webb trans, Polity Press, 2001) 84 ('*A Taste for the Secret*') [trans of: *Il Gusto del Segreto* (first published 1997)].

Thirdly, with some similarity to Levinas, that the subject is called to itself in response to the other. I very briefly describe Levinas' influence below. Altogether, these elements appear to be part of the functioning of *différance*, or they may be simply different ways of explaining that movement that need not or should not be dissected. This quandary in itself illustrates my struggle in taking on Derrida's pedagogy in attempting to resist making my own presences, and at the same time, having to subject my logic and my thesis to the scrutiny of the laws of the thesis: in inheriting the traces of others and attempting to precisely reflect them, to demonstrate that I understand that which I am about to apply.

In using the term *différance* in the context of 'a deconstructive process',²²⁴ Anderson explains that *différance* allows thinking of 'a subjectivity that is not fixed and unified by a certain concept of time and space',²²⁵ which refers to presence.²²⁶ Anderson explains that *différance* therefore questions thinking of the subject as an 'originary source'²²⁷ in decision making and in context to 'ethical autonomy'.²²⁸ Subjectivity as an affect of *différance* at work, with its continual movement between presence and absence, means that presence is always contaminated and punctuated by absence,²²⁹ (as described in the previous section, in regard to 'dead time' or 'spacing'). Otherness as absence within ourselves is inherent, it is constitutive of what we experience as presence, and in that sense, otherness *cannot* be thought of something that is 'outside' or in opposition to presence.²³⁰

Lingis describes Levinas' concept of responsibility, as a 'bond with an imperative order' to which subjectivity is subjected.²³¹ That responsibility arises in response to 'the face' of the other, and that relationship to the alterity of the other, is 'constitutive of subjectivity'.²³² Levinas proposed that reduction and repression of otherness is a result of grasping at comprehension, by representation (signification) in languages, and by denial of their infinite

²²⁴ Anderson, *Ethics*, above n 15, 65, 71.

²²⁵ Ibid 71.

²²⁶ Ibid 72.

²²⁷ Ibid 71 quoting Derrida, *Speech and Phenomena*, above n 5, 146.

²²⁸ Anderson, *Ethics*, above n 15, 71.

²²⁹ See, eg, ibid 101: 'The subject is thus both present and absent; it is in fact spectral'. Following Derrida, Anderson does not use the term spectral in any metaphysical sense.

²³⁰ See, eg, ibid 101-02.

²³¹ Alphonso Lingis, 'Translator's Introduction' in Emmanuel Levinas, *Otherwise Than Being: Or Beyond Essence* (Alphonso Lingis trans, Duquesne University Press, 1998) xvii-xlv, xix [trans of: *Autrement qu'être* (first published 1974)] ('*Otherwise Than Being*').

²³² Ibid. See also See also Tamra Wright, Peter Hughes and Alison Ainley, 'The Paradox of Morality: An Interview with Emmanuel Levinas' in Robert Bernasconi and David Wood (eds), *The Provocation of Levinas: Rethinking the other* (Andrew Benjamin and Tamra Wright trans, Taylor and Francis, 2002) 168-80, 169 ('*Interview*'): Levinas was translated as saying: '[y]our reaction to the face is a response ... a responsibility'.

and ungraspable otherness which he called 'the face'.²³³ The face is '[t]he way in which the other presents himself, exceeding *the idea of the other in me*.'²³⁴ Whilst it appears Levinas was primarily concerned with human relations,²³⁵ he also noted that 'negation' of the other also occurs through 'appropriation and usage', and he listed examples including 'the hunt', 'labor and usage', 'destruction' and 'extermination'.²³⁶ In all of those utilisations, they are exercised without reference to 'the face' of that Other.²³⁷ Levinas' ethics arises through the encounter with the 'face',²³⁸ or as he described it, the 'epiphany of the face',²³⁹ or 'the injunction of a face'.²⁴⁰ As Critchley describes, Levinas's ethics requires a questioning of the ego, that is, of self-consciousness as it has been constituted in metaphysics.²⁴¹ That the ego is a result of its own assimilation of otherness, a consumption of otherness, resignification(s) of otherness, – into that which is *already* known.²⁴²

The neutralization of the other who becomes a them or an object – appearing, that is, taking its place in the light – is precisely his reduction to the same ... lays itself open to grasp, becomes a concept ... removing from it its alterity ... For the things the work of ontology consists in apprehending the individual (which alone exists) not in its individuality but in its generality (of which alone there is science) ... Philosophy is an egology.²⁴³

²³³ Levinas, *Totality and Infinity*, above n 100, 74-75, 194-99; Wright, Hughes and Ainley, *Interview*, above n 232, 168: Levinas was translated as explaining: '[t]he face is ... not at all a representation ... it is an irreducible means of access, and it is in ethical terms that it can be spoken of'. See also Jacques Derrida, 'Violence and Metaphysics: An essay on the thought of Emmanuel Levinas' in Jacques Derrida, *Writing and Difference* (Alan Bass trans, Routledge, 1978) 97-192, 125: Derrida noted that 'the face' 'eludes every category' of signification, at 112: and without 'intermediary' exposing the relation to the other, 'the truth to which the traditional logos is forever inhospitable'.

²³⁴ Levinas, *Totality and Infinity*, above n 100, 50. See also Levinas, *Otherwise Than Being*, above n 231, 91, 94.

²³⁵ Levinas, *Totality and Infinity*, above n 100, 116, 279-80: Levinas limits the possibility of the face to human fraternity. See also Derrida, *The Animal That Therefore I Am*, above n 24, 117:

[t]he animal remains for Levinas what it will have been for the whole Cartesian-type tradition: a machine that doesn't speak, that doesn't have access to sense, that can at best imitate "signifiers without a signified".

See also John Llewelyn, 'Am I Obsessed by Bobby? (Humanism of the Other Animal)' in Robert Bernasconi and Simon Critchley (eds), *Re-Reading Levinas* (Indiana University Press, 1991) 234-245, 240; below n 249.

²³⁶ Levinas, *Totality and Infinity*, above n 100, 198.

²³⁷ Ibid.

²³⁸ Ibid 198-99. See also Simon Critchley, *The Ethics of Deconstruction: Derrida and Levinas* (Edinburgh University Press, 2014) 5.

²³⁹ Levinas, *Totality and Infinity*, above n 100, 199.

²⁴⁰ Ibid 305.

²⁴¹ Critchley, above n 238, 4-5.

²⁴² Ibid; Levinas, *Totality and Infinity*, above n 100, 192-93; see also at 93-96.

²⁴³ Levinas, *Totality and Infinity*, above n 100, 43-44.

That call by the face of the other is a not-cognitive recognition that gives rise to the presentment of self.²⁴⁴ Responsibility also involves a vulnerable exposing of oneself to others.²⁴⁵ The subject is called to its responsible self, or, is able to recognise itself in response to the other: that is, the other that comes before.²⁴⁶ In Derrida's view, this revelation of the self, or the constituting of the self, follows as a result of the workings of trace and *différance*. Even without any proper recognition, that is signification of the other/Other, the self is differentiated, and to an extent, experienced in that moment. In context to Levinas' logic, in *Adieu to Emmanuel Levinas*,²⁴⁷ Derrida extrapolated his own broader interpretation:

Intentionality, attention to speech, welcome of the face, hospitality – all these are the same, but the same as the welcoming of the other, there where the other withdraws from the theme. This movement without movement effaces itself in the welcoming of the other, and since it opens itself to the infinity of the other, an infinity that, as other, in some sense precedes it, the welcoming of the other (objective genitive) will already be a response: the yes to the other (subjective genitive), to the yes of the other ... This responsible response is surely a yes, but a yes to preceded by the yes of the other. One should no doubt extend without limit the consequences of what Levinas asserts in a passage where he repeats and interprets the idea of infinity in the Cartesian *cogito*: "It is not I, it is the other that can say yes".²⁴⁸

As indicated previously, and as highlighted by Derrida, Levinas' conception of ethics and responsibility (and response-ability) was limited to human relationships.²⁴⁹ It not only applied

²⁴⁴ Levinas, *Otherwise Than Being*, above n 231, 11-15.

²⁴⁵ Ibid 11-15, 103-05.

²⁴⁶ See, eg, ibid; Levinas, *Totality and Infinity*, above n 100, 197-201; Derrida, *Eating Well*, above n 24, 278-79; Derrida, *The Beast & The Sovereign I*, above n 26, 237-39. Derrida also articulates his proposition in a video interview that was recorded in English: Interview with Jacques Derrida (Video Recording) <<https://www.youtube.com/watch?v=Z2bPTs8fspk>>. I was unable to clarify the interviewer or its date of making. It is noted as being uploaded to YouTube on 26 December 2007. See also Anderson, *Ethics*, above n 15, 160-61: Anderson notes that autonomy of the subject is a result of the interruption of, and in subordination to, the other, and at 165: Anderson sought to show, following Derrida, that:

empirical and contingent subjectivity and norms are traced through with an alterity which deconstructs their pure empirical status ... [that they are] constantly (re)negotiated and made different, in and through singular ethical responses.

²⁴⁷ Jacques Derrida in Werner Hamacher and David E Wellbery (eds), *Adieu: To Emmanuel Levinas*, (Pascale-Anne Brault and Michael Naas trans, Meridian, 1999) [trans of: *Adieu à Emmanuel Levinas* (first published 1997)] ('*Derrida's Adieu to Levinas*').

²⁴⁸ Ibid 23 (italics in original).

²⁴⁹ Derrida, *Eating Well*, above n 24, 278-79; Derrida explains that Levinas' ethics only apply to human animals; Derrida, *The Beast & The Sovereign I*, above n 26, 238-39. See also Derrida, *Derrida's Adieu to Levinas*, above n 247, 21; Derrida, *The Animal That Therefore I Am*, above n 24, 107. See also Wright, Hughes and Ainley, *Interview*, above n 232, 169: Levinas is quoted as claiming: '[o]ne cannot entirely refuse the face of an animal ... Yet the priority here is not found in the animal, but in the human face' and he went to characterise a dog as an example as of 'the force of nature

the 'after you' in interpersonal relations, but also as an element in human ipseity itself. The otherness of the internal 'I' experiences its own alterity and a responsibility toward the internal other that comes before the 'me'.²⁵⁰ In that sense ethics and responsibility, it seems, is something that is experienced, or called to, in the construction of subjectivity before it is repeated in the relationship with other beings. Roffe articulated Levinas' thought as follows:

[B]efore there is any identity of any kind, there is an other who calls me forth, who constitutes me as that being who is responsible for the other. Ethics, far from being concerned with rights or equality, has as its key terms hostage, infinite debt and respect.²⁵¹

A4.2 The space in *différance* as opening to Derridean 'ethics'

Derrida's proposition of our dependence on otherness differentially follows Levinas. I understand that an element of what Derrida proposed was that in the moment of the possibility of that presentment of absolute otherness, that is not yet cognised, *différance* produces an empty place, a not-yet-fully-differentiated other, a space for a future presence that is unknowable or even impossible. In that process and in that moment, that otherness is unconditionally welcomed.²⁵² Anderson explains that it is to 'welcome, justly, what may possibly arrive, without ever being sure of the actual or possible arrival of the other'.²⁵³

[that] is pure vitality', at 172: 'what I want to emphasize is that the human breaks with pure being ... the being of animals is a struggle for life', although he also said that 'without considering animals as human beings, the ethical extends to all living beings. We do not want to make an animal suffer needlessly and so on. But the prototype of this is human ethics'.

²⁵⁰ Levinas, *Otherwise Than Being*, above n 231, 56, 103: 'The ego is in itself like a sound that would resound in its own echo, the node of a wave which is not once again consciousness'; Levinas described it as a result of 'play' and 'the effect of an expulsion' and '[i]t has meaning only as an upsurge in me of responsibility prior to commitment, that is, a responsibility for the other.' In regard to a summary of Derrida's perspective on this same claim: see de Ville, above n 11, 196-97 citing Jacques Derrida in Gil Anidjar (ed), *Acts of Religion* (Gil Anidjar trans, Routledge, 2002) 361; Derrida, *Derrida's Adieu to Levinas*, above n 247, 54-55; Derrida and Ferraris, *A Taste for the Secret*, above n 223, (Polity, 2001) 84.

²⁵¹ Jonathan Roffe, 'Ethics' in Jack Reynolds and Jonathan Roffe (eds), *Understanding Derrida* (Continuum, 2004) 37-45, 40. I take up Derrida's notion of hospitality in Appendix 1, Part C: *Derridean Justice*.

²⁵² See, eg, Jacques Derrida, *Spectres of Marx: The state of the debt, the work of mourning, and the new international* (Peggy Kamuf trans, Routledge, 2006) 65 [trans of: *Spectres de Marx* (first published 1993)]: Derrida describes our ability and metaphysical predisposition to leaving openings, in hope, for impossible ideals (such as actual democracy) to arrive. In *Of Hospitality*, Derrida examines the aporias of hospitality, and notes that unconditional hospitality requires a welcoming of the other, prior to any economy of return, prior to conformance to any duties, and that involves leaving space for the other, to welcome them even before questioning the other (where questioning of course results in signification of the other): Jacques Derrida, *Of Hospitality: Anne Dufourmantelle Invites Jacques Derrida to Respond* (Rachel Bowlby trans, Stanford University Press, 2000) 25-29, 83 [trans of: *De l'hospitalité: Anne Dufourmatelle invite Jacques Derrida à répondre* (first published 1997)]. See also Anderson, *Ethics*, above n 15, 120.

²⁵³ Anderson, *Ethics*, above n 15, 120. See also Derrida, *Eating Well*, above n 24, 261-62.

Perhaps that occurs between the 'dead time' and signification – although, and even though it is ridiculous to deny it, in my grasping at his meaning, I am not here *wanting* to intimate any linear operation of trace/ *différance*. Yet I cannot resist it. Perhaps it is better to just surmise that Derrida meant that 'the welcome' is simply a part of trace/*différance*.

Therefore, Levinasian and Derridean notions of beingness, that inherently incorporate an 'ethical' implication with the arrival of the other/Other, differently reflect an 'after you'. Derrida suggested that all decision making and responsibility may always be 'of the other'.²⁵⁴ For Derrida, that signalled a rupture of the Western idea of human autonomy and the assumption of our absolute powers to respond rather than react.²⁵⁵ That is taken up further in the following Parts of this Appendix 1.

A5 Summary

This survey of Derridean propositions relating to presence(s), cognition and consciousness suggests that whilst the metaphysics of presence has given us a mode of 'living', of recalling and projecting our lives, of adhering to 'truths' and building 'knowledge', and of instituting consistency through language and law, it has also limited our capabilities and instilled false distinctions. For a willing Derridean audience, the stage of presence appears to spotlight what we *desire* to 'think' about ourselves.

Key elements reverberating here include: that there was, and perhaps still is, a dogma of human self-presence and autonomy; that there may be life forces at work through writing, trace and *différance*; that there is an element of desire, a drive to consume, to become sovereign over 'knowledge'; that there is a belief in origins and archés; that there is a discounting of the value of sensory perceptions in objectivity; that meaning, subjectivity, rationality and objectivity are constructed through a commitment to logocentric oppositions; that there is a logocentric habit of selectively raising some characteristics or possibilities regarding non-material things to the metaphysical status of existence; that meaning is an approximation based on oppositions; that repetitions of signs and concepts are constructive of 'knowledge'; that significations and meaning can incorporate ambiguity and are potentially unique to each individual's trace; that 'truth' is potentially unknowable in its otherness; that some conceptual notions such as justice could be boundless and ungraspable; and that despite our faith in philosophical and scientific thoughts and methods, denial or repression of otherness could be habitual.

²⁵⁴ Derrida, *Derrida's Adieu to Levinas*, above n 247, 23.

²⁵⁵ Ibid 23-24.

Part B of this Appendix follows. It engages with what has been examined in this Part A. It highlights some of the key elements of some of Derrida's deconstructions that exposed the metaphysics of presence at work.

APPENDIX 1, PART B: ELEMENTS OF DECONSTRUCTIONS

B1 Introduction

B1.1 Chapter introduction

This chapter explores elements of Derrida's deconstructions and his contentions about the value of deconstructions. It provides examples of Derrida's own descriptions of deconstructions and deconstructive elements. It also refers to Lawlor's description in his *Translator's Introduction in Voice and Phenomenon*.¹ Deconstructive processes are further illustrated by reference to Derrida's "... *That Dangerous Supplement*"² and *Force of Law*.³ That is followed by a review of some of his 'non-concepts' that have revealed aspects of the workings of the metaphysics of presence. The goal in explicating these elements is to assist my deconstructive reading in Chapter 10. This chapter also provides an introduction to the decision making aporias that Derrida highlighted in Western constructions of ethics that I take up further Appendix 1, Part C: *Derridean Justice*.

B1.2 Deconstructions: purpose and overview

Derrida's deconstructions expose the metaphysics of presence at work.⁴ That working includes: the repressions of logocentrism; the positing of transcendental notions of self-presence; the undergirding of Western epistemologies; and satisfying the desire for mastery through conceptualisations. Derrida suggested that 'writing' in his fullest sense,⁵ and life, that is 'existence', are of 'the same *tissue*, the same *text*'.⁶ He argued that the metaphysics of presence manifests violence and injustice, to which nonhuman animals are also subject.⁷ The metaphysical infection is to be found within all 'knowledge' that relies on our languages

¹ Leonard Lawlor 'Translator's Introduction: The Germinal Structure of Derrida's Thought' in Jacques Derrida, *Voice and Phenomenon: Introduction to the Problem of the Sign in Husserl's Phenomenology* (Leonard Lawlor trans, Northwestern University Press, 2011) xi-xxviii ('*Lawlor in VP*').

² Jacques Derrida, "... *That Dangerous Supplement* ..." in Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak trans, John Hopkins University Press, 1997) 141-64 ('*Supplement*') [trans of: *De la Grammatologie* (first published 1967)] ('*Of Grammatology*').

³ Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' (1990) 11 *Cardozo Law Review* 919 ('*Force of Law*').

⁴ See, eg, Jacques Derrida, 'Afterword: Toward an Ethic of Discussion' in Gerald Graff (ed), *Limited Inc* (Samuel Weber trans, Northwestern University Press, 1988) 111-54, 147 (italics in original) ('*Limited Inc*'): '[T]he "de" of deconstruction signifies not the demolition of what is constructing itself, but rather what remains to be thought beyond the constructivist or destructionist scheme'.

⁵ See Appendix 1, Part A, section A3.

⁶ Derrida, *Supplement*, above n 2, 150 (italics in original).

⁷ See, eg, Derrida, *Force of Law*, above n 3, 951-53.

for expression, and therefore all disciplines including philosophies, sciences and law.⁸ To combat the metaphysical closure of thinking and knowledge, Derrida's deconstructions recognise the effects of signification and the subordination of writing within logocentrism. He demanded that *that* recognition is necessary before 'knowledge' can be re-thought:

It is thus the idea of the sign that must be deconstructed through a meditation upon writing which would merge, as it must, with the undoing ... of onto-theology, faithfully repeating it in its *totality* and *making* it *insecure* in its most assured evidences.⁹

Derrida reiterated that deconstructive thinking must address the effects of history, that is, our conceptualisations, what we perceive as world views, empiricisms and objectivity.¹⁰ It must then consider how those views are carried in the text(s) being analysed.¹¹ Those influences need to be examined as part of any deconstruction. It cannot be reduced to a simple literary or textual analysis.¹² Further, deconstructive reading 'must be intrinsic and remain within the text'.¹³ Derrida argued that due to the workings of the metaphysics of presence, deconstruction is already, and is always going on within texts.¹⁴ Deconstructions expose inherent 'disfunctioning' of texts, and so '[d]econstruction is not a method or some tool that you apply to something from the outside'.¹⁵

By shaking the foundations of logocentrism, including its purported stability of meanings, deconstructions question objectivity and subjectivity in its reliance on the 'certainty of self-consciousness'.¹⁶ In the *Villanova Interview* Derrida commented on his analysis of classical works. He described his deconstruction in that context as:

⁸ See Appendix 1, Part A, section A2.

⁹ Jacques Derrida, 'Linguistics and Grammatology' in Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak trans, John Hopkins University Press, 1997) 27–73, 73 (*italics in original*) ('*Linguistics*').

¹⁰ Jacques Derrida, 'Some Statements and Truisms about Neologisms, Newisms, Postisms, Parasitisms, and Other Small Seismisms' in David Carroll (ed), *The States of "Theory"* (Columbia University Press, 1990) 63-94, 91-92 ('*Truisms*').

¹¹ Derrida, *Truisms*, above n 10, 92:

... deconstruction in general – also dislocates the borders, the framing of texts, everything which should preserve their immanence and make possible an internal reading, or merely reading in the classical sense of the term.

¹² See, eg, *ibid* 79, 86.

¹³ Derrida, *Supplement*, above n 2, 159.

¹⁴ Jacques Derrida and John D Caputo, 'The Villanova Roundtable: A Conversation with Jacques Derrida' in *Deconstruction in a Nutshell* (Fordham University Press, 1994) 3-28, 9 ('*Villanova Interview*'): Derrida stated '[d]econstruction is something which happens and which happens inside; there is a deconstruction at work within Plato's work, for instance'.

¹⁵ *Ibid*.

¹⁶ See, eg, Derrida, *Truisms*, above n 10, 86.

an analysis which tries to find out how [the authors'] thinking works or does not work, to find the tensions, the contradictions, the heterogeneity within their own corpus.¹⁷

Therefore, deconstructions must be developed in appreciation of Derrida's broader propositions of writing, trace and *différance*. That includes consideration of what has been written by the selective histories of the past, and that which is carried forward in meaning and in us.¹⁸ Derrida's deconstructive approach calls for vigilance in regard to the performative force of significations, including those effects as they are manifest in law.¹⁹ It seeks to accept, or rather not reduce, the fullness of otherness,²⁰ including the otherness of nonhuman animals.²¹ Deconstruction brings with it the possibility of making new 'knowledge' through the unveiling of what is repressed within particular texts. In my interpretation, Derrida urged that we should change our philosophical and linguistic lenses to be less focussed on our own interests, including that as an affect of *différance*,²² and turned more openly toward all 'others' and otherness. That does not mean that the other, the singular other, the being or object of our focus, must be elevated above all others and otherness. As de Ville explains, that type of simple reversal would leave Derridean thought squarely within the metaphysics of presence.²³ What deconstructions do, is to enliven us to the constraints of metaphysics. It opens our thinking to appreciate repressions and aporias. '[D]econstruction hyperbolically raises the stakes of exacting justice; ... [it] strives to denounce not only theoretical limits but also concrete injustices'.²⁴

B2 Elements of deconstructions

Whilst recognising that every deconstruction is different, some steps usually involved in deconstructions were demonstrated and articulated by Derrida in particular key texts. I have selected the early text *Supplement* and his deconstruction of Benjamin's text, *Critique of*

¹⁷ Derrida and Caputo, *Villanova Interview*, above n 14, 9.

¹⁸ See, eg, Derrida, *Truisms*, above n 10, 85-93.

¹⁹ See, eg, Derrida, *Force of Law*, above n 3, 929-41.

²⁰ See, eg, Derrida and Caputo, *Villanova Interview*, above n 14, 17-18.

²¹ See, eg, Jacques Derrida in Marie-Louise Mallet (ed), *The Animal That Therefore I Am* (David Wills trans, Fordham University Press, 2008) 107 [trans of: *L'animal que donc je suis* (first published 2006)] ('*The Animal That Therefore I Am*'); Derrida, *Force of Law*, above n 3, 973; Jacques Derrida in "'Eating Well" or the Calculation of the Subject' in Elisabeth Weber (ed), *Points... Interviews, 1974-1994* (Peggy Kamuf et al trans, Stanford University Press, 1995) 255-87, 279 [trans of: *Points de suspension, Entretiens* (first published 1992)] ('*Eating Well*').

²² This appears to be confirmed in Derrida's demand that his justice is a 'gift without exchange' and beyond rationality: Derrida, *Force of Law*, above n 3, 965. See also Jacques de Ville, *Jacques Derrida: Law as Absolute Hospitality* (Routledge, 2011) 144.

²³ de Ville, above n 22, 143.

²⁴ Derrida, *Force of Law*, above n 3, 955.

Violence,²⁵ in *Force of Law* as relevant examples. I have tied the deconstructive steps exercised in those texts with Derrida's description of deconstructions that he offered in *Positions*,²⁶ and with Lawlor's *Translator's Introduction to Voice and Phenomenon*.

B2.1 Steps common to some deconstructions

B2.1.1 Explicating the 'logical' structure of the text

In his deconstructions, Derrida identified structural, philosophical oppositions in a text.²⁷ He would scrutinize the authority of the presupposed hierarchy of that opposition.²⁸ Derrida's launching of a deconstruction, although it need not be a first step, may involve identifying, within the target text, such 'a place of well-determined form' and 're-marking [of that] nerve, a fold, and angle that interrupts totalization'.²⁹ For example, in *Supplement*, he attacked the autobiographical declaration of Rousseau whose character Jean-Jacques stated: 'for with me it has always been everything or nothing. I found in Thérèse the substitute [*supplément*] that I needed'.³⁰ It was chosen because of Rousseau's character's forceful denial of his willingness to consider anything but total absence or total presence.³¹ In a subsequent step that I describe below, Derrida then went on to justify his selection of the word 'supplement' as his lever within the texts. The word supplement reflected Rousseau's wrangling with presence(s).

In *Force of Law*, in his deconstruction of Benjamin's text, Derrida identified and translated what appeared to be the determined hinge of the text, that: '[d]ivine violence ... may be called sovereign violence'.³² Derrida identified a number of interrelated signifying structures

²⁵ Walter Benjamin, 'Critique of Violence' in Peter Demetz (ed), *Reflections: Essays, Aphorisms, Autobiographical Writings* (Edmund Jephcott trans, Schocken Books, 1986) 277-300. Derrida, *Force of Law*, above n 3, 973: In the unnumbered footnote (which includes the text of the oral introduction that Derrida gave at the University of California colloquium), Derrida cites the German title '*Kritik der Gewalt*' without reference to a particular publication (although the page numbers that he quotes match the text of the English version that I refer to throughout, that is, the Demetz edited version).

²⁶ Jacques Derrida, in 'Positions: Interview with Jean-Louis Houdebine and Guy Scarpetta' in Alan Bass (ed), *Positions: Jacques Derrida* (Alan Bass trans, Athlone Press, 1981) 37-96 ('*Positions Interview*') [trans of: *Positions* (first published 1972)] ('*Positions*').

²⁷ Lawlor, *Lawlor in VP*, above n 1, xii.

²⁸ Ibid.

²⁹ Derrida, *Positions Interview*, above n 26, 48.

³⁰ Derrida, *Supplement*, above n 2, 157 (italics in original) quoting Jean-Jacques Rousseau, 'Les Confessions' in Bernard Gagnebin and Marcel Raymond (eds), *Oeuvres Complètes Volume I* (Éditions Gallimard, 1959) 1-351, 331-32.

³¹ Derrida, *Supplement*, above n 2, 157.

³² Derrida, *Force of Law*, above n 3, 979, 1037 quoting Benjamin, above n 25, 300.

posited by Benjamin.³³ These included Benjamin's indications of what Derrida termed a 'tautology' or 'phenomenal structure',³⁴ in law. That is, that law, promises and exercises its own violence against any violence committed by others.³⁵ Therefore, Derrida suggested that law, if it was to be thought metaphysically, is itself 'outside law' – an 'outlaw'.³⁶ Derrida also found, through reading Benjamin's text, that the law's intelligibility and justness is sanctioned by its own general rules of interpretation.³⁷ That the past violence of the law in its making, and the future violence of the law are turned non-violent through law's own general rules of interpretation, as it is enabled through the performativity of the logos,³⁸ which I describe further below.

B2.1.2 Overturning to identify metaphysics at work

In exposing the logocentricity of the text, Derrida's deconstructive logic demonstrates that the superior term of an opposition shares, or is infected by, traits of the subordinated term.³⁹ Derrida was able to highlight that the structure of those opposites is not as it seems. Rather, that they include cross-dependency and aporia. For example, Derrida identified that whilst it appeared that Rousseau thought he was utilising one consistent meaning, in his use of the word supplement, the text revealed that the meaning oscillated.⁴⁰ With a more structural focus, *Force of Law* demonstrated metaphysical confounding of origins and repetitions. That was found in Benjamin's text, and more generally as it works in language and the structure of law. It includes the denial of cross contamination in what is accepted to be the oppositional meanings of founding and repetition.⁴¹ Derrida's contention was that the identification of oscillations, contaminations or aporias point toward the transcendental workings of language in a more general sense. It demonstrated, in his view, the workings of writing, trace and différance. He found that working in the texts; in the authors' thinking even though the authors' were not conscious of it; and in non-deconstructive reading, which is also of course, logocentric reaffirmation in its re-writing of the reader. Therefore, he found writing, trace and différance at work *in* life, or rather, that *that* working is *of* life itself.⁴²

³³ Derrida, *Force of Law*, above n 3, 981-83. These included Benjamin's assertions that founding law is 'mythic' and that annihilating law is 'divine', and that justice was 'divine end making' and power was 'mythical positioning of law'.

³⁴ Derrida, *Force of Law*, above n 3, 987.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid 993-95.

³⁸ Ibid.

³⁹ Lawlor, *Lawlor in VP*, above n 1, xii.

⁴⁰ Derrida, *Supplement*, above n 2, 157-58.

⁴¹ Derrida, *Force of Law*, above n 3, 997, 1003.

⁴² See, eg, Derrida, *Supplement*, above n 2, 158.

Derrida's deconstructions also proceed to an 'overturning'⁴³ of the oppositional terms to reveal which of the terms or meanings have 'the upper hand'.⁴⁴ This overturning should not be construed as a simple reversal of the target hierarchy. Derrida notes this overturning phase is needed to identify the 'conflictual and subordinating structure of opposition'.⁴⁵ In *Supplement* Derrida noted Rousseau's oscillating meaning of his use of the term 'supplement', in that it 'cumulates and accumulates presence'.⁴⁶ It adds as a surplus to form the '*fullest measure of presence*'⁴⁷ and it *also* 'adds to replace'.⁴⁸ In that case, that text overturned its own meanings.

In *Force of Law*, in an overturning of Benjamin's logic, Derrida suggested that the violence that Benjamin *only* acknowledged in the founding of law, is repeated indefinitely in the maintaining of law. It 'envelop[s] the violence of conservation'.⁴⁹ In that context, Derrida analysed our dependence on, and enforcement of, performative speech acts, where words themselves are perceived to be endowed with law making power to institute new eras and new beginnings. That was an example of iterability at work. Derrida examined post-war peace treaties and the necessity of their accompanying ceremonies.⁵⁰ He demonstrated that ceremony can deliver iterative signification and power. In the overturning phase Derrida also evidenced Benjamin's resorting to spectrality and religion as non-origins where Benjamin found that meaning or logic was ungraspable.⁵¹ For example, Benjamin resorted to 'divine' justice and the 'ghostly presence'⁵² of the police force.

B2.1.3 Exploring inheritances to elucidate structure

In the *Positions Interview* Derrida warned not to 'proceed too quickly [from the overturning phase] to a *neutralization* that *in practice*'⁵³ would fail to take a sufficient 'hold on the previous opposition, thereby preventing any means of *intervening* in the field effectively'.⁵⁴ He insists that this taking-hold function in the analysis, need not be performed chronologically but he indicates that it should be systematic, structural and interminable.⁵⁵ By that, I assume he means fastidious, as it was in both of his texts that I describe above,

⁴³ Derrida, *Positions Interview*, above n 26, 41.

⁴⁴ Ibid.

⁴⁵ Ibid 46.

⁴⁶ Derrida, *Supplement*, above n 2, 144.

⁴⁷ Ibid 144 (italics in original).

⁴⁸ Ibid 145.

⁴⁹ Derrida, *Force of Law*, above n 3, 997.

⁵⁰ Ibid 999.

⁵¹ Ibid 1005-07; 1027-31.

⁵² Ibid 1011; Benjamin, above n 25, 287.

⁵³ Derrida, *Positions Interview*, above n 26, 41 (italics in original).

⁵⁴ Ibid (italics in original).

⁵⁵ Ibid 41-42.

and that it is possible that it would never be exhaustive.⁵⁶ In this phase, Derrida engages with the cultural and philosophical inheritance of the related concepts. Whilst it may be playful to show relationships between words and meanings,⁵⁷ it is never mere playing with words. It must explicate the *structure* of the target text.⁵⁸

B2.1.4 Suggesting non-concepts to reflect *différance* at work in the author's thinking, text and life

In another step in many deconstructions, Derrida introduced of an 'irruptive ... new "concept"',⁵⁹ or rather a non-concept. The word *différance* is but one of Derrida's many examples. As these non-concepts are introduced to combat the metaphysics of presence, the meaning of these terms, must not settle, must not be left to '[constitute] a third term'.⁶⁰ They are illusively constructed in his deconstructions so that they 'cannot be reassembled into a definition'.⁶¹ They must not point to an alternative meaning that would resolve anything in the text. For example, he insisted that his non-concept 'supplement' is 'neither a plus nor a minus, neither an outside nor the complement of an inside, neither accident nor essence, etc.'. ⁶² In that sense, his non-definition calls upon that which already confounds us, and on which we rely in our metaphysical constructions of 'logic'. The non-concepts, including 'supplement' mirror the enigmatic non-concept *différance*.⁶³

Through deconstructions Derrida was also able to highlight his core contention, that is, how human animals (at least), 'live': how we experience beingness. The goal was not to establish the intended meaning of the target texts, but rather identify its 'engagement and the appurtenance that encompass existence and writing in the same *tissue*, the same *text*'.⁶⁴ This points to his propositions of auto-affection and its dependence on hetero-affection, that is, otherness. Deconstructions always, as such, point to a lack of self-presence and undermine the traditional conceptions of beingness. For example, in *Supplement*, Derrida demonstrated that 'Rousseau cannot utilize [the word 'supplement'] at the same time in all the virtualities of its meaning' and this included displaying 'neither an unconsciousness nor a

⁵⁶ This makes sense in Derrida's logic since meaning is never full and always deferred. It would also indicate that there is no right answer to the question of when to stop tracing, or rather, approximating the traces of others.

⁵⁷ Ibid 42.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid 43.

⁶¹ Derrida, *Positions Interview*, above n 26, 44.

⁶² Ibid 43.

⁶³ Derrida, *Supplement*, above n 2, 150; Derrida, *Positions Interview*, above n 26, 43-44.

⁶⁴ Derrida, *Supplement*, above n 2, 150 (*italics in original*).

lucidity on the part of the author'.⁶⁵ Derrida invited us to 'abandon these [metaphysical] categories' including the oppositions of 'unconsciousness' and 'lucidity', with his deconstruction as an opening to understanding and acceptance of life through supplementarity/différance.⁶⁶ And so, deconstructions are not nihilistic, but rather, offer an affirmation of a differentiated beingness that provide a means of agitation within, and that points toward an exit of, the closure of the metaphysics of presence.⁶⁷ The driving forces are responsibility and justice.⁶⁸

B3 Deconstruction as correction toward justice

B3.1 Introduction

This section briefly addresses Derrida's deconstruction of rationality in *Cogito and the History of Madness*,⁶⁹ and the relationship between law and our usual conception of justice. It also introduces Derridean justice.

As explained in the preceding sections of this chapter, the goal of deconstruction in a general sense, is correction toward responsibility and justice in its unveiling of the violence of the metaphysics of presence. According to Derrida, that violence is partly instituted through logocentric oppositions. *Cogito* deconstructs the opposition of rationality to madness, and in the process, the opposition of objectivity to subjectivity.⁷⁰ In his exposure of so called rationality, Derrida highlighted that decision making is not a result of logic as such, but instead, a moment of madness in its forced addressing of undecidability.⁷¹

More specifically in relation to law, what Derrida achieved in *Force of Law* was a deconstruction of law in relation to force, and in relation to our usual conception of justice, and his stricter notion of justice.⁷² He demonstrated that whilst law, force and justice are

⁶⁵ Ibid 163.

⁶⁶ Ibid.

⁶⁷ See, eg, Derrida, *Of Grammatology*, above n 2, 4-5; Derrida, *Voice and Phenomenon*, above n 1, 14, 88; Lawlor, *Lawlor in VP*, above n 1, xii-xiii.

⁶⁸ See, eg, Derrida, *Force of Law*, above n 3, 955.

⁶⁹ Jacques Derrida, 'Cogito and the History of Madness' in Jacques Derrida, *Writing and Difference* (Alan Bass trans, Routledge, 1978) 36-76, 76 ('*Cogito*') [trans of: *Writing and Difference* (first published 1967)] ('*Writing and Difference*').

⁷⁰ Derrida, *Cogito*, above n 69.

⁷¹ See section B3.2 below.

⁷² See, eg, Derrida, *Force of Law*, above n 3, 931-35, at 935: 'Deconstruction, while seeming not to "address" the problem of justice, has done nothing but address it, if only obliquely, unable to do so directly', at 945: '[d]econstruction is justice'.

conceived as separate ideas, they are not opposed to each other, rather, they are inseparable and cross-contaminated.⁷³

In what at first seems a surprising move, Derrida claimed that his notion of justice is absolutely an overflowing 'concept', an ideal that exceeds all law.⁷⁴ It appears this was a necessary contention, as Derrida set his own arché – in demanding that his 'justice' could not properly, and should not be deconstructed.⁷⁵ He summarised his justice as a 'sense of responsibility without limits, and so necessarily excessive, incalculable, before memory',⁷⁶ and as an 'infinite demand'.⁷⁷ His justice 'always addresses itself to singularity, to the singularity of the other'.⁷⁸ Derrida's justice has a differential relation to Levinasian justice⁷⁹ – which as explained in the previous chapter of this research, is a demand that arises through 'the face' of the other.⁸⁰ Derrida's justice is impossible, in its uncompromising addressing of the Other and otherness. That impossibility is exposed through the aporias of what we deem as 'ethical' decision making which I survey in Appendix 1, Part C: *Derridean Justice*.

B3.2 Deconstructing rationality: undecidability and the madness of decision making

In *Cogito* Derrida deconstructed Foucault's *Madness and Civilization: A History of Insanity in the Age of Reason*.⁸¹ He also considered the influence of Descartes' *Meditations* in relation to rationality and beingness. *Cogito* includes examination of madness in context to the assumption of human self-presence, philosophy, rationality, history and logocentrism. Derrida determined that our concept of history, and history as it is written, is only a history of rationality and 'meaning'.⁸² That is, history as conceived within the bounds and constructs of the logos.⁸³ Derrida concluded that Foucault had reconfirmed the Cartesian declaration 'I think therefore I am'. That 'thinking' denies a plurality in self-presence, insists on rationality, denies the contribution of the senses, and must conform to the constraints of the logos if it is

⁷³ Ibid 925. See also at 937-41.

⁷⁴ Ibid 969-71: 'Justice remains, is yet to come ... Perhaps it is for this reason that justice, insofar as it is not only a juridical or political concept, opens up ... the transformation, the recasting or refounding of law and politics'.

⁷⁵ Ibid 945.

⁷⁶ Ibid 953. This means that it is something outside of our usual traces, in that it cannot be recalled, it is something uncompromising. That it could open a new future.

⁷⁷ Ibid 955.

⁷⁸ Ibid.

⁷⁹ See Appendix 1, Part A, section A4.

⁸⁰ Derrida, *Force of Law*, above n 3, 959.

⁸¹ Michel Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason* (Richard Howard trans, Pantheon, 1965) [trans of: *Folie et déraison: Histoire de la folie à l'âge classique* (first published 1961)].

⁸² Derrida, *Cogito*, above n 69, 43, 50.

⁸³ Ibid 45, 65, 74.

not to be deemed madness.⁸⁴ As such, madness is not merely a kind of insanity, but represents cognition beyond the logos, and in turn serves to define rationality as its opposite.⁸⁵ We are able to forget that we don't know everything about everything, or perhaps anything. Even when we think we might 'know', we largely remain silent on what Derrida posits is the reality that the signifying forces of our Western languages repress otherness and merely work amongst différential distinctions and deferring.⁸⁶ The constructions of rationality and of madness are therefore political and are a violence of conformance. According to Derrida, proof of the political violence is played out in (part of the reasons for) the physical internment of the 'insane' and the silencing of irrationality.⁸⁷ That was a decision of Western philosophy and epistemology.⁸⁸

Derrida extended the problem of madness and undecidability in *Force of Law*. His propositions highlight the possibility that signifying forces deny and suppress the reality that not everything is resolvable or calculable within what we deem as rationality.⁸⁹ At times, and often, rationality runs out. Decisions are made that require a step beyond the calculable.⁹⁰ By definition, decisions, whether made with or without consideration of Derrida's justice, should be seen as a type of madness.⁹¹ Yet our usual form of decision making is characterised as a result of 'logic'. Logic itself has its own 'laws' requiring adherence to 'strict principles of validity'.⁹² Justice and truth are hijacked by each other under the logos, where 'truth' presupposes justice.⁹³ The laws of logic tend to deny the influence of the senses, of emotion, and of any split self-presence. The metaphysics of presence forces the belief that logic, and the results of a decision, come-to-light, are made present, as some kind of natural, calculable process. Whereas Derrida suggested that we forget that we 'work' on a less-than-fully-conscious level within our codes of writing, within our own traces, through the power of

⁸⁴ See, eg, *ibid* 54-58, 65-68. See also, de Ville, above n 22, 100-07.

⁸⁵ Derrida, *Cogito*, above n 69, 39.

⁸⁶ See, eg, *ibid* 75, 66: Derrida seemed to suggest that Foucault's text included an example of this logocentric habit: '[t]o all appearances it is reason that [Foucault] interns, but, like Descartes, he chooses the reason of yesterday as his target and not the possibility of meaning in general'.

⁸⁷ *Ibid* 52-53, 74-76.

⁸⁸ *Ibid* 76.

⁸⁹ Derrida, *Force of Law*, above n 3, 963-65, at 65: By deconstructing presences we can recognise the undecidability of every decision, and the impossibility of the truth or justice of every decision.

⁹⁰ *Ibid* 963. See, also, Jack Reynolds, 'Decision' in Jack Reynolds and Jonathan Roffe (eds), *Understanding Derrida* (Continuum, 2004) 46-53, 47-48.

⁹¹ Derrida, *Force of Law*, above n 3, 965-67.

⁹² Oxford University Press, *British & World English: logic* English Oxford Living Dictionaries <<https://en.oxforddictionaries.com/definition/logic>>.

⁹³ Derrida, *Force of Law*, above n 3, 969.

the logos, and under the pressure of the political. Responsibility toward different truths is negated.⁹⁴

B3.3 Forces in law

B3.3.1 Force submerging origins

As introduced in the previous section, Derrida argued that performative speech acts are employed to found law and rights.⁹⁵ That founding, that making, may depend on previous actual or even presupposed conventions, to impose their force, their power.⁹⁶ As such, the authority of law itself is delivered through performative force, which Derrida described as a 'violence without ground'⁹⁷ and following Montaigne, the 'mystical foundation of authority'.⁹⁸ It brings to light the submerged origins of law. That is, that it masks the economic and political forces behind laws and regimes, rather than law maintaining a direct connection to those forces.⁹⁹ Derrida would also argue that law's relationship to what is assumed to be 'natural law' and its associated 'justice', are performatively enforced as ideals through the logos.¹⁰⁰ For Derrida, this obscurity invited his analysis of the relationship between law, that is legitimate or legitimised force, and justice.¹⁰¹

B3.3.2 Law as means to ends: legal justness vs justice

Derrida explained that 'law is always an authorized force, a force that justifies itself or is justified in applying itself, even if this justification may be judged from elsewhere'.¹⁰² That is, that law is a legitimised force, through itself, despite the fact that it may not be 'just' in terms of any conception of justice. Derrida explored the relationship between law as means to ends, that is, law as a legitimised force to meet legal ends, rather than 'just' ends.¹⁰³ Earlier, in *Force of Law*, in following Pascal, Derrida explained:

Justice without force is contradictory, as there are always the wicked; force without justice is accused of wrong. And so it is necessary to put justice and force together; and for this, to make sure that what is just be strong, or what is strong be just.¹⁰⁴

⁹⁴ See, eg, *ibid* 967-69.

⁹⁵ *Ibid* 941-43.

⁹⁶ *Ibid* 943.

⁹⁷ *Ibid*.

⁹⁸ *Ibid* 939.

⁹⁹ *Ibid* 941.

¹⁰⁰ See, eg, *ibid* 939-41.

¹⁰¹ See, eg, *Ibid* 939-45: His deconstruction was triggered through the traces in texts of Pascal, Montaigne and Benjamin.

¹⁰² *Ibid* 925.

¹⁰³ See, eg, *ibid* 983.

¹⁰⁴ *Ibid* 937.

Derrida also summarised Montaigne's conclusion that '[o]ne obeys [laws] not because they are just but because they have authority'.¹⁰⁵ Pascal more devastatingly criticised law: '[t]here are, no doubt, natural laws; but this fine thing called reason has corrupted everything'.¹⁰⁶ It appears that for Derrida, that force, that 'corruption' comes to be, through the performativity of language.¹⁰⁷

Since every constative utterance itself relies, at least implicitly, on a performative structure ... the dimension of *justness* or truth of the theoretico-constative utterances (in all domains, particularly in the domain of the theory of law) always thus presupposes the dimension of justice of the performative utterances, that is to say their essential precipitation, which never proceeds without a certain dissymmetry and some quality of violence.¹⁰⁸

B3.4 Problems of the singularity of justice and the generality of law

One of the apparent relations in the analysis in *Force of Law* is that since justice and responsibility in the Levinasian and Derridean senses requires consideration of the singular other, law, which espouses rules in the general sense, cannot, without more, deliver *that* form of justice. A judge must, to deliver Derridean justice, consider the case in its singularity and that includes to 'approve' and 'confirm' the value of the rule *for this case*, every time.¹⁰⁹ A judge must have the freedom to consider that singularity.¹¹⁰

[J]ustice' [can]not just consist in conformity ... each case is other, each decision is different and requires an absolutely unique interpretation, which no existing, coded rule can or ought to guarantee absolutely.¹¹¹

Derrida was not arguing that rules or laws should be discarded, but that acting as a 'calculating machine' does not connote freedom of the decision maker or responsibility toward the singular other.¹¹² This has perhaps further implications that should be considered in our common law, adversarial system, where it is the parties that propose which legal rules are to be applied. It appears that Derridean justice, requires a questioning of our belief that consistency in the application of rules, is possible and desirable, as is demanded under the rule of law. At a more basic level, one should question the degree of freedom of thought in

¹⁰⁵ Ibid 939.

¹⁰⁶ Ibid 941 quoting (and translating) Pascal, Section IV, pensée 294.

¹⁰⁷ Derrida, *Force of Law*, above n 3, 941-45, 969.

¹⁰⁸ Ibid 969: Derrida explained that this was how he might interpret a differentially contextualized proposition of Levinas'. However, he did confirm that this statement, as he put it in his own words as I quote it above, was 'not without consequence, needless to say, for the status, if we can still call it that, of truth'.

¹⁰⁹ Ibid 961.

¹¹⁰ Ibid.

¹¹¹ Ibid 969.

¹¹² Ibid 961-63.

any decision maker if there is a lack of awareness of the power of signifying structures and the values that those structures instil. It seems likely that *that* lack of awareness inherently discounts singularity and otherness as it causes subjects and concepts to be already reduced to limited generalities. De Ville raises the related question of the freedom of decision makers in that there may be no united self-presence as traditionally assumed.¹¹³ Derrida's point is that we should remain aware of the paradox that following laws cannot be just in the singular, Derridean sense, and at the same time, justice cannot be wrought without rules.¹¹⁴ Laws deliver merely legal justice, and always in the context of a repetition of its founding violence.¹¹⁵

B3.5 Relevance of trace to justice for human and nonhuman animals

Derrida's analysis of justice also demands consideration of the workings of writing, trace and *différance* in *each* individual. Where the repercussions of unique traces, hetero-affection, and the individual functioning of cognition are not considered, then questions remain as to whether justice can be fully delivered.¹¹⁶ Justice in the usual sense, imposes generalisations in its '[suspension of] the unilaterality or singularity of the idioms'.¹¹⁷

Derrida explicated this problem with reference to prevailing oppositions between human animals and nonhuman animals.¹¹⁸ As a first step, legal justice presupposes that its subjects are 'capable of a language in general'.¹¹⁹ That is, the language of human, speaking animals,¹²⁰ to the exclusion of nonhuman animals. As a corollary of that, Derrida argues that traditionally, legal justice only applies to those that can speak. Only they are presumed to be subjects of the law.¹²¹ Derrida intimates that this so-called logic based on the language distinction is faulty for at least two reasons. These reasons undermine the 'possibility of justice'.¹²² Firstly, following his own logic of trace, he states that not all human animal subjects in a community 'share the same idiom throughout ... [and] in all rigor this ideal situation is never possible'.¹²³ Secondly, Derrida highlights that some human animals are

¹¹³ de Ville, above n 22, 19.

¹¹⁴ Derrida, *Force of Law*, above n 3, 961-63.

¹¹⁵ Ibid 963.

¹¹⁶ See, eg, 949-51: Derrida discusses this in relation to comprehension of language of law.

¹¹⁷ Ibid 949.

¹¹⁸ Ibid 951-53.

¹¹⁹ Ibid 951.

¹²⁰ Ibid.

¹²¹ Ibid 951, 953: Derrida introduces the relationship between the Western culture of sacrifice, including sacrifice of nonhuman animals, that is, he claims, structures Western culture and laws. I take that up in Appendix 1, Part D: *Derrida's Animot*.

¹²² Ibid 951.

¹²³ Ibid.

already excluded from legal justice— in that they are not ‘recognised as subjects and ... receive this animal treatment.’¹²⁴ Derrida argues that human and nonhuman animals all have language(s) of sorts, and as such, *all* animals are individual ‘beings’ in that they experience life, albeit to different degrees. It appears that for Derrida, all beings are deserving of his notion of justice.

B3.6 Derridean justice

As described above, Derrida suggested that acting in accordance with a legal rule does not render justice. It is merely acting in accordance with a duty, as Kant contended.¹²⁵ It does not equate to Derridean justice.¹²⁶ As explained above, law, through language, suspends full consideration of singularity.¹²⁷ Further, law and language, as instruments of the logos, anchor our thinking to the past,¹²⁸ as it forces repetitions of limited conceptualisations.¹²⁹ For Derrida, since law is of language, and since law is not justice, law is deconstructible.¹³⁰ Not deconstructible in a negative sense, but toward *his* conception of justice¹³¹ that he insisted is *not* deconstructible.¹³² Deconstruction is a working toward Derridean justice,¹³³ it is ‘mad about this kind of justice’.¹³⁴ The Derridean non-concepts, including *différance*, iterability, supplementarity and economy, and other robust deconstructive elements yet to be revealed within texts, are means by which we can leave open the possibility of a different future.¹³⁵

As Derrida’s justice requires thinking beyond logocentric rationality and application of generalised rules, Derrida did recognise that his justice also demands a kind of madness, as irreducible and beyond economic circularity.¹³⁶ Derrida identified the troublesome, worrying,

¹²⁴ Ibid.

¹²⁵ Ibid 949.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ See, eg, *ibid* 971-73.

¹²⁹ See, eg, *ibid* 969-71. See also, de Ville, above n 22, 192-93.

¹³⁰ Derrida, *Force of Law*, above n 3, 943-45. See also Derrida and Caputo, *Villanova Interview*, above n 14, 16:

Each time you replace one legal system by another one, one law by another one, or you improve the law, that is a kind of deconstruction, a critique and a deconstruction. So, the law as such can be deconstructed and has to be deconstructed ... [j]ustice is what gives us the impulse ... to improve the law ... to deconstruct the law.

¹³¹ Derrida, *Force of Law*, above n 3, 945.

¹³² Ibid.

¹³³ Ibid 955

¹³⁴ Ibid 965.

¹³⁵ See, eg, de Ville, above n 22, 194.

¹³⁶ Derrida, *Force of Law*, above n 3, 965. Economic circularity is a Derridean term that refers to return to the self, and does not in this sense relate to monetary return. See also Appendix 1, Part A, section A1.3.

anxiety-making moment of suspension,¹³⁷ that is, in the recognition of aporia that should always precede the awakened deconstruction of law.¹³⁸ That is because Derridean justice is impossible.¹³⁹ It is not something we can experience.¹⁴⁰ As also explained in Appendix 1, Part C: *Derridean Justice*, it is always ‘to come’.¹⁴¹ As such, any decision with an aim toward justice is made in madness, unassured of its justness and always, and in its own capture within the metaphysics of presence, is made without the full consideration of the other.¹⁴² However, ‘there is no justice without this experience’ of aporia.¹⁴³ A decision that is made with the benefit of deconstructive thought is one that may be enlivened to the violence of logocentrism. It may be a better informed decision that considers more than compliance to prescriptive rules and laws. It may be a decision cognisant of the respective failure of ethical treatment of all others. Despite its impossibility, Derrida demanded that his justice cannot wait,¹⁴⁴ and must remain a possibility. Deconstruction is a striving toward it. Even if it is unreachable, it is necessary to learn to think beyond what we have, so far, instituted through the logos.

We must take it as far as possible, beyond the place we find ourselves and beyond the already identifiable zones of morality, or politics or law ... [E]ach advance in politicization obliges one to reconsider, and so to reinterpret the very foundations of law such as they had previously been calculated or delimited. This was true for example in the Declaration of the Rights of Man, in the abolition of slavery, in all the emancipatory battles that remain and will have to remain in progress ...¹⁴⁵

B4 SUMMARY

This chapter has sought to capture key elements of deconstructive thought and deconstructive approaches that may be applied to the animal law related texts in this research. Those elements may be summarised as follows. In his deconstruction of *Supplement*, Derrida took an intertextual approach. He found a bold contradictory statement that reflected the structure of Rousseau’s argument. Derrida also identified a particular word that was key and operated ephemerally or chimerically across its logocentric binary

¹³⁷ Ibid 955.

¹³⁸ Ibid 947, 955.

¹³⁹ Ibid 947.

¹⁴⁰ Ibid.

¹⁴¹ Ibid 969.

¹⁴² Ibid 967.

¹⁴³ Ibid 947.

¹⁴⁴ Ibid 969.

¹⁴⁵ Ibid 971.

oppositions in relation to that argument. He chose that word because it directly related to the operation of the metaphysics of presence *and* because it supported the signifying structure within those texts. He then created his 'non-concept' that he called the 'supplement' or 'supplementarity'. That non-concept served to dislodge the text and expose the workings of the metaphysics of presence in a broader sense. Derrida suggested that supplementarity, or *différance*, is inherent in the making of 'meaning' in that text, and, are at work in life itself. In *Force of Law*, Derrida used Benjamin's resorting to spectrality and transcendental ideas to expose aporias within the text that reflected aporias in the law more generally. In both deconstructions, Derrida analysed the structure of the texts, and found the hinges on which their logic was mounted. He found logocentrism at work, and he found that the authors remained blinded to their own wrangling with *différance*. Rousseau indiscriminately and not-consciously made, and enhanced, presences where they were lacking. Benjamin, seemingly unaware of the performativity of language, and the confounding of origins and repetitions in conceptuality, invited ghostly presences into his thinking, into his text, and into his life, in order to grasp at the workings of law. Both authors constructed 'logic' based on metaphysical beliefs.

The following Part B of this Appendix 1 examines Derridean justice as an unshakeable grounding, and in contrast to systems of 'ethics' and their inherent violence. It also highlights the aporias in true decision making.

APPENDIX 1, PART C: DERRIDEAN JUSTICE

C1 Introduction

This chapter briefly reviews problems of rationality and ethics as they were proposed by Derrida. It then recounts key considerations of Derrida's responsibility and justice, and the aporias that he highlighted in decision making. Then, following Derrida, Lawlor, Anderson and de Ville, I recount that Derridean justice calls for deconstructions to awaken us to the violence wrought by the metaphysics of presence.

Key Derridean texts that consider the inter-related issues of responsibility, ethics, hospitality, law and justice include *Force of Law*,¹ *Eating Well*,² *Spectres of Marx*,³ *Politics of Friendship*,⁴ *Of Hospitality*⁵ and *Gift of Death*.⁶ This chapter references those texts, and is also guided by Lawlor's *This is Not Sufficient: An Essay on Animality and Human Nature in Derrida*,⁷ de Ville's *Law as Absolute Hospitality*⁸ and Anderson's *Derrida: Ethics Under Erasure*.⁹ Whilst it is not possible here to review all of the aporias and deconstructive non-concepts that Derrida considered relevant to decision making and ethics, I have selected those that appear to be most relevant to analysis of law, and those that may assist analysis of law as it impacts nonhuman animals.

C2 Problems of rationality and ethics

Various problems of rationality have been briefly raised in previous Parts of Appendix 1. In Part A: *Derridean Propositions: Presence(s), Cognition and Consciousness*, Derrida's

¹ Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority" (1990) 11 *Cardozo Law Review* 919 ('*Force of Law*').

² Jacques Derrida in "'Eating Well" or the Calculation of the Subject' in Elisabeth Weber (ed), *Points... Interviews, 1974-1994* (Peggy Kamuf et al trans, Stanford University Press, 1995) 255-87 [trans of: *Points de suspension, Entretiens* (first published 1992)] ('*Eating Well*').

³ Jacques Derrida, *Spectres of Marx: The state of the debt, the work of mourning, and the new international* (Peggy Kamuf trans, Routledge, 2006) [trans of: *Spectres de Marx* (first published 1993)] ('*Spectres of Marx*').

⁴ Jacques Derrida, *Politics of Friendship* (G Collins trans, Verso, 1997) [trans of: *Politiques de l'amitié* (first published 1994)] ('*Politics of Friendship*').

⁵ Jacques Derrida, *Of Hospitality: Anne Dufourmantelle Invites Jacques Derrida to Respond* (Rachel Bowlby trans, Stanford University Press, 2000) 25-29, 83 [trans of: *De l'hospitalité: Anne Dufourmatelle invite Jacques Derrida à répondre* (first published 1997)] ('*Of Hospitality*').

⁶ Jacques Derrida, *The Gift of Death* (David Wills trans, University of Chicago Press, 1995) [trans of: *Donner la mort in L'éthique du don, Jacques Derrida et la pensée du don* (first published 1992)] ('*Gift of Death*').

⁷ Leonard Lawlor, *This is Not Sufficient: An Essay on Animality and Human Nature in Derrida* (Columbia University Press, 2007) ('*Not Sufficient*').

⁸ Jacques de Ville, *Jacques Derrida: Law as Absolute Hospitality* (Routledge, 2011).

⁹ Nicole Anderson, *Derrida: Ethics Under Erasure* (Continuum, 2012) ('*Ethics*').

concerns relating to Western representationalist epistemology were raised.¹⁰ He suggested that scientific objectivity appears to leave unconsidered the limitations in knowledge that arise through the signifying power of language. The connections between self-affirmation and the pursuit and consumption of knowledge indicate a drive to sovereignty, and a link between ontotheology and what we perceive as truth, knowledge and objectivity. Derrida questioned the tautological nature of language, and by extension, different disciplines of practice including philosophies, sciences and law.

Appendix 1, Part B: *Elements of Deconstructions* refers to Derrida's analysis of the 'madness' of decision making, in that a true decision is always a leap beyond rationality in that it addresses the undecidable.¹¹ Derrida argued that language, reason and rationality limit comprehension of otherness, that 'truth supposes justice', and that political pressure demands conformance to logocentric thinking and decision making. Derrida's deconstructions highlight a lack of full consciousness in our utilisation of language, a succumbing to the performative forces of significations and iterability, and a tendency to follow rules that mask the paradoxes inherent in decision making.¹²

As highlighted in Appendix 1, Part D: *Derrida's Animot*, human reason appears to be constructed through a discounting of sensory perceptions, and in differentiation to animality. Only nonhuman animals were presumed, by influential philosophers including Descartes, Heidegger and Lacan, to merely react to sensations rather than respond, and were denied the presumed human animal capability of autonomous decision making. Derrida highlighted that our metaphysically structured modes of investigation, inherited from Aristotle, are concerned with seeking and proposing ends, foundations, principles and causes.¹³ Rationality inflicts upon us, a positive value in the pursuit of human ends as a human good. As explored Appendix 1, Part D, Derrida found that nonhuman animals are conceived as means to human ends.

Anderson recounts that in contrast to the Western philosophical inheritance, Derrida suggests that presumptions about human animal beingness should be questioned.¹⁴ Anderson suggests that both utilitarian and deontological codes of ethics rely on: the principle of a united self-presence of actors; the belief that reason and rationality is reducible to decision making based on what is seen to be objective, external evidence, that is, what

¹⁰ See Appendix 1, Part A, section A2.

¹¹ See Appendix 1, Part B, section B3.

¹² Ibid.

¹³ See also Anderson, *Ethics*, above n 9, 117 citing Jacques Derrida, 'The Principle of Reason: The University in the Eyes of Its Pupils' (1983) Fall *Diacritics* 3, 8 ('*Principle of Reason*').

¹⁴ See also Anderson, *Ethics*, above n 9, 94-96, 116-17.

we deem as knowledge and; the belief that decision making limited to prescriptive ethical frameworks of values is sufficient.¹⁵ According to Anderson: '[t]hinking ... is limited to deductive and logical reasoning associated with argumentative-theoretical evidence',¹⁶ and hence ignores what could be the limits of our inherited principles of reason. Anderson explains that our process of reasoning based on what we deem as objectivity, supports our conceptions of our own autonomy and distances us 'temporally, psychologically and affectively' from our response to others and otherness.¹⁷ What are ignored are other(ed) elements that contribute to experience, decision making, and the construction of knowledge.¹⁸ We do not take into account our writtenness. That is, how we 'know', and deeper consideration of our own inheritances. It includes our situatedness within our own particular traces (as I use that term, as explained in the Preface).

From a Derridean perspective, it appears that, through the workings of trace and *différance*, and its economy of substitutions which drives us, we can come to, or perhaps most often fall into, conclusions and patterns of decision making that are limited and already learnt. Through Derrida's lens, we appear as creatures at risk of not thinking, or not living beyond the inscriptions of our own particular traces. Derrida urged us to remain open to being written differently.¹⁹ Anderson highlighted his demand that "'[t]hought" requires *both* the principle of reason *and* what is beyond the principle of reason'.²⁰ Similarly, de Ville reminds legal decision makers to think, to make decisions beyond the economies of reinstitution and self-legitimation of the collective subject through law.²¹ It is necessary to ensure that Derrida's 'idea of justice' is not subsumed or reduced, and to hold it apart from rules and laws. It is necessary to recognise its demand for:

¹⁵ Ibid 112-17.

¹⁶ Ibid 116.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ See, eg, Jacques Derrida, *Voice and Phenomenon: Introduction to the Problem of the Sign in Husserl's Phenomenology* (Leonard Lawlor trans, Northwestern University Press, 2011) 88 ('*Voice and Phenomenon*'); Jacques Derrida, 'Of Grammatology as a Positive Science' in Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak trans, John Hopkins University Press, 1997) 74-100, 93 ('*Positive Science*') [trans of: *De la Grammatologie* (first published 1967)] ('*Of Grammatology*'); Derrida, *Of Grammatology*, above n 20, 4-5; Leonard Lawlor 'Translator's Introduction: The Germinal Structure of Derrida's Thought' in Jacques Derrida, *Voice and Phenomenon: Introduction to the Problem of the Sign in Husserl's Phenomenology* (Leonard Lawlor trans, Northwestern University Press, 2011) xi-xxviii, xxvii-xxviii ('*Lawlor in VP*'); Derrida wanted to make us think differently, beyond the closure of metaphysics, to seek 'truth' beyond the repetitions of conceptuality.

²⁰ Anderson, *Ethics*, above n 9, 117 (italics in original) quoting Derrida, *Principle of Reason*, above n 13, 18-19.

²¹ De Ville, above n 8, 138-39.

... gift without exchange, without circulation, without recognition or gratitude, without economic circularity, without calculation and without rules, without reason and without rationality ... [to recognise in it] ... [a kind of] madness.²²

In summary and in contrast, the problems of liberal humanist ethical frameworks include reinstitution of the belief in the autonomous decision maker, and failure to incorporate concentrated concern for alterity and the unknown.²³ Therefore, they do not fully engage our response-ability or responsibility toward others and alterity. They do not allow a new future to come.

While it seems we cannot function without what we deem are moral and ethical frameworks, and whilst Derrida did not submit that they be rejected,²⁴ what *is* required are deconstructions of reasoning that broaden our considerations to expose what we habitually repress. As demonstrated in the following subsections, Derrida did undertake a number of more detailed deconstructions of reason that unveil ambiguities and aporias that should be taken into account in decision making in ethical and other contexts. In developing this awareness, Derrida urged us to work toward a different concept of justice, one that could deliver a different future. Derrida argued that to peer beyond the cage of our presence-limited logic and carnophallogocentrism, we need to appreciate our own writtenness. It requires becoming aware of our own traces inscribed by tradition and culture, learning to consider the affects and effects of the metaphysics of presence and *différance*, appreciating the limitations of rationality and rules-based systems, and recognising the aporias of decision making. In sum, we need to deconstruct ourselves.

C3 Aporias of decision making

C3.1 The aporias of hospitality

Derrida considered the responsibility that arises when hospitality is offered and provided to an other. He identified a number of aporias that we habitually repress.

²² Derrida, *Force of Law*, above n 1, 965.

²³ See, eg, Anderson, *Ethics*, above n 9, 116-17.

²⁴ See, eg, Derrida, *Force of Law*, above n 1, 971: Derrida explained that we must calculate, we must 'negotiate the relation between the calculable and the incalculable'; Derrida, *Eating Well*, above n 2, 272-73: 'There has to be some calculation, and this is why I have never held against calculation ... I believe there is no responsibility, no ethico-political decision, that must not pass through the proofs of the incalculable or the undecidable'. See also, Anderson, *Ethics*, above n 9, 117 citing Derrida, *Principle of Reason*, above n 13, 16-19.

C3.1.1 Hosts and Hostages

Following Levinas, Derrida draws relationships between responsibility and ethics, and hospitality. Levinas proposed that the call to responsibility that is a result of the 'after you', that is, that call of the other to which we respond ethically, also makes the receiving subject a hostage of sorts.²⁵ According to Derrida, the responsibility toward the other makes the subject beholden to, to perhaps have an ethical duty toward the other, and is therefore both the host and the hostage.²⁶ In *The Beast & The Sovereign Vol I*, Derrida discussed this awakening of ethical responsibility in the face of the other in context to a Lawrence poem and Levinasian ethics.²⁷ Derrida read the poem as registering regret in the actor's violence towards a snake who had arrived before the actor and their encounter.

So his ethics is announced or awakened in this scene of hospitality before a first comer whoever it be, and this ethics was formalized, confirmed ... He becomes aware ... he truly thinks what duty would have obligated him toward the living creature in general, in the figure of the snake, the snake's head, this snake that is a nonhuman living creature, who becomes in some sense the sovereign as other, as guest ... it is the guest ... that commands, the other as guest ... who commands.²⁸

Derrida recognised, or rather deconstructed, that within the idea of hospitality, are a number of tensions. They require the host to give up, at least to an extent, their own sovereignty, at least in regard to place, and in the Levinasian sense, through the vulnerability in being called to oneself by the face of the other. The duty of the host re-marks the host as hostage in that context of genuine hospitality.²⁹ In *Of Hospitality* Derrida also noted that hospitality

²⁵ Emmanuel Levinas, *Otherwise Than Being: Or Beyond Essence* (Alphonso Lingis trans, Duquesne University Press, 1998) 112, 127 [trans of: *Autrement qu'être* (first published 1974)] ('*Otherwise Than Being*'). See also Tamra Wright, Peter Hughes and Alison Ainley, 'The Paradox of Morality: An Interview with Emmanuel Levinas' in Robert Bernasconi and David Wood (eds), *The Provocation of Levinas: Rethinking the other* (Andrew Benjamin and Tamra Wright trans, Taylor and Francis, 2002) 168-80, 169-70 ('*Interview*'): Levinas is quoted as recounting the link between language itself, responsibility and the response to the face of the Other.

²⁶ Jacques Derrida, *The Beast & the Sovereign Volume I* (Geoffrey Bennington trans, University of Chicago Press, 2009) 244 [trans of: *Seminaire: La bete et le souverain Volume I (2001-2002)* (first published 2008)] ('*The Beast & the Sovereign Vol I*'); Jacques Derrida in Marie-Louise Mallet (ed), *The Animal That Therefore I Am* (David Wills trans, Fordham University Press, 2008) 107 [trans of: *L'animal que donc je suis* (first published 2006)] ('*The Animal That Therefore I Am*') 106; Derrida, *Of Hospitality*, above n 5, 125.

²⁷ Derrida, *The Beast & The Sovereign I*, above n 27, 236-46.

²⁸ Ibid 244.

²⁹ Ibid 244-45. See also Derrida, *Eating Well*, above n 2, 279; Jacques Derrida in Werner Hamacher and David E Wellbery (eds), *Adieu: To Emmanuel Levinas*, (Pascale-Anne Brault and Michael Naas trans, Meridian, 1999) 55 [trans of: *Adieu à Emmanuel Levinas* (first published 1997)] ('*Derrida's Adieu to Levinas*') citing Emmanuel Levinas, *Otherwise than Being or Beyond Essence* (Alphonso Lingis trans, Martinus Nijhoff, 1981) 114.

can be absolute or conditional in that hospitality is often awarded to a 'foreigner', but not an 'absolute other': that is, an other without a connection to the host.³⁰ Absolute or unconditional hospitality would require a paradoxical break with conditional hospitality that comes with its own rights and duties that limit hospitality that protect the interests of the host.³¹ Following Derrida, Naas explains that 'the laws of hospitality must be thought of as a response to the undeniable though always vulnerable and pervertible *experience of the other*.'³² In that way, the 'law' of hospitality is self-limiting and encloses both the host and guest. In the movement or the arrival of the guest from the status of absolute other to foreigner and guest, the host and the guest become subjects of the 'law' of hospitality.³³

Derrida also recalled the Kantian connection in *Perpetual Peace* whereby the naming of the other, in welcoming the other as guest, and by asking their name and thereby guaranteeing their identity (and I assume as a united self-presence), the guest becomes a subject of the law.³⁴ The link is drawn between nomination of identity as a *human* subject, that is of being signified, of being welcomed into a domain, and becoming subject to the sovereignty of the host's laws. Naas explains that the question 'what is your name?' can be thought of as including the beginnings of the relationship with, and experience of the other, of the opening of hospitality – of the 'becoming-law of justice, in the becoming-law of the other'.³⁵ He suggests that '[t]he question is already a response, perhaps responsible and perhaps not, to the experience of the other'.³⁶ The response here may be a response-of-sorts, rather than one that is fully awakened to, and free of, the tensions and aporias of hospitality and responsibility.

Derrida indicates there is an inescapable tension between the welcoming in hospitality, and its violent subjection.³⁷ Naas clarifies that unconditional hospitality simultaneously includes an appeal to, or desire for, Derrida's notion of justice.³⁸ That is where the host and the guest

³⁰ Derrida, *Of Hospitality*, above n 5, 25.

³¹ Ibid 25.

³² Michael Naas, 'Alors, qui êtes-vous?: Jacques Derrida and the Question of Hospitality' in Michael Naas, *Derrida From Now On* (Fordham University Press, 2008) 18-36, 25 (italics in original) (*'Derrida's Hospitality'*).

³³ Derrida, *Of Hospitality*, above n 5, 25, 27.

³⁴ Ibid 27.

³⁵ Naas, *Derrida's Hospitality*, above n 33, 25-26. In *The Gift of Death*, Derrida also briefly points toward the problem that through our names, we are beholden to, and accountable to, the general laws of responsibility. That is, we are accountable under what we are signified as under our names, by others. Whereas true responsibility requires, perhaps an impossible accountability, of what we hold private and secret, within that 'self' that is beyond how we are known by our public names: Derrida, *Gift of Death*, above n 6, 58. See also section C3.1.2 below.

³⁶ Naas, *Derrida's Hospitality*, above n 33, 25.

³⁷ Derrida, *Of Hospitality*, above n 5, 27, 29.

³⁸ Naas, *Derrida's Hospitality*, above n 33, 24-25.

desire the welcoming and sharing that is not hampered by economic return (in its non-monetary sense), or the risk of 'the worst', that is, violence being wrought by the other.³⁹ Conditional hospitality heeds that call to that unlimited justice, yet its laws take account of it and simultaneously destroy it.⁴⁰

C3.1.2 Hosts and hostages in law

The boundaries of hospitality are further complicated by Derrida in the contexts of technology, privacy and private property under the laws of a State. I mention this here in that it is relevant to State intervention in the protection of children and nonhuman animals that will be recalled in subsequent chapters of this research. Derrida referenced the complexities of internet technologies and States' self-made rights of surveillance that impinges on, what we believed had more clearly been defined in the past, as public and private domains.⁴¹ The hospitality of the State interrupts the hospitality we can enjoy in our own domains, 'at home', and the hospitality that we are able to offer others.⁴² Those restrictions impact on privacy and property rights.⁴³ For the State, just as it is for the individual, a power of denial of hospitality is exercised in order to remain sovereign over that domain.⁴⁴ To preserve itself and its own domain, the host, in hospitality, always subjects the guest to a 'limiting jurisdiction'.⁴⁵

C3.2 The aporias of responsibility in ethical decision making

Derrida highlighted at least three aporias that are repressed in decision making. When these are considered in light of decisions made that purport to be ethical in a general sense, it is clear that so-called ethical decisions are always deconstructible and ethically questionable. As described below, ethical decisions in favour of one, always compromise our ethical duties to others. Additionally, ethical decisions on the basis of one particular ethical rule or idea are always in conflict with other ethical rules and ideas, and in all cases, ethical decisions always involve a reduction in our response and perhaps responsibility to a level of generality that may undermine our response-ability.

³⁹ Ibid. See also Anderson, *Ethics*, above n 9, 52 citing Derrida, *Derrida's Adieu to Levinas*, above n 30, 111-12.

⁴⁰ Derrida, *Of Hospitality*, above n 5, 25.

⁴¹ Ibid 53, 55, 57.

⁴² Ibid 53.

⁴³ Ibid 51, 53.

⁴⁴ Ibid 55.

⁴⁵ Ibid 59.

C3.2.1 An ethical response to one, is violence to others

In *The Gift of Death*, Derrida highlighted the aporia that arises when we are called to responsibilities or duties.⁴⁶ When we address a singular duty we should recognise the possibility of its corresponding violence and failure in meeting our duties to all others.⁴⁷ There is a trade-off between meeting the singular duty – which Derrida describes as the absolute responsibility to that particular other, and its impacts on others. Responsibility to an other, constitutes irresponsibility to other(s).⁴⁸ It involves sacrifice and an economy of violence.⁴⁹

C3.2.2 Sacrifice of general responsibilities to others

There is also a trade-off between adherence to the ethical duty itself believed to be owed to that singular other, and other general duties and responsibilities one may concurrently owe to all others. The institution of ethical codes and rules masks and deprioritises what, or even who, is sacrificed.⁵⁰

As soon as I enter into a relation with the other ... I know that I can respond only by sacrificing ethics, that is, by sacrificing whatever obliges me to also respond, in the same way, in the same instant, to all the others.⁵¹

C3.2.3 Sacrifice through generalising language

It is language and rules that substitute the uniqueness of the decision with generality.⁵² There is a link to the basic violence of signification that consumes and suppresses otherness. Derrida explained that whilst the context of decision making is posited as coming from the singularity of the decision maker, once a person 'enters the medium of language, one loses that very singularity' as a generalization takes over and deprives the decision maker of their absolute singularity.⁵³ Anderson clarifies that Derrida's use of the term 'singularity' is in reference to what is 'irreducible, unrepeatable, heterogeneous and idiosyncratic'.⁵⁴ There is an acceding to the generality of ethical rules as a substitute.⁵⁵ This

⁴⁶ Derrida, *Gift of Death*, above n 6, 59-62. See also, Anderson, *Ethics*, above n 9, 14.

⁴⁷ Derrida, *Gift of Death*, above n 6, 59-62.

⁴⁸ Ibid 61-62, 68-69. See also, Anderson, *Ethics*, above n 9, 13, 16.

⁴⁹ Derrida, *Gift of Death*, above n 6, 68-69.

⁵⁰ Ibid 68. See also, Anderson, *Ethics*, above n 9, 16: Anderson clarifies that sacrifice in this sense for Derrida 'is the condition of every decision or choice'.

⁵¹ Derrida, *Gift of Death*, above n 6, 68. See also Nicole Anderson, 'deconstruction and Ethics: An (ir)Responsibility' in Claire Colebrook (ed), *Jacques Derrida: Key Concepts* (Routledge, 2015) 48-57, 55 ('(ir)Responsibility').

⁵² Derrida, *Gift of Death*, above n 6, 60-61.

⁵³ Ibid 60.

⁵⁴ Anderson, *Ethics*, above n 6, 13.

⁵⁵ Derrida, *Gift of Death*, above n 6, 61.

is despite our general belief that ethical decision-making is a testament to our autonomy. Derrida suggests that the substitution through language and rules deprives the decision maker of their true liberty and responsibility.⁵⁶ Yet, problematically, responsibility can only be delivered through speaking, otherwise, one does not respond or answer for themselves.⁵⁷

In elaborating this aporia, in *Gift of Death*, Derrida also made reference to Kierkegaard's exploration of sacrifice⁵⁸ in the generalization that occurs through language, decision making and speaking.⁵⁹ Sacrifice here is 'the putting to death of the unique in terms of its being unique, irreplaceable, and most precious'.⁶⁰ It includes the passage from a private, silent decision made by myself in my singularity, through to the possibilities of its justification as I can announce it in language.⁶¹ In justifying myself in language, to account for myself, I must speak and therefore 'dissolve my singularity'.⁶² It is possible that my true 'liberty' and 'responsibility' is abandoned or escapes.⁶³ In considering this problem, I perceive that to some degree, my reasons are reduced and recast as they are forced through the forges of signification, rationality, and my moral and ethical frames. Of course, those factors, or factories, may often influence the forming of my decision, but they are not the only raw materials of my decision making, as I may take account of, or repress my other-than 'rational' response. Neither can I claim that my decision making is a fully conscious process. Sometimes, or perhaps often, reactions are a matter of the body more than the mind (if there actually is such a distinction).⁶⁴ Borrowing Derrida's words, I could say that I 'respond without [truly] responding',⁶⁵ and that no other will ever know me, in that they could never live in *my* trace.

Most often we neither know what is coming upon us nor see its origin; it therefore remains a secret. We are afraid of the fear, we anguish over the anguish, and we tremble. We tremble in that strange repetition that ties an irrefutable past (a shock has been felt, a traumatism has already affected us) to a future that cannot be anticipated; anticipated but unpredictable;

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Derrida, *Gift of Death*, above n 6, 56-65 citing Søren Kierkegaard, 'Fear and Trembling by Johannes de Silentio' in Howard V Hong and Edna V Hong (eds), *Fear and Trembling/Repetition: Kierkegaard's Writings Volume 6* (Howard V Hong and Edna V Hong trans, Princeton University Press, 1983) [trans of: *FGrygt og bœ ven and of Gjentagelsen*]. No first published date is listed in this English translation.

⁵⁹ Derrida, *Gift of Death*, above n 6, 60-61.

⁶⁰ Ibid 58.

⁶¹ Ibid 60 citing Kierkegaard, above n 60, 113.

⁶² Derrida, *Gift of Death*, above n 6, 61.

⁶³ Ibid 60.

⁶⁴ See also Chapter 3, section 3.1.

⁶⁵ Derrida, *Gift of Death*, above n 6, 59.

apprehended, but, and this is why there is a future, apprehended precisely as unforeseeable, unpredictable; approached as unapproachable.⁶⁶

As described by Derrida, it is a 'paradox' or 'scandal' that responsibility is usually tied to what is said and what is public.⁶⁷ In light of the above, what is made public cannot be a true account. I am unable to fully account for my own decisions. *What is me* withholds the secret and the unknowable that remains unspeakable. Deconstructed, I must confess that I may not be able to hold myself to account, and others' judgments of my reactions and decisions are likely to remain ill-informed. This idea of course, further undermines the foundations of law, testimony, witnessing, knowledge, and even 'truth'.

C3.2.4 Responsibility incites 'irresponsibility'

At base, I suspect that *what I am* functions primarily on the différential, substitutive, economic circularity that Derrida infers. Yet, our obligation toward a conformance with generalised ethical, and of course legal rules compels reduction and negation of more accurate, or fuller reasoning and responsibility. Derrida complains that 'responsibility' as formed through generalised ethical rules is an incitement toward irresponsibility.⁶⁸ I cannot escape the aporia of the sacrifice of either the singular or the general in terms of who and what is involved in my decision. Even if I am consciously or not-consciously concerned with economic return, incentive remains to protect my secrets lest I subject myself to moral or ethical condemnation. Neither may I be rewarded in offering justifications that do not conform with whatever rationality is perceived applicable in that context. Intuitive, emotional, physically-driven and physical reactions may not be accepted as valid reasons for decisions particularly when those decisions deliver consequences for others. Through Derrida's and Kierkegaard's lenses, responsibility as we normally conceive it, is a reducing, generalizing concept.⁶⁹ From this perspective, decision making and justifications for 'responsibility' are conceptualised and generalized. In the process, unreduced and absolute responsibility that does not reduce the otherness within myself or the otherness of others, is subsumed. General responsibility and its ethical constructions are therefore described by Derrida as 'irresponsibilization'.⁷⁰ The same aporias, paradox and scandal inhabit notions of duties that

⁶⁶ Derrida, *Gift of Death*, above n 6, 54 (italics in original).

⁶⁷ Ibid 60.

⁶⁸ Ibid 61.

⁶⁹ Ibid citing Kierkegaard, above n 60, 115.

⁷⁰ Derrida, *Gift of Death*, above n 6, 61. See also Anderson, *Ethics*, above n 9, 15.

function by way of these same sacrifices.⁷¹ Derrida suggested that recognition of these aporias is metaphysical conceptual thinking pushed to its limits.⁷²

C3.2.5 The mere following of rules cannot render Derridean justice

Following the above, and what Derrida explained in *Force of Law* for example, the application of generalised rules, which may be described as ethical or legal, always imposes a violence. It may be lawful but cannot be just.⁷³ The mere following of rules or laws, without consideration of the parties, as others and in all their otherness (which is unknowable and cannot be anticipated), in each case, cannot render Derridean justice. It is further complicated in any assumption of the decision maker's united self-presence and purported autonomy, as they deny their own inherent otherness.⁷⁴ Ultimately, any decision is one that chooses, makes a preference, and a judgment, and in that process, otherness is always discounted. As described above, acting justly or ethically from one perspective is always an injustice to others.⁷⁵ Decision making as we experience it, makes unjust and, to an extent, necessarily less-than-fully-informed assumptions. It requires a leap of faith, that is, the kind of madness that constructs logic, perhaps in so-called rationality.⁷⁶ That otherness of undecidability in decision making is also denied. To impose a code of ethics or coded rules to be merely followed cannot be just in any of those senses, but it can be deemed to be just, or even legally just, in that it is a consistent following of rules.⁷⁷

C3.2.6 Derrida's justice: beyond and before economic return and reparation

De Ville highlights a necessary implication of Derrida's thinking of trace and *différance*. With reference to Derrida's texts including *Envoi*,⁷⁸ and *Spectres of Marx*, de Ville explains that since there must be 'death in life', there is also a disjunction in time and beingness.⁷⁹ Presence as we have perceived it, is not constant. In *Envoi*, Derrida argued that if trace and *différance* operate as he proposes, then we must question how we signify, and how we

⁷¹ Derrida, *Gift of Death*, above n 6, 68.

⁷² Ibid.

⁷³ Derrida, *Force of Law*, above n 1, 961.

⁷⁴ Ibid. See also de Ville, above n 8, 19.

⁷⁵ See eg, Derrida, *Gift of Death*, above n 6, 68-69. See also Jonathan Roffe, 'Ethics' in Jack Reynolds and Jonathan Roffe (eds), *Understanding Derrida* (Continuum, 2004) 37-45, 43-44.

⁷⁶ See, eg, Derrida, *Force of Law*, above n 1, 967.

⁷⁷ Ibid 961-63. See also Appendix 1, Part B, section B3.4.

⁷⁸ Jacques Derrida, 'Envoi' (Peter Caws and Mary Ann Caws trans) in Peggy Kamuf and Elizabeth Rottenberg (eds), *Psyche: Inventions of the Other Volume I* (Peggy Kamuf et al trans, Stanford University Press, 2007) 94-128 ('*Envoi*').

⁷⁹ de Ville, above n 8, 188-191. See also Anderson, *Ethics*, above n 9, 94-96; Appendix 1, Part A, section A3.5.

conceptualise.⁸⁰ If everything we know is a result of referring to traces, then, there is no true signification of things or ideas as they 'are' but a continual construction of them as ideas through divisions of differences.⁸¹ If that is the case, then there cannot ever be 'destiny', as something that is 'guaranteed to gather itself up, identify itself, or determine itself'.⁸² Yet, our metaphysical casting of representations into the future as concepts (including our own ipseities),⁸³ as stabilisable, as existing, as continual, is what enables 'meaning, presence, truth, language, theme, thesis, and colloquium'.⁸⁴ In relation to law, Derrida highlighted the metaphysical workings of its 'presence'. Even though law is something that we perceive as something 'gathered up' and conceivable, it still remains as a whole, something that 'exceeds every representation'.⁸⁵ I understand that he was highlighting two things. Firstly, it is trace and *différance* that enables this 'thinking' and tendency to believe in conceptual things that do not exist. Things such as 'law' as a whole, are things that we conjure, and crudely reconstruct at every thought of it. Secondly, that there is a gap that he deconstructed in our perceptions of presences, in that whilst we may conceive of 'law' as a whole, it shows that we can still maintain belief in, and endow presence on, something totally other and ungraspable. Perhaps, that proves that an *opening* remains possible, for the impossible.

In another approach, in *Spectres of Marx*, Derrida spoke of his notion of justice as something that cannot be 'gathered up' and cast into the future as a concept, as a graspable presence.⁸⁶ That is, it should not and cannot be gathered up where there is recognition of the disjunction in time, space and Being.⁸⁷ This proposition follows the logic that historically, Western law has instituted justice on the basis of reparation,⁸⁸ of righting past wrongs in the present through punishment.⁸⁹ That thinking, of course, involves a tying of the past to the present, of making the past and the future a part of the present. De Ville explains that recognition of the disjuncture 'opens the possibility of a notion of justice which exceeds the circularity of economic exchange'.⁹⁰ As such, Derrida's notion of justice requires 'giving beyond the due, the debt, the crime or the fault'.⁹¹ Derrida's justice therefore opens a new future, an unknown future, because his justice is *not* tied to the past, to any debt that is

⁸⁰ Derrida, *Envoi*, above n 80, 127-28.

⁸¹ Ibid 127.

⁸² Ibid 128.

⁸³ Ibid 127.

⁸⁴ Ibid 128.

⁸⁵ Ibid.

⁸⁶ Derrida, *Spectres of Marx*, above n 3, 27.

⁸⁷ Ibid.

⁸⁸ Ibid 25, 27-28.

⁸⁹ See also de Ville, above n 8, 190.

⁹⁰ Ibid 191.

⁹¹ Ibid 190 citing Derrida, *Spectres of Marx*, above n 3, 24-29.

due.⁹² Properly thought, any form of justice cannot be something that is a presence, that can be given by one who does not possess it, to another.⁹³ Derridean justice is beyond (and before) economic exchange.⁹⁴ As I understand it, that includes negation of the rewarding through presence(s).

C3.2.7 Justice deferred is not justice rendered

With reference to *Rogues*⁹⁵ and *Force of Law*, Lawlor discusses Derrida's references to 'the Kantian regulative idea'⁹⁶ and its inadequate equation to a horizon of sorts.⁹⁷ Lawlor explained that in Derridean thinking, regulatory ideas are reduced to 'nothing more than an ideal possibility that is deferred'.⁹⁸ Derrida objected to the metaphysical thinking that justice can be delivered even though it remains an ideal cast into the future. He argued that 'justice, however unrepresentable ... must not wait'.⁹⁹ It is not that Derrida was claiming that justice could be rendered immediately, but that a further aporia that should not be masked, is at work in decision making.¹⁰⁰ Justice requires the decision or judgment to be made immediately, yet, that means that the judgment is made with limited knowledge (as a kind of madness). The performativity of claims and decision making 'presupposes the dimension of justice ... which never proceeds without a certain dissymmetry and some quality of violence'.¹⁰¹ It would also always proceed in context to the limitations on 'truth' and the impossibility of knowing the true singularity of others as described in the previous subsections.

C3.2.8 Contaminations and impossibilities

As demonstrated in his deconstruction of hospitality, aporia stems from the inherent contamination of what we believe to be oppositional concepts.¹⁰² Firstly, it is the opposite, the otherness of the particular concept itself that defines and makes that concept possible or

⁹² Derrida, *Spectres of Marx*, above n 3, 26-27.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Jacques Derrida, *Rogues* (Pascale-Anne Brault and Michael Naas trans, Stanford University Press, 2005) 122-23 [trans of: *Voyous* (first published 2003)] ('*Rogues*').

⁹⁶ See Derrida, *Force of Law*, above n 1, 969.

⁹⁷ Lawlor, *Not Sufficient*, above n 7, 90-91: Lawlor discusses it in a richer context of Derrida's analysis of death, waiting and lateness.

⁹⁸ Ibid 90 citing Jacques Derrida, 'Force of Law: The Mystical Foundation of Authority' (trans Mary Quaintance) in Drucilla Cornell, Michael Rosenfeld and David Gray Carlson (eds), *Deconstruction and the Possibility of Justice* (Routledge, 1992) 3-67, 57-60; Derrida, *Rogues*, above n 97, 122-23.

⁹⁹ Derrida, *Force of Law*, above n 1, 967. See also Anderson, *Ethics*, above n 9, 79-80.

¹⁰⁰ Derrida, *Force of Law*, above n 1, 967.

¹⁰¹ Ibid 969.

¹⁰² Derrida, *Of Hospitality*, above n 5, 79, 81, 83, 135; Derrida, *Gift of Death*, above n 6, 70: 'There is no front between responsibility and irresponsibility but only between different appropriations of the same sacrifice'.

meaningful.¹⁰³ For example, absolute hospitality cannot exclude conditional hospitality. Secondly, benefits in favour of the singular, result in detriment to the general. Responsibility to one, is at the cost of irresponsibility to others.¹⁰⁴ A duty owed in favour of one, is a negation of a duty owed to others. Thirdly, justice rendered through law may only be reparation or retribution, and justice deferred. Justice rendered, is reduced to justice in accordance with prescribed legal rules. Fourthly, it seems unlikely that pure hospitality or pure altruism (as examples) are impossible in the sense that they always include some form of economic return. Hence, responsibility is infected by irresponsibility, duty envelops failure of duty, justice in its narrow rule-following sense is blinded to injustice. Conditional, and unconditional or absolute hospitality, are infected by each other. Absolute hospitality would either be temporary or impossible.¹⁰⁵ Altruism is constituted by self-interest, and the ethical is contaminated by the non-ethical.¹⁰⁶

C4 Derrida's justice as a future to come

C4.1 Différance opens to otherness and Derrida's justice

As explained in Appendix 1, Part A,¹⁰⁷ Derrida proposed that *différance* opens a place for welcoming of the other and otherness.¹⁰⁸ He suggested that we function in responding *before* we consume through language and reason, and *before* we enter into our usual mode of economic calculation. Derrida did not limit this possibility to human animals.¹⁰⁹ This inherent initial functioning in responsiveness is not only demonstrative of our dependence on others and otherness, but it is also a possibility as an opening toward a functioning that is alive to that dependence. It is also toward a responsibility that is excessive,¹¹⁰ that is at the

¹⁰³ See Geoffrey Bennington, 'Deconstruction and Ethics' in Geoffrey Bennington, *Interrupting Derrida* (Routledge, 2000) 34-46, 41-43 ('*Deconstruction and Ethics*'). See also Anderson, *Ethics*, above n 9, 80-81.

¹⁰⁴ See sections C3.2.1-C3.2.5 above; Anderson, *Ethics*, above n 9, 16.

¹⁰⁵ Derrida, *Of Hospitality*, above n 5, 75, 77, 79. See also Naas, *Derrida's Hospitality*, above n 33, 20-24.

¹⁰⁶ See also Anderson, *Ethics*, above n 9, 52.

¹⁰⁷ See Appendix 1, Part A, section A4.

¹⁰⁸ See also Anderson, *Ethics*, above n 9, 120.

¹⁰⁹ Derrida, *Eating Well*, above n 2, 276.

¹¹⁰ See, eg, *ibid* 272, 276: 'Something of this call of the other must remain nonreappropriable, nonsubjectivable, an in a certain way nonidentifiable, a sheer supposition, so as to remain *other*, a *singular* call to response or to responsibility' (italics in original). At 286 Derrida further articulated what he meant by the excessive necessity of responsibility – in that it must 'never authorize any silence', and there he was discussing the violence of Auschwitz. He said 'responsibility is excessive or it is not a responsibility. A limited, measured, calculable, rationally distributed responsibility is already the becoming-right of morality'. See also, Derrida, *Force of Law*, above n 1, 955-56, 970-71: the justice

same time, before and beyond *prescriptive* economic calculation.¹¹¹ Derrida calls for that different functioning that is awakened to: our own alterity, to our own workings within an inheritance that can be open to change, to the limitations of how we have ‘reasoned’ to date, and the violence of our logocentrism that we should work to ameliorate.¹¹² I understand that all of this underpins, and are requirements of, a working toward Derrida’s justice and that it is a call to deconstructions. In *Eating Well*, Derrida brought together some of these key contentions and his desire for us to work toward escaping that violence:

[T]hen as concerns “Good” [*Bien*] of every morality, the question will come back to determining the best, most respectful, most grateful and also most giving way of relating to the other and of relating the other to the self ... “One must eat well” does not mean above all taking in and grasping in itself, but *learning* and *giving* to eat, learning-to-give-the-other-to-eat. One never eats entirely on one’s own: this constitutes the rule underlying the statement, “One must eat well.” It is a rule offering infinite hospitality ... One must eat well – here is a maxim whose modalities and contents need only be varied, *ad infinitum* ... [one has to have] respect for the other at the very moment when, in experience... one must begin to identify with the other, who is to be assimilated, interiorized, understood ideally (something one can never do absolutely without *addressing oneself to the other* and without absolutely limiting understanding itself, the identifying appropriation) ... and respect the law that is at once a voice and a court (it hears itself, it is *in us* who are before it). The sublime refinement involved in this respect for the other is also a way of ‘Eating well,’ in the sense of “good eating” but also “eating the Good” ... the Good can also be eaten. And it, the good, must be eaten and eaten well.¹¹³

C4.2 Différential opening to ‘letting be’

Derrida’s ‘eating well’ has a relation to his question about the possibility of ‘letting be’ in *The Animal That Therefore I Am*.¹¹⁴ Derrida began a further deconstruction of Heidegger’s

and responsibility of deconstruction and transformation must be beyond limits that we normally presume.

¹¹¹ See, eg, Derrida, *Force of Law*, above n 1, 971: Calculation (reasoning) is still required to ameliorate the risks of the possibilities of the worst scenarios arising, however justice must be in excess of prescription.

¹¹² See also Derrida, *Eating Well*, above n 2, 282: Derrida lamented that, in regard to contemporary ‘ethics’ and consumption through signification and rationality, that:

[t]he question is no longer one of knowing if it is [a human] “good” to eat the other or if the other is “good” to eat, nor of knowing which other. One eats him regardless and lets oneself be eaten by him. The so-called non-athropophagic cultures practice symbolic anthropology and even construct their most elevated socius, indeed the sublimity of their morality, their politics, and their right, on this anthropophagy.

¹¹³ Ibid 282-83 (italics in original) (punctuation is as it appears in original).

¹¹⁴ Derrida, *The Animal That Therefore I Am*, above n 27, 159-60.

proposition of nonhuman animal beingness.¹¹⁵ Derrida questioned Heidegger's assertion that nonhuman animals cannot perceive of others as they [really] are, that is, as they are in their beingness, 'as such', without nomination in terms of their utility.¹¹⁶ In a reversal, Derrida asked whether *human animals* can perceive the 'as such'.¹¹⁷ That is, without consumption through signification, as effected by our own designs.¹¹⁸ Derrida left open the question whether that consumption is a function not only of language, but of life itself, since to perceive of something as it is, would mean to see it as if we were not there, as if we were dead.¹¹⁹ He asked whether we can perceive of an other, I surmise in the fullness of its living, without the application of any 'knowledge', and uninfected by our already-determined, definitions of 'being'.¹²⁰

That question of 'letting be' and the relation to ethics was also canvassed, much earlier, by Derrida in *Violence and Metaphysics*.¹²¹ There, he examined the opinions of Levinas and Heidegger, and their proposed connections between definitions of beingness and ethics. Derrida traversed the difficulties in presupposing what beingness *is*, prior to determining whether respect for an other should be awarded.¹²² He argued that to submit beingness to definition or categorisation is already an undermining of ethics.¹²³ That submission and limitation through categorisation would not allow otherness to be recognised fully in its alterity.¹²⁴ Therefore, others that are completely other, are at risk of not being considered Beings, and consequently not subjects of responsibility and ethical treatment. That ontology already incorporates closure. It raises the possibility of the impossibility of any 'letting be', and particularly outside of any humanism including Cartesianism.¹²⁵ Yet, recognition of beingness and respect for the other, for what they are, or who they are, *is* [what should be] ethics.¹²⁶ In *The Animal That Therefore I Am*, Derrida explained that his 'strategy', in his desired deconstruction of Heidegger's text, would be to complicate, to pluralize and vary, the

¹¹⁵ Ibid 141-160. Derrida's accounting of Heidegger's views are briefly canvassed in this research: see Appendix 1, Part A, section A2.1, Appendix 1, Part D, section D3.5.

¹¹⁶ Derrida, *The Animal That Therefore I Am*, above n 27, 159-60 citing Martin Heidegger, *Being and Time* (John Macquarrie and Edward Robinson trans, Harper and Row, 1962) 253 (*Being and Time*). See also Lawlor, *Not Sufficient*, above n 7, 48-53.

¹¹⁷ Derrida, *The Animal That Therefore I Am*, above n 27, 160.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Jacques Derrida, 'Violence and Metaphysics: An essay on the thought of Emmanuel Levinas' in Jacques Derrida, *Writing and Difference* (Alan Bass trans, Routledge, 1978) 97-192 ('*Violence and Metaphysics*') [trans of: *Writing and Difference* (first published 1967)].

¹²² Ibid 168-88.

¹²³ Ibid 174-77.

¹²⁴ Ibid 176.

¹²⁵ See, eg, ibid 172-79.

¹²⁶ Ibid 172.

so-called 'as such' of the living.¹²⁷ To show that life cannot be captured within the terminology of any 'essence', of any kind of animality, nonhuman or human.¹²⁸ He wanted, in this way, to undermine the entire 'question of being'.¹²⁹ Derrida already went a long way toward that goal in his insistence that trace and *différance* are what affect beingness and life. I surmise that Derrida's possibility of the 'letting be' of an other, which must also be a non-carnophallogocentric bearing, is also an opening toward his 'impossibles' of absolute hospitality, responsibility, ethics and justice. A bearing, and a kind of carrying,¹³⁰ without their sacrifice, and without economic return. It also seems to intimate that the possibility of letting be, that is to recognise without signifying consumption, can *only* begin to occur in the 'dead' moment, in the spacing, in *différance*,¹³¹ if we could harness it. That is, in the moment of non-recognition of the other, as their, living response to us, calls us to our ipseity, in our empty space of response, before we apply any so-called 'knowledge' or name, and before we decide its', or their, beingness.¹³² To see that other without naming, as another animot.¹³³

C5 Toward Derridean justice

C5.1 Derrida's call to awakening and response-ability

As outlined above, Derrida guides us to understand that rule making and decision making is never as simple or transparent as metaphysics has led us to believe.¹³⁴ In addressing that, we need to recognise that our own claims to ascendancy, that is human sovereignty over others, that has been deemed to justify our current form of rule and decision making, is, from

¹²⁷ Derrida, *The Animal That Therefore I Am*, above n 27, 160.

¹²⁸ Ibid.

¹²⁹ Ibid. See also Jacques Derrida in 'Implications: Interview with Henri Ronsse' in Alan Bass (ed), *Positions: Jacques Derrida* (Alan Bass trans, Athlone Press, 1981) 1-14, 10 ('*Implications*'):

... by going to the end of this thought of the truth of Being, we would have to become open to a *différance* that is no longer determined, in the language of the West, as the difference between Being and beings ... [*différance* ... therefore would name provisionally this unfolding of difference, in particular, but not only, or first of all, of the ontico-ontological difference.

¹³⁰ See Derrida, *Beast & The Sovereign Vol I*, above n 27, 258-59. See also Lawlor, *Not Sufficient*, above n 7, 92-96; Kelly Oliver, 'The Poetic Axis of Ethics' (2014) 7(2) *Derrida Today* 121, 127-136.

¹³¹ See, Appendix 1, Part A, section A3.5. Jacques Derrida, 'Linguistics and Grammatology' in Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak trans, John Hopkins University Press, 1997) 27-73, 69 (italics in original) (spelling is as it appears in the text) ('*Linguistics*'): '... signification is formed only within the hollow of difference'.

¹³² See Appendix 1, Part A, sections A4.1-A4.2.

¹³³ See Appendix 1, Part D, section D2.3.

¹³⁴ See also Appendix 1, Part A, section A3.5, Paul Livingston, 'Derrida and Formal Logic: Formalising the Undecidable' (2010) 3(2) *Derrida Today* 221-39, 236-37: Livingston discusses Derrida's call for awareness of our entire system of decision making and its 'inclosure' and its workings that mask the possibility of genuine decision making.

a Derridean perspective, falsely and violently instituted. We need to be awakened to our own 'writing', that which has given rise to the disavowal of our own lack of response-ability.

In contrast to Lacan's notions of ethics and duties that are only owed to one's 'fellows', Derrida's justice starts with a duty and responsibility toward beings that are most other (including human animals not considered 'fellows').¹³⁵ Hence, Derridean responsibility, ethics and justice is beyond ideas of 'rights' as we currently conceive them.¹³⁶ Derrida declared:

So long as there is recognizability and fellow, ethics is dormant. It is sleeping a dogmatic slumber. So long as it remains human, among men, ethics remains dogmatic, narcissistic, and not yet thinking. Not even thinking the human that it talks so much about.

The "unrecognizable" is the awakening. It is what awakens, the very experience of being awake.¹³⁷

Derrida argued that whilst we might *feel* a greater responsibility toward beings most like us, that should never be the basis for rights, ethics or politics.¹³⁸ Our compassion and duty should not be limited to recognition of ourselves.

C5.2 Derridean 'ethics' is not a code

Roffe confirmed that both Levinas and Derrida rejected the traditional positing of ethics as based on the belief of a united self-presence, of 'intersubjectivity', or 'ethics as equality', that is reflected in predominant western thought from 'Kant to utilitarianism'.¹³⁹ What is important to note is that Derrida did not prescribe any code for moral or ethical behaviour.¹⁴⁰ He suggested that to do so would render injustices relative to the aporias as explained above. Rather, Derrida required that we strive to deal with the incalculable, to take it as far as we can toward justice.¹⁴¹ At the same time, he did not renounce the necessity and inescapability of calculation:

[A]mong other things, the subject is also a principle of calculability – for the political ... in the question of legal rights ... and in morality. There has to be some calculation, and this is why I have never held against calculation ... I believe there is no responsibility, no ethico-political

¹³⁵ Derrida, *The Beast & The Sovereign Vol I*, above n 27, 108.

¹³⁶ Ibid. See also de Ville, above n 8, 162-64.

¹³⁷ Derrida, *The Beast & The Sovereign Vol I*, above n 27, 108.

¹³⁸ Ibid 109.

¹³⁹ Roffe, above n 77, 41-42. See also Anderson, *(ir)Responsibility*, above n 53, 53: citing Derrida, *Violence and Metaphysics*, above n 123, 145: Anderson notes that Derrida disputed that Levinas successfully addressed the violence in the denial of otherness as Levinas did not escape 'the language of metaphysics'.

¹⁴⁰ See also Bennington, *Deconstruction and Ethics*, above n 105, 34: Derrida's deconstruction includes deconstruction of ethics and delivers something 'archi-ethical' in analysis of ethics.

¹⁴¹ Derrida, *Force of Law*, above n 1, 971.

decision, that must not pass through the proofs of the incalculable or the undecidable. Otherwise everything would be reducible to calculation, program, causality'.¹⁴²

What he did urge, was that we do not settle for pre-defined norms and to 'reconsider, and so to reinterpret the very foundations of law such as they had previously been calculated or delimited', as has occurred in past 'emancipatory battles'.¹⁴³ Anderson highlights that Derrida recognised ethical codes as constructs of metaphysics, that is, precisely what he targeted in his deconstructions.¹⁴⁴ Derrida described the 'deconstruction experience' as a 'responsibility, even an ethico-political responsibility' that can open 'ethico-political questions'.¹⁴⁵ Derrida's work was driven by his notion of justice without perpetuating the idea that systematised rules could justly address the aporias inherent in decision making.¹⁴⁶ As Anderson describes, deconstruction of ethics provides 'a more nuanced' responsibility, in its taking into account otherness and difference.¹⁴⁷ For de Ville, Derridean justice as it could be received in law, calls for 'an unbearably risky negotiation' beyond prescribed rules and norms, as 'a madness' beyond the usual strictures of law and rationality, that in its 'exposure' welcomes a 'chance for decision, for responsibility' that is beyond economic return.¹⁴⁸

C5.3 Anderson's Derridean 'Ethics Under Erasure'

Rather than proposing what seems to be an impossible solution to the question of who, or even *what* responds, Anderson suggests that Derrida's dislodgement of the transcendental subject invites a more considered approach to the problem of 'ethics'.¹⁴⁹ With appreciation of the workings and limitations of trace (which Anderson describes as 'context') and *différance* (or 'play'): that is within the limitations of what we may already have experienced or appear to 'know', and the limitations of language itself, Anderson follows Derrida's deconstructive thread.¹⁵⁰ Anderson agrees with Derrida that the ambiguities in decision making highlighted by deconstruction and *différance* open the way to a 'free', or perhaps a more free response

¹⁴² Derrida, *Eating Well*, above n 2, 272-73.

¹⁴³ Derrida, *Force of Law*, above n 1, 971.

¹⁴⁴ Anderson, *(ir)Responsibility*, above n 53, 50.

¹⁴⁵ Jacques Derrida, 'Counter-Signatures' in Elizabeth Weber (ed), *Points ... Interviews* (Peggy Kamuf trans, Stanford University Press, 1995) 365-371, 364 [trans of: *Points de suspension, Entretien* (first published 1992)].

¹⁴⁶ See, eg, Anderson, *(ir)Responsibility*, above n 53, 50-56.

¹⁴⁷ Ibid 56.

¹⁴⁸ de Ville, above n 8, 163.

¹⁴⁹ Anderson, *Ethics*, above n 9, 72.

¹⁵⁰ Ibid.

in light of those revelations, and appreciation of 'ethical' decision making aporias.¹⁵¹

Anderson explains that:

the play of differences opens, rather than closes, ethical possibilities ... [and that] *différance* also allows for a simultaneous reconceptualization of subjectivity that is not, or is not only, founded on a liberal humanist philosophy and ethics.¹⁵²

In response to the aporias of responsibility and ethics highlighted by Derrida, and following Derrida's technique of *sous rature*,¹⁵³ Anderson offers what she calls 'ethics under erasure'. She aims to capture, and claims to extend, an articulation of those paradoxes.¹⁵⁴ I quote her in full here to avoid offending her unique proposition. She explains:

Ethics under erasure not only reveals this aporia or paradox ('irresponsibilization') between absolute responsibility and ethical duty (general), or the inextricable relation between the two, but the phrase also attempts to capture the debt to, and acknowledgement of, ethics at the moment it is betrayed by our absolute responsibility to the singular Other/event...

Furthermore, ethics under erasure extends the condition of paradox of aporia articulated [by Derrida] in *The Gift of Death*, by revealing not only the sacrifice constitutive of every ethical decision, but the *negotiation* inherent in every sacrifice. There is a negotiation between not only the singular and the general, between absolute responsibility and ethics, respectively, but also between one singularity and another; one general principle of duty (ethical theory) and another. It is a question of not only *who* we sacrifice, but *what* we sacrifice. Bringing under erasure together with ethics, then, encapsulates how our singular ethical responses to 'others' entails *negotiation* with and within ethical systems (and hence social values and norms built on those systems) that carry universal status. It entails a negotiation with our ethical inheritance.¹⁵⁵

It appears that for Anderson, a responsible decision then, must start with recognition, rather than masking of aporias, and the unveiling of negotiation between ethical rules and duties, and the impacts on all others, and the sacrifice of other ethical rules and values. She demands recognition of the sacrifices made in that negotiation. In concordance with Derrida,

¹⁵¹ Ibid 72-73.

¹⁵² Ibid 73.

¹⁵³ Derrida, *Linguistics*, above n 133, 60: This Derridean practice involves using words and their meanings as we currently appreciate them and striking them out with a cross and leaving them still legible. At 60-61: it puts the word, its meaning and its trace 'under erasure'. This sign upon the sign signals a desire to utilise a sense of that word's meaning whilst at the same time recognising its trace and the consequences of our system of meaning-making. At 61: Derrida proposed that this would 'mark the [place] of that future meditation'.

¹⁵⁴ Anderson, *Ethics*, above n 9, 17.

¹⁵⁵ Ibid.

Anderson does not reject the need for calculation, but rather it appears she demands proof of informed decision making, perhaps a justification of what it is proposed as a response.

C5.4 De Ville's calls to lawyers of the future

De Ville also offers a deep contextual analysis of Derrida's justice and responsibility.¹⁵⁶ He also highlights the negotiation that Derrida suggested is necessary in a movement toward Derridean justice and a differentiated future.¹⁵⁷ De Ville recounts the relationship between Derrida's arguments about conceptualisation, iterability, the making of presences, the usual opposing of singularities to generalities, and economies at work.¹⁵⁸ He proposes that Derrida's deconstruction of law and ethics reveals their closure within metaphysical thinking.¹⁵⁹ Derrida's deconstruction of law and our usual determination of justice, shows that they limit or prohibit the coming of a different future, of Derridean justice, that lets otherness arrive without mastery, sovereignty and the application of economy.¹⁶⁰ What is required, in de Ville's interpretation, whilst impossible, is an openness to the other where 'decisions' are made not through calculable rules, and not through belief in the autonomy of the decision maker, but rather a 'passive and unconscious' response in hospitality that allows the other to come,¹⁶¹ and to come without our signification.¹⁶² What Derrida reveals, or rather deconstructs, is our own thinking of ourselves, that is, our metaphysical construction of subjectivity.

De Ville's call to philosophers of law, to those open to the arriving of a differentiated future,¹⁶³ is to 'bring to the fore the aporia within every legal concept, to move law beyond what is simply possible... to expose [what in legal texts] makes [those] texts possible in the first place'.¹⁶⁴ That is, to deconstruct legal texts and conceptualisation, and to tempt 'a movement away from essence, consistency and truth towards the (dangerous) logic of the perhaps.'¹⁶⁵

¹⁵⁶ See, eg, de Ville, above n 8, 143-50.

¹⁵⁷ Ibid 143-50, 163.

¹⁵⁸ Ibid 143-50.

¹⁵⁹ Ibid 149-50.

¹⁶⁰ Ibid 150.

¹⁶¹ Ibid 151 citing Derrida, *Politics of Friendship*, above n 4, 68-69.

¹⁶² Ibid 152 quoting Derrida, *Derrida's Adieu to Levinas*, above n 30, 111.

¹⁶³ de Ville, above n 8, 198.

¹⁶⁴ Ibid 199.

¹⁶⁵ Ibid citing Derrida, *Politics of Friendship*, above n 4, 29.

C5.5 Lawlor's interpretation of Derrida's justice for nonhuman animals

Specifically in relation to Derrida's calls for justice for nonhuman animals, Lawlor translated and interpreted Derrida's plea in *The Animal That Therefore I Am*.¹⁶⁶ Lawlor proposed that Derrida argued for the 'least violent' response, a weak response,¹⁶⁷ through an 'unheard-of grammar ... that wanted to do no harm [*mal*] to the animal'.¹⁶⁸ Lawlor continues with his interpretation of Derrida and suggests that if we should think 'like poets (and not like philosophers and scientists)',¹⁶⁹ we could interpret that nonhuman animals do suffer, 'just like us', and if that is the case, 'then what must happen, is that we, we humans, must stop, as much as possible, sacrificing animals for our sake'.¹⁷⁰ That would require an approach that is beyond the inheritances of Cartesianism and carnophallogocentrism. Lawlor argued that Derrida's plea was we must 'receive the animals', in 'the least violent response', 'the most amiable response'.¹⁷¹ In that way, Lawlor confirms Derrida was calling for us to attempt to render hospitality and justice for all others, including nonhuman animals.

C6 An interpretation of Derridean justice

As a broad summary, Derrida recognised that decision making cannot be achieved without calculation. It appears that we cannot escape calculation, but rather what we can achieve is awareness of: what he proposes is our workings in trace and *différance*; the tautology of language and conceptualisation that both are technologies of sovereignty and its repression of otherness and; the limits of so-called rationality and the resulting aporias of decision making. Derrida provided a means to uncover our mode of being and its violence through deconstructions. He also demanded that a rendering of justice must begin in acceptance, and welcoming, rather than signification and domination of the other. He proposed that to define beingness in at least any ontotheological sense, is a beginning of violence.

Following Derrida, de Ville, Anderson and Lawlor confirm that a hospitable and just reception of the other can only begin with an undoing of our metaphysical inheritance, through deconstructions, and that includes deconstructions of decision making. Derridean justice then demands deconstructions. Deconstructions invite analyses of law that are beyond law, beyond any inheritance of carnophallogocentrism, and beyond what law and politics perceives as 'justice', 'duty' and 'owing' within the confines of economic exchange. By

¹⁶⁶ Lawlor, *Not Sufficient*, above n 7, 72-74.

¹⁶⁷ Ibid 72.

¹⁶⁸ Ibid quoting and translating Jacques Derrida, *L'animal que donc je suis* (Galilée, 2006) 93.

¹⁶⁹ Lawlor, *Not Sufficient*, above n 7, 73.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

following Anderson and de Ville in particular, the deconstructions must recognise the 'negotiation' that occurs in each decision, to then unveil the aporias and violence rendered through signification, conceptualisation and the following of rules.

In the following Part D of this Appendix, I recount key elements of Derrida's tracing of the Western inheritance regarding the human-animal relationship.

APPENDIX 1, PART D: DERRIDA'S ANIMOT

D1 Introduction

In his final animal-related works, *The Animal That Therefore I Am*,¹ and both volumes of *The Beast & The Sovereign*,² Derrida continued retracing the human-animal relationship as it had been portrayed in ancient, biblical and philosophical texts. He concluded that conceptually, 'humanity' is constructed in opposition, and in preference, to 'animality'.³ He also suggested that philosophy, the 'philosopheme itself' is constituted by that posited difference.⁴ He found that many of the worst characteristics and possibilities of human behaviour are cast as 'animal' and that an 'abyss' of difference has been constructed to ensure animality is quarantined from what we have coveted for ourselves. Those things are posited to include self-presence, autonomy, rationality and dignity. Derrida suggested that the abyss of difference is captured within the signification 'animal',⁵ and that what nonhuman animals are dogmatically presumed to lack,⁶ in Western thought, justifies their sacrifice to human consumption. He concluded that nonhuman animals are perceived as, and are utilised as, means to human ends. They are fuel for our drive to, and desire for, sovereignty.

Derrida's deconstructions in terms of his approach and findings, regarding the human-animal opposition, were consistent with his approach and his base contentions that I have traced in the previous Parts of Appendix 1 of this research. He focussed on some key logocentric and Cartesian assertions. He asked us to consider: what the 'I think' and thinking really could be: if it is driven by the imposed violence of signification that denies otherness; where logocentric signification enforces values under the hegemony of a particular logos; where determination and meaning is limited by the workings of limited traces; where we remain largely oblivious to the indeterminacy of language, and; where we deny the impacts of

¹ Jacques Derrida in Marie-Louise Mallet (ed), *The Animal That Therefore I Am* (David Wills trans, Fordham University Press, 2008) [trans of: *L'animal que donc je suis* (first published 2006)] ('*The Animal That Therefore I Am*').

² Jacques Derrida in Michel Lisse, Marie-Louise Mallet and Ginette Michaud (eds), *The Beast & the Sovereign Volume I* (Geoffrey Bennington trans, University of Chicago Press, 2009) 244 [trans of: *Seminaire: La bete el le souverain Volume I (2001-2002)* (first published 2008)] ('*The Beast & the Sovereign Vol I*'); Jacques Derrida in Michel Lisse, Marie-Louise Mallet and Ginette Michaud (eds), *The Beast & the Sovereign Volume II* (Geoffrey Bennington trans, University of Chicago Press, 2011) [trans of: *Seminaire: La bete el le souverain Volume II (2002-2003)* (first published 2010)] ('*The Beast & the Sovereign Vol II*').

³ See, eg, Derrida, *The Animal That Therefore I Am*, above n 1, 31-34.

⁴ Ibid 40.

⁵ Ibid 31.

⁶ See, eg, Derrida, *The Beast & The Sovereign Vol II*, above n 2, 243: '... the difference between animal and human has always been defined according to the criterion of "power" or "faculty"'.

iterability. He remained convinced that *we are* wedded to the metaphysics of presence. Beneath all of this, his core question was whether the posited distinction between reaction, as has been posited as a limit of animality, and response, as has been awarded to humanity, was at all robust. He doubted the assertion that true response, as attributed to human animals, was a *capability* at all, and he argued that the distinction between reaction and response should be redefined.⁷ For him, it could not remain a robust proposition if it relied on what had been claimed to be the united self-presence, full consciousness and autonomy of the human animal.⁸ He found that human presence itself was a metaphysical construction, undergirded by its violent opposition to, and denial of, its own material workings that he posited were of trace and *différance*.

Throughout Derrida's animal-related works, he examined the Judeo-Christian 'sacrificialist current'⁹ in the constructions of human ipseity reflected in the legacies of Descartes, Kant, Heidegger, Lacan and Levinas. For example, Heidegger argued that the 'Western doctrine of the human' was affirmed through the Greek encapsulation: '*zōon logon echon, animal rationale*',¹⁰ as 'rational living thing'.¹¹ Heidegger insisted that this 'doctrine' is not just pervasive to ontology but to 'all psychology, ethics, epistemology, and anthropology'.¹² A point of interest for Derrida was that Greek philosophies had retained the signification of animal within definitions of what is human, despite the distinction of 'rationality'.¹³ That element of 'animality' was then severed within the works of Descartes and Heidegger.¹⁴ Derrida was particularly critical of Descartes, Kant and Levinas. He claimed their:

[D]isavowal[s] of foreclosure [of individual 'animal' beingness] is just as powerful when they don't speak of it or when they speak of it in order to deny to the *animot* everything they attribute to the human.¹⁵

⁷ Derrida, *The Beast & The Sovereign Vol I*, above n 2, 176-79.

⁸ Ibid 182-83.

⁹ See, eg, Derrida, *The Animal That Therefore I Am*, above n 1, 91.

¹⁰ Martin Heidegger, *Introduction to Metaphysics* (Gregory Fried and Richard Polt (eds), Yale University Press, 2nd ed, 2014) 157-58 [trans of: *Einführung in die Metaphysik*] ('*Metaphysics*'). Derrida claimed that the expression was Aristotle's: Derrida, *The Beast & the Sovereign Vol I*, above n 2, 314.

¹¹ Heidegger, *Metaphysics*, above n 10, 158.

¹² Ibid.

¹³ Derrida, *The Animal That Therefore I Am*, above n 1, 71.

¹⁴ Ibid citing René Descartes, 'Meditations on First Philosophy' (John Cottingham trans) in *The Philosophical Writings of Descartes Volume II* (John Cottingham, Robert Stoothoff and Dugald Murdoch trans, Cambridge University Press, 1984) 1-62, 17; Heidegger, *Metaphysics*, above n 10, 157-58.

¹⁵ Derrida, *The Animal That Therefore I Am*, above n 1, 113 (italics in original). He also described Heidegger's 'discourse on the animal [as] violent and awkward, at times contradictory': Jacques Derrida, "'Eating Well" or the Calculation of the Subject' in Elisabeth Weber (ed), *Points... Interviews*,

D2 Construction, diagnosis, deconstruction: toward justice through l'animot

D2.1 Construction of human-animal difference through the logos

In *The Beast & The Sovereign Vol I*, Derrida recalled the many definitions of logos that he had found in other texts and that he had considered in that series of lectures. They included logos as language, discourse, reason, calculation, counting and ratio.¹⁶ He also noted Heidegger's interpretations as including gathering, assembling, reading, and a maintenance of contraries by force.¹⁷ There was also the powerful, biblical translation of logos as Christ as mediator.¹⁸ Prior to that was Aristotle's implication of logos in his *zoōn logon ekhon* – 'man' as rational animal.¹⁹ Aristotle had, according to Derrida, made an 'essential' and 'indissociable' link between the logos and man's purported ascendancy to rational, political animal with sovereignty over slaves and nonhuman animals.²⁰ Aristotle declared that only man has speech, rather than merely the voice as animals do, with which animals can only express pain and pleasure.²¹ Aristotle went on to claim that only man can, through the logos, '[perceive] good and evil, the just and the unjust ... and the other values'.²² Through values, he argued, man makes 'family and city'.²³

Derrida found working hand-in-hand with logocentricity was a type of denial, disavowal and obstinacy that negated the call for responsibility toward nonhuman and human others. He had deconstructed and retraced the classical-biblical-Cartesian-Kantian *beliefs* that he claimed undergird modern philosophy, science and law that all claim to objectively and scientifically encapsulate the human-animal relationship. Those beliefs largely leave the possibility of human and animal otherness undisturbed, and whether or not they do so for the convenience of sovereign powers, those beliefs, accounted for as *knowledge* must, he argued, contain disavowal, obstinacy and stupidity, or 'bêtise'.²⁴ Following Nietzsche, Derrida suggested with the logos at work, the animality of life shows itself as, 'idiotic and cunning, naïve and smart' all at the same time, without any limits or boundaries between those oppositions.²⁵ It should also make us think about the performativity of language, rather

1974-1994 (Peggy Kamuf et al trans, Stanford University Press, 1995) 255-87, 277 [trans of: *Points de suspension, Entretiens* (first published 1992)] ('*Eating Well*').

¹⁶ Derrida, *The Beast & The Sovereign Vol I*, above n 2, 337.

¹⁷ Ibid 338, 319-21.

¹⁸ Ibid.

¹⁹ Ibid 338-39 citing Aristotle, *Politics*.

²⁰ Ibid 347.

²¹ Ibid citing Aristotle, *Politics* [1253a].

²² Derrida, *The Beast & The Sovereign Vol I*, above n 2, 348 citing Aristotle, *Politics* [1253a].

²³ Derrida, *The Beast & The Sovereign Vol I*, above n 2, 348 citing Aristotle, *Politics* [1253a].

²⁴ Derrida, *The Beast & The Sovereign Vol I*, above n 2, 164-86.

²⁵ Ibid 176.

than merely what we accept as its descriptive or constative functions.²⁶ We should question, in the context of our own traces, and in the context of the performative power of the logos, whether universal, independent, ideal meanings are as prevalent or as evident as we believe them to be, and whether we are, as individuals, as sovereign, free and responsible as we like to [not] *think*.²⁷ There must be a degree of 'not thinking' (or stupidity) and positivism²⁸ involved not only in regard to meaning and the constructions of our worlds, but also in the denial of the ever-present disavowals.²⁹ Derrida suggested it is evidence of a lack of a united self-presence, and that we have laid claim falsely, to the distinction between reaction and response.³⁰

D2.2 Diagnosis: we are carnophallogocentric

Derrida found that the classical-biblical-Cartesian-Kantian views cement what are the purported uniquely-human, logocentric, and so-called political 'capabilities'. Those posited capabilities are employed to justify human animals' absolute sovereignty over nonhuman animals.³¹ Derrida sometimes referred to that constituting of the human subject as phallogocentrism, where the western idea of the subject concurrently privileges the masculine schema, posited as virile and autonomous.³² His complete diagnosis was that the human animal is carnophallogocentric.³³ With unusual force for him, Derrida used the term to mark and to expose what the human animal obstinately refuses to openly acknowledge. Carnophallogocentrism screams of 'carnivorous virility',³⁴ of the human subject's perceived entitlement to, and sovereignty over, the consumption, and not only through the signifying force of language, of every 'thing' that the human deems as nonhuman.³⁵ Whilst that consumption and autonomy is bounded by human laws, Derrida suggested that subjects of the law view that legal subjugation as freedom.³⁶ Further, that the law, embodying

²⁶ Ibid 177.

²⁷ Ibid 178-79, 162. See also Derrida, *The Beast & The Sovereign Vol II*, above n 2, 336-37: Derrida summarised his analysis of the French term *bêtise* and concluded that the contextual impact, equivocality of meanings, and the complexity of the 'complicated programs or wiring' had to undermine any 'easily formalizable difference' between human and nonhuman animal languages.

²⁸ Derrida, *The Beast & The Sovereign Vol I*, above n 2, 307.

²⁹ Ibid 182.

³⁰ Ibid 182-83.

³¹ See, eg, Derrida, *The Beast & The Sovereign Vol I*, above n 2, 15-16, 25-26.

³² Derrida, *Eating Well*, above n 15, 280-81.

³³ See, eg, ibid 280; Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' (1990) 11 *Cardozo Law Review* 919, 951 ('*Force of Law*'); Derrida, *The Beast & The Sovereign Vol I*, above n 2, 15; Derrida, *The Animal That Therefore I Am*, above n 1, 104.

³⁴ Derrida, *Eating Well*, above n 15, 280.

³⁵ Ibid 280-81.

³⁶ Ibid 280.

carnophallogocentricity, provides rights to that consumption.³⁷ Inherited through Aristotle, the Judeo-Christian traditions, Descartes, Kant, Heidegger and Levinas at least, he described it as a western culture of sacrifice.³⁸ Derrida recounted that in Kant's view, animality, as deemed only of the senses, and not of rationality, is never an ends in itself, but only means.³⁹ Accordingly, animality is sacrificed to what are deemed to be higher interests. Following that, what embodies animality, that is, nonhuman animal bodies, are conceived as mere resources for human ends, and always have a market price.⁴⁰

Among other points, in the final session of *The Beast & The Sovereign Vol II*, Derrida considered Kant's and Heidegger's assertions concerning the so-called spirit of the political human animal.⁴¹ At root is man's belligerence, and propensity for war mongering as a mechanism of forming society, State-making and sovereignty.⁴² The continual preparation for and against war, builds communities, nations and States.⁴³ The violence of signification, that is, the nomination through the 'as such', is also part of that domination.⁴⁴ The violent ordination of things and beings through the consuming gaze of the human animal works toward sealing the fate of those others.⁴⁵ That is, that signification has a relationship to their perceived utility. Derrida recalled that Heidegger indicated that man is gripped by violence.⁴⁶ Yet man denies or forgets *that* element of humanity.⁴⁷ That element that should be properly described as an unjustness proper to *humanity*, but as revealed throughout both volumes of *The Beast & The Sovereign*, it is often referenced elsewhere as a base animality. The culture of sacrifice is a result of humanity's violence, a culture that is masked and enshrined in language and in law.⁴⁸ It comprises the predominant form of the Western human animals'

³⁷ Ibid.

³⁸ Ibid 278-84; Derrida, *The Animal That Therefore I Am*, above n 1, 100.

³⁹ Immanuel Kant, 'Transition From Popular Moral Philosophy to Metaphysics of Morals' in Mary Gregor (ed), *Groundwork of the Metaphysics of Morals* (Mary Gregor trans, Cambridge University Press, 1997) [trans of: *Grundlegung zur Metaphysik der Sitten*] 19-47, 42-43 cited in Derrida, *The Animal That Therefore I Am*, above n 1, 100.

⁴⁰ Derrida, *The Animal That Therefore I Am*, above n 1, 100.

⁴¹ Derrida, *The Beast & The Sovereign Vol II*, above n 2, 279-83.

⁴² Ibid 271-73.

⁴³ Ibid 272 citing Immanuel Kant, 'Conjectures on the Beginnings of Human History' in Hans Reiss (ed), *Kant's Political Writings* (H B Nisbet trans, University of Cambridge Press, 2nd ed, 1991) 221-34, 231-32.

⁴⁴ Derrida, *The Beast & The Sovereign Vol II*, above n 2, 269-71, 278-83.

⁴⁵ Ibid 278-83, 287-89.

⁴⁶ Ibid 288 citing Martin Heidegger, *Einführung in die Metaphysik* (Niemeyer, 1976) 108 ('*Metaphysik*') 119-20.

⁴⁷ Derrida, *The Beast & The Sovereign Vol II*, above n 2, 288 citing Heidegger, *Metaphysik*, above n 46, 119-20.

⁴⁸ Derrida, *The Beast & The Sovereign Vol II*, above n 2, 288-90 citing Heidegger, *Metaphysik*, above n 46, 119-20.

idealism of its own sense of beingness, that is more aptly described by Derrida as the 'superarmament' of Western idealism.⁴⁹

D2.3 Undoing human-animal difference through 'l'animot'

Derrida's device, to begin a detonation of the culture of sacrifice, is a reconstruction of the signification 'animal'. He introduced a deconstructive non-concept that he proposed was a working toward his justice for nonhuman animals. Rather than 'animal' remaining the grounding of differentiation for what is 'human', all individual others, including each of us, should be rethought as 'animot'.⁵⁰ Animot suggests that all living beings are individuals, and should not be thought as constituting an 'asinine' collection of the great multiplicity of species that have been erroneously collected in the term animal.⁵¹ The suffix 'mot' should be read as a rejection of the violent human habit of the naming, that which identifies beings 'as such', as if their beingness can be taken for granted.⁵² Animot does *not* designate any poverty of capabilities, and certainly not deprivation of language in its broader sense.⁵³ Derrida argued that l'animot should only be contrast, if that was still necessary, with l'animort, that is, that which has no life at all.⁵⁴ However, that potential positing of oppositional difference would also be deconstructible, as he suggested that differences between 'organic and inorganic, of life and/or death' are also 'more and more difficult to dissociate'.⁵⁵

D3 Tracing Cartesianism and carnophallogocentrism

This section includes a brief summary of the key elements of the classical propositions that pertain to animal beingness, as relevant to, or recounted by, Derrida. It also recalls some of the sacrificial significations posited in Genesis, and an outline of the views of Descartes, Kant, Heidegger, Levinas and Lacan. What I highlight here is how these ideas have added to, or appear to reflect, the abyss of human-animal difference that was the focus of Derrida's animal-related works. I also reference indications toward, and denials of, recognition of what Derrida proposes is laying of carnophallogocentric 'trace'. That includes the cementing of ontotheological thought and its calls to metaphysics, as well as problematic modes of analysis where that was a concern for Derrida, and which may reflect epistemological limitations.

⁴⁹ Derrida, *The Beast & The Sovereign Vol II*, above n 2, 290.

⁵⁰ Derrida, *The Animal That Therefore I Am*, above n 1, 41, 47-49.

⁵¹ Ibid 48.

⁵² Ibid.

⁵³ Ibid 47-48.

⁵⁴ Ibid 62.

⁵⁵ Ibid 31.

D3.1 The 'soul' differentiating humanity in classical texts

The Homeric poems associated the soul exclusively with the lives of humans.⁵⁶ In the fifth century before Christ, the soul was more broadly associated with nonhuman animal life.⁵⁷ The soul was thought to be 'the bearer of such virtues as courage, temperance and justice'.⁵⁸ In the fourth century, Plato appears to have attributed souls to all living things.⁵⁹ According to Lorenz, Plato suggested that the soul animated the body and was a source of reason that could be *disturbed by* the senses.⁶⁰ In Lorenz's interpretation, in the *Republic*, Plato developed his theory of the soul toward a 'unity of the mind' with the soul incorporating 'all mental or psychological' and 'other vital functions' of life.⁶¹

In contrast, Aristotle's notion of the soul, similarly responsible for vital functions and reason, was only awarded to 'organisms of suitable structure and complexity'.⁶² Lorenz suggests that Aristotle believed that human thinking 'involves some activity of the perceptual apparatus', *dependent* on the 'sensory impressions' of the body.⁶³ Frede interpreted that Aristotle believed that what a living object is, is greater than its 'material constituents' and must be explained in relation to its 'essence or nature'.⁶⁴ That essence or Aristotelian soul, was said to impact, but was not the exclusive source or cause of behaviour.⁶⁵ Due to the organism's 'disposition or organization',⁶⁶ it was deemed to have particular capabilities.⁶⁷ For Aristotle, the soul was a disposition *of* the body, rather than separate from it, and made the living thing the kind of thing that it was, according to its 'essential features or characteristics'.⁶⁸ A being's nature was so affecting that there was no need for Aristotle to propose 'a distinct soul' to account for life and behaviours.⁶⁹ Oksenberg Rorty also suggests that Aristotle believed that

⁵⁶ Hendrik Lorenz, *Ancient Theories of Soul* (22 April 2009) Stanford Encyclopedia of Philosophy, <<https://plato.stanford.edu/entries/ancient-soul/>> [1].

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Lorenz, above n 56, [3.1]: 'Plato evidently retains the traditional idea of soul as distinguishing the animate from the inanimate' citing Plato, *Phaedo*.

⁶⁰ Lorenz, above n 56, [3.1] citing Plato, *Phaedo* [94b].

⁶¹ Lorenz, above n 56, [3.2] citing Plato, *Republic*.

⁶² Lorenz, above n 56, [4] *Aristotle's Theory of Soul* citing Aristotle, *De Anima*.

⁶³ Lorenz, above n 56, [4] citing *Aristotle's Theory of Soul* citing Aristotle, *De Anima* [3.7, 431a14-7; 3.8, 432a7-10].

⁶⁴ Michael Frede, 'On Aristotle's Conception of the Soul' in Martha C Nussbaum and Amélie Oksenberg Rorty (eds), *Essays on Aristotle's de Anima* (Clarendon Press, 1992) 93-108, 94-95.

⁶⁵ Frede, above n 64, 95.

⁶⁶ Ibid 98.

⁶⁷ Ibid 95-98.

⁶⁸ Ibid 98.

⁶⁹ Ibid 106-07.

'[t]he affections of the soul ... involve both cognition and the body'.⁷⁰ For Aristotle, explanations of behaviour should include inquiries into both the physiological and the cognitive.⁷¹ According to Oksenberg Rorty, Aristotle had already recognised differences between what he would have described as natural sciences and metaphysics that would lay claim to phenomena beyond manifestations of the physical and the cognitive.⁷²

Frede clarifies that Aristotle's view contrasted with that of Descartes,⁷³ which I summarise in more detail below. Descartes posited that a soulless life was possible through the material properties of a body.⁷⁴ Concurrently Descartes suggested that thinking, which he insisted was the exclusive domain of human animals, cannot be explained by the workings of material bodies alone, and so he supplemented human beingness with his own, and different, notion of a soul.⁷⁵ For Descartes, it was his God that awarded the human body a soul for the purpose of thinking.⁷⁶ Hence, only human animals were deemed to enjoy the power of reason.⁷⁷

D3.2 Animality and difference in Genesis

In the story of Genesis, it is claimed that *that* God made living, moving creatures,⁷⁸ and then made man in the image of God to 'have dominion' 'over every living thing that moveth upon the earth.'⁷⁹ Beyond the exclusivity of the soul as reserved for humans, the logos appeared in the 'tree of knowledge of good and evil.'⁸⁰ The power of signification was awarded to Adam, to name 'every living creature'.⁸¹ Woman was made of Man and signified as Woman by Adam.⁸² The snake, by disobeying God's command, was posited as recalcitrant and capable of lying, and as an *external* influence.⁸³ Adam told God that it was the Woman that gave him the fruit,⁸⁴ and the Woman laid blame with the snake that 'beguiled' her to eat the

⁷⁰ Amélie Oksenberg Rorty, 'B. De Anima: Its Agenda and its Recent Interpreters' in Martha C Nussbaum and Amélie Oksenberg Rorty (eds), *Essays on Aristotle's de Anima* (Clarendon Press, 1992) 7-13, 8 citing Aristotle, *De Anima* [403¹25].

⁷¹ Oksenberg Rorty, above n 70, 8 citing Aristotle, *De Anima* [403²25 ff.].

⁷² Oksenberg Rorty, above n 70, 8 citing Aristotle, *De Anima* [403^b15].

⁷³ Frede, above n 64, 94.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ See below nn 95-103 and accompanying text.

⁷⁷ See below n 104 and accompanying text.

⁷⁸ Genesis 1:20-1:25.

⁷⁹ Genesis 1:28.

⁸⁰ Genesis 2:9.

⁸¹ Genesis 2:19.

⁸² Genesis 2:23

⁸³ Genesis 3:1-3:6.

⁸⁴ Genesis 3:12.

fruit against God's command.⁸⁵ For her sin, the Woman committed herself to reproduction and to remain beneath the sovereignty of her husband.⁸⁶ When Cain only offered God his 'fruit of the ground' as opposed to Abel's 'flock and fat thereof',⁸⁷ God did not respect Cain's oblation.⁸⁸ After Noah had preserved all of the animals, God declared: '[e]very moving thing that liveth shall be meat for you; even as the green have I given you all things'.⁸⁹

Genesis affirmed cultural beliefs through oppositions. It declared a hierarchy of sovereignty through gender, ownership and right. Animality represented capability for, and a source of human dissention and dishonesty, as if animality, as other, had the power to corrupt human reason. Nonhuman animals were also posited here, as merely means to human ends. This God was said to reward man with the right to consume animals. It appears this particular story affirmed the connection between what it is to be a 'man' and sovereignty over all animals.

D3.3 Descartes

D3.3.1 The Cartesian *arché* cemented in ontotheology

In the *Meditations*,⁹⁰ Descartes began his reasoning by claiming to reject 'as being absolutely false everything in which [he] could suppose the slightest reason for doubt'.⁹¹ But since he had to begin with thinking, he himself must 'be something' and so he declared: '*I think, therefore I am*'.⁹² It was the 'first principle' of his philosophy.⁹³ In contrast to Aristotle who had determined a connection between soul and body, Descartes concluded his 'whole essence or nature consists in thinking'.⁹⁴ He renounced findings of the senses as sources of truth, and so he set up the difference between intuition and sensory perception as a base signifying structure, that is, a logical foundation in his text and his thought. Nevertheless, he was still confronted with the epistemological problem of confirming certainties both in relation to things themselves and conceptualities:

And having noticed that there is nothing at all in this, *I think, therefore I am*, which assures me that I am speaking the truth, except that I see very clearly that in order to think one must exist,

⁸⁵ Genesis 3:13.

⁸⁶ Genesis 3:16.

⁸⁷ Genesis 4:3-4:4.

⁸⁸ Genesis 4:5.

⁸⁹ Genesis 9:3.

⁹⁰ René Descartes, *Discourse on Method and The Meditations* (F E Sutcliffe trans, Penguin Books, 1968). Descartes' text was first published in 1637.

⁹¹ Ibid 53.

⁹² Ibid (italics in original).

⁹³ Ibid 54.

⁹⁴ Ibid 54; 56: '... intelligent nature is distinct from the corporeal'. See also ibid 132-33.

I judged that I could take it to be a general rule that the things we **conceive** very clearly and very distinctly are all true, but that there is nevertheless some difficulty in being able to recognize for certain which are the things we **see** distinctly.⁹⁵

Apparently to resolve this difficulty, Descartes confirmed his belief in the transcendental, that all beingness, beings, imperfections and unintelligibles were the work of his God and all remained dependent on his God.⁹⁶ Truth is only possible because of the existence of his God.⁹⁷ Descartes argued that since, as he contended, his God was certain to exist, as an ultimate kind of concept, then other ideas, and conceptual things such as those derived through geometry, could also be said to exist.⁹⁸ That is, that they *can* be conceived even though they cannot be sensed materially.⁹⁹ He argued that if it wasn't for his God, the things that we imagine and perceive could not be known as truths, and for example, we would not be able to discern reality from dreams.¹⁰⁰ That was despite his insistence on a united self-presence, and that when he was dreaming his mind did what the minds of insane people did.¹⁰¹ Through this maze of logocentricity, Descartes concluded that a human animal's 'ideas and notions' that are 'clear and distinct' are 'real things' and must be 'true'.¹⁰² Whilst he admitted that some ideas might be erroneous because they contain 'something confused and obscure' as a result of our *human lack* of perfection, he remained adamant that what is 'real and true' comes from his God.¹⁰³ As such, the presence of his God provides a grounding, or as Derrida would say, an *arché*, so that perceived truths are beyond any need for excavation. For Descartes, the question of 'truth' stopped at God and interned any necessity to detonate the metaphysical.¹⁰⁴

⁹⁵ Ibid 54 (italics in original, highlighting not in original).

⁹⁶ Ibid 55-56, 135.

⁹⁷ Ibid 58. See also ibid 113-31, 142-49.

⁹⁸ Ibid 57.

⁹⁹ Ibid.

¹⁰⁰ Ibid 58.

¹⁰¹ Ibid 96-97.

¹⁰² Ibid 58.

¹⁰³ Ibid 58-59.

¹⁰⁴ Whilst not followed in this research, Descartes, in attempting to find some grounding for truths, considered, but did not take up, the possibility of an evil God that posited us within a world of falsity: ibid 100, 103, 115, 131, 168. As discussed by Derrida in *Cogito and the History of Madness*, Derrida and Foucault both considered Descartes' fear of this 'evil genius': Jacques Derrida, 'Cogito and the History of Madness' in Jacques Derrida, *Writing and Difference* (Alan Bass trans, Routledge, 1978) 36-76, 55 ('*Cogito*') [trans of: *Writing and Difference* (first published 1967)] ('*Writing and Difference*') citing Michel Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason* (Richard Howard trans, Pantheon, 1965) [trans of: *Folie et déraison: Histoire de la folie à l'âge classique* (first published 1961)]: the good God's reassuring logos, saves us from madness. Descartes seems to have reflected that in his logic as it is his 'good' God that provides means of 'acquiring a perfect knowledge': Descartes, *Discourse*, above n 90, 149. See also Derrida, *The Animal That Therefore I*

D3.3.2 Descartes' 'humanity' distinguished from 'animality'

Before applying any of his method, Descartes opened his *Discourse on Method* by reaffirming his belief in the human animal as uniquely endowed with reason:

... as far as reason or good sense is concerned, inasmuch as it is the only thing which makes us men and distinguishes us from the animals, I am ready to believe that it is complete and entire in each one of us, following in this the commonly held opinion of the philosophers who say that there are degrees only between *accidents* and not between the *forms* or *natures* of the *individuals* of a given *specie*.¹⁰⁵

In the *Second Meditation* Descartes rejected the term 'rational animal' because he wanted to avoid defining both 'animal' and 'rational' and having to confound his definitions of 'I am' with those already presumptive terms.¹⁰⁶ Rather, he turned his discussion back to his determination of the human 'soul' and beingness.¹⁰⁷ Descartes did temporarily include man in the category of animal, but only until he perceived that his God endowed the original, soulless body of man with reason that *then* formed human nature. That nature, was 'only to think'.¹⁰⁸ He insisted that even though nonhuman animals' bodies resemble our own, and despite him having seen the similarities within dissected animal bodies,¹⁰⁹ he insisted that *they* do not think. It becomes clear, by the end of his exposition on the workings of a nonhuman animal's heart, that what he intended to show was that the body worked as a mechanism, and that there was no need to insinuate a soul in that working.¹¹⁰

Descartes suggested that 'animal spirits' that motivate locomotion in both nonhuman animals and human animals were a result of the movement of blood to the brain, and an energy from the nerves to the muscles.¹¹¹ For the human brain, he surmised that it had the ability to 'imprint' itself in regard to behaviours, recognition of sensory perceptions, memory, drives and imagination.¹¹² In Derridean terms, I suggest he may have surmised that there was a

Am, above n 1, 46: Derrida suggested that the snake in Genesis, also seemed to appear as the serpent (mentioned as the forgotten tail of the Chimaera) in Descartes and Homer, potentially as the 'evil genius' incarnate in the body of a nonhuman animal. It seems that evil and shame were posited in opposition to a good God and His reassuring logos. The myths also sustain human-animal difference in elevating human goodness through rationality.

¹⁰⁵ Descartes, *Discourse*, above n 90, 27-28 (italics in original).

¹⁰⁶ Ibid 104. See also, Derrida, *The Animal That Therefore I Am*, above n 1, 70-73.

¹⁰⁷ Descartes, *Discourse*, above n 90, 105. See also Derrida, *The Animal That Therefore I Am*, above n 1, 73.

¹⁰⁸ Descartes, *Discourse*, above n 90, 65, 106-11.

¹⁰⁹ Ibid 66-68: Descartes recounts what he had seen in dissections and he encouraged his readers to 'have cut open in front of them the heart of some large animal'.

¹¹⁰ Ibid 68, 73.

¹¹¹ Ibid 73.

¹¹² Ibid.

laying of a kind of trace, but only within *human* animals.¹¹³ His next leap was to make connections between knowledge, reason and human language that further pried open the abyss. Even though he had earlier stated that human animal bodies can move without will,¹¹⁴ he concluded that ‘reason’ in a human animal, rather than sensory perception,¹¹⁵ is what causes a human animal to ‘act through knowledge’, even when painfully prodded.¹¹⁶ Another devastating and obviously teleological argument was that only a human animal can properly *respond* using human language rather than merely *react* to sound.¹¹⁷ In sum, he suggested that even the most ‘dull-witted’¹¹⁸ human animal can learn to communicate, whereas nonhuman animals merely emit sounds.¹¹⁹ Descartes declared:

... [a]nd this shows not only that animals have less reason than men, but that they have none at all; for we see that very little of it is required in order to be able to speak.¹²⁰

Descartes then proposed that nonhuman animals do not communicate at all:

... neither should one think, as did certain of the Ancients, that animals speak although we do not understand their language. For, if it were so, as they have many organs similar to our own, they could make themselves understood by us as well as by their fellows.¹²¹

He signified animals as mindless machines.

... although there are many animals which show more skill than we do in certain of their actions, yet the same animals show none at all in many others; so that what they do better than we do does not prove that they have a mind, for it would follow that they would have more reason than any of us and would do better in *everything*; rather it proves that they do not have a mind, and that it is nature that acts in them according to the disposition of their organs, as one sees that a clock, which is made up of only wheels and springs, can count the hours and measure time more exactly than we can with all our art.¹²²

¹¹³ Ibid 112: Descartes insisted that whilst sensory perception may play a role in deriving knowledge, it was undoubtedly what was ‘in the mind itself’, and certainly not the imagination that was significant. He wrote that he then must pause to then ‘*imprint* this new knowledge more deeply in [his] memory’ (italics not in original).

¹¹⁴ Ibid 73.

¹¹⁵ Ibid.

¹¹⁶ Ibid 74.

¹¹⁷ Ibid 75.

¹¹⁸ Ibid 74.

¹¹⁹ Ibid 75.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid 75-76 (italics not in original).

D3.4 Kant

In his *Anthropology from a Pragmatic Point of View*,¹²³ Kant started with the Cartesian assumption that man was 'a freely acting being'.¹²⁴ His pragmatic approach involved extolling what man *should* make of himself, since enquiry into the physiological makeup of man, including the workings of 'the traces of impressions which keep lingering in our brain' was only possible through speculation and hence 'a sheer waste of time'.¹²⁵ Through that, in contrast to Derrida, he had denied the relevance of the material workings of the human animal mind and therefore eliminated consideration of its commonality with nonhuman animal minds. In what seems to be setting of an arché of his truth, Kant declared that man 'is his own ultimate purpose'.¹²⁶

Derrida contended that Kant reconfirmed and extended the Cartesian 'I think' as constituting human-animal difference.¹²⁷ It seems that Kant declared that human animal ascendance and sovereignty was sealed through man's 'dignity':¹²⁸

[t]he fact that man is aware of an ego-concept raises him infinitely above all other creatures living on earth. Because of this, he is a person; and by virtue of this oneness of consciousness ... He is a being who, by reason of his preeminence and dignity, is wholly different from *things*, such as irrational animals whom he can master and rule at will. He enjoys this superiority even when he cannot yet give utterance to his ego, although it is already present in his thought, just as all languages must think it when they speak in the first person, even if the language lacks a specific word to refer to this ego-concept. This faculty (to think) is understanding.¹²⁹

Derrida explained that the Cartesian extension is evidenced in Kant's assertion that without the capability of self-reference, through the 'I', there is no thinking at all, and therefore nonhuman animals lack reason, response and responsibility.¹³⁰ In foregrounding what would become one of Heidegger's contentions, Kant asserted that only the human being is capable of recognition of the 'ego-ness as such'.¹³¹ However, unlike Lacan,¹³² Kant did acknowledge

¹²³ Immanuel Kant, *Anthropology from a Pragmatic Point of View* (Victor Lyle Dowdell trans, Southern Illinois University Press, 1996) [trans of: *Anthropologie in pragmatischer Hinsicht*] ('*Anthropology trans Dowdell*').

¹²⁴ Ibid 3.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Derrida, *The Animal That Therefore I Am*, above n 1, 92-94.

¹²⁸ See also ibid 93.

¹²⁹ Kant, *Anthropology trans Dowdell*, above n 123, 9.

¹³⁰ Derrida, *The Animal That Therefore I Am*, above n 1, 94.

¹³¹ Ibid 93 citing Immanuel Kant, *Anthropology from a Pragmatic Point of View* (Robert B Loudon trans, Cambridge University Press, 2006) 15 ('*Anthropology trans Loudon*').

that man's 'inclination to evil can be regarded as innate.'¹³³ Derrida surmised that the Kantian human person, defined by its opposition to 'things', is the only being in Kantian logic, that is a subject of reason, morality and law.¹³⁴ Kant also drew a connection between the socialisation of humanity and the domestication of animals, and in the process denied nonhuman animals the possibility of any concept of society.¹³⁵ Kant went so far to claim that war for human animals was 'the incentive to pass from the crude state of nature to the *civil* state'.¹³⁶

Derrida highlighted a strange contradiction in Kant's text, as Derrida described it: that 'one day, in a "third epoch", the chimpanzee might be able to say "I think" and so accede to understanding, and hence to the rank and dignity of the human'.¹³⁷ Derrida commented that Kant's contention did not seem to be taken seriously by Kant himself, and remained 'strongly anthropomorphic and anthropocentric'.¹³⁸ For Derrida, that purported 'thinking' and the related speech-capability difference between human and animal remained a foundational problem.¹³⁹ He foresaw that its effect is the depriving of nonhuman animals the possibility of becoming 'the subject of rights or duties, given the correlation between right and obligation that is proper to the subject as a free person'.¹⁴⁰ Derrida explained that Kant's conceptualisation of nonhuman animals was as means to human ends, to be sacrificed where animals' interests would always be subordinated in relation to human 'dignity'.¹⁴¹ That

¹³² See below n 197 and accompanying text.

¹³³ Kant, *Anthropology* trans Dowdell, above n 123, 241.

¹³⁴ Derrida, *The Animal That Therefore I Am*, above n 1, 92.

¹³⁵ Ibid 96 citing Kant, *Anthropology* trans Louden, above n 131 (no page numbers cited by Derrida).

¹³⁶ Kant, *Anthropology* trans Louden, above n 131, 235 quoted in Derrida, *The Animal That Therefore I Am*, above n 1, 97 (italics in Derrida's original). See also Derrida, *The Beast & The Sovereign Vol II*, above n 2, 271-72.

¹³⁷ Derrida, *The Animal That Therefore I Am*, above n 1, 98-99 citing Kant, *Anthropology* trans Louden, above n 131, 233, n 33. Kant, *Anthropology* trans Dowdell, above n 123, 245: In Dowdell's translation the note discusses the mystery of Nature in its development of human babies' habit of crying at birth, which Kant assumes must have only occurred once the human parents had progressed to a second stage of culture to protect them from predators. He is translated as:

But we do not know how, or through what contributing causes, Nature determined on the course of such a development. This observation involves more thinking and it suggests, for example, the question, whether this second stage is followed by a third, as in the case of major revolutions of Nature when an orangutang or a chimpanzee developed the organs used for walking, touching of objects, and speaking, into human forms whose interior housed an organ for the employment of the understanding and which developed gradually through social culture.

¹³⁸ Derrida, *The Animal That Therefore I Am*, above n 1, 99.

¹³⁹ See also, Derrida, *Eating Well*, above n 15, 284-85: 'The idea according to which man is the only speaking being, in its traditional form or in its Heideggerian form, seems to me at once undisplaceable and highly problematic'. Derrida indicated that a way to surmount the problem was through re-conceptualising language and writing as possibilities through trace and *différance* – and therefore, a function or capability not unique to human animals. See also section D4 below.

¹⁴⁰ Derrida, *The Animal That Therefore I Am*, above n 1, 99.

¹⁴¹ Ibid 100.

posited dignity of human animals, is imbued with 'the value of an end in itself'.¹⁴² Further, Kant's violence was reiterated in his claim that there is, as Derrida described it: 'the imperative necessity of *sacrificing* sensibility to moral reason.'¹⁴³ Derrida argued that Kant's 'morality', in its justification of war, domestication and sacrifice, and in its undergirding of 'human rights', amounts to 'a war without mercy against the animal'.¹⁴⁴

D3.5 Heidegger

Through Derrida's analysis it seems clear that Heidegger's signifying structure in his extrapolation of human 'beingness' was hinged on a stream of oppositions which appear to be unjustified assumptions about animality.¹⁴⁵ In *The Beast & The Sovereign Vol I*, Derrida recounted Heidegger's questioning of the human application of the logos.¹⁴⁶ Derrida interpreted Heidegger as asking how the logos, as applied, had become logic itself, and how it had 'come to dominate being'.¹⁴⁷ Heidegger considered how the logos had become 'a violently imposed sovereignty of *logos* as reason, understanding, logic ... as force of reason',¹⁴⁸ and as a kind of 'gathering'.¹⁴⁹ However, in *Letter on Humanism*,¹⁵⁰ Heidegger argued that the beingness of human animals would not be properly revealed, if that questioning continued to position man as human *animal*, even if it sought to attribute man with a soul.¹⁵¹ Heidegger strangely declared that *that* thinking remained metaphysical and incomplete.¹⁵² He argued that biologism was erroneous, and that the idea that the essence of man was alive as a function of the human body was mistaken.¹⁵³

¹⁴² Ibid.

¹⁴³ Ibid (italics in original).

¹⁴⁴ Ibid 102.

¹⁴⁵ As meticulously explored by Derrida throughout *The Beast & The Sovereign Vol II* and particularly in its Eighth Session through to the Tenth Session.

¹⁴⁶ Derrida, *The Beast & The Sovereign Vol I*, above n 2, 318 citing Heidegger, *Metaphysik*, above n 46, 108.

¹⁴⁷ Derrida, *The Beast & The Sovereign Vol I*, above n 2, 318.

¹⁴⁸ Ibid (italics in original).

¹⁴⁹ Ibid 319-20.

¹⁵⁰ Martin Heidegger, 'Letter on Humanism' in David F Krell (ed), *Martin Heidegger: Basic Writings from Being and time (1927) to The task of thinking (1964)* (Frank A Capuzzi and J Glenn Gray trans, Harper and Row, 1977) 189-242, 203-04 ('Krell Letter on Humanism').

¹⁵¹ Ibid 322-23 quoting Heidegger, *Krell Letter on Humanism*, above n 150, 203-04.

¹⁵² Heidegger, *Krell Letter on Humanism*, above n 150, 204-05 quoted in Derrida, *The Beast & The Sovereign Vol I*, above n 2, 323.

¹⁵³ Heidegger, *Krell Letter on Humanism*, above n 150, 204-05 quoted in Derrida, *The Beast & The Sovereign Vol I*, above n 2, 323.

Heidegger's analysis of the animal and its relationship to the world led Heidegger to the conclusion that the animal is 'poor in the world'¹⁵⁴ and so poor in spirit.¹⁵⁵ Heidegger contended that the animal does not have access to the (or any) logos.¹⁵⁶ Without the signifying and declaratory power of the logos, the animal cannot grasp what Heidegger called the 'as such' of other things or beings.¹⁵⁷ Yet, Derrida argued, Heidegger did not admit that the 'as such' *depends* on language and the logos.¹⁵⁸ That was despite Heidegger's statement that '[t]he animal's behaviour is never an apprehending of something as something as characteristic of the phenomenon of world'.¹⁵⁹ Heidegger suggested that the 'as' was what enabled a being to have a relationship to other things, beings and the world.¹⁶⁰ Heidegger privileged questioning as a human activity, through the 'as such', and Derrida argued that was integral to Heidegger's notions of essence, dignity and freedom of thought.¹⁶¹ The ability to develop relationships, through the 'as such' was reserved, by Heidegger, to human animals.¹⁶² He contended that the human ability to be-with-one-another, to recognise beings 'as such', is what makes speech possible.¹⁶³ Derrida explained that Heidegger was relying on a transcendence in that sense, and had denied that human animal speech was anything akin to nonhuman animals' sounds.¹⁶⁴

¹⁵⁴ See Heidegger, *Being and Time* (John Macquarrie and Edward Robinson trans, Harper and Row, 1962) 177 ('*Being and Time*'). See also, Jacques Derrida, *Of Spirit: Heidegger and the Question* (Geoffrey Bennington and Rachel Bowlby trans, University of Chicago Press, 1989) [trans of: *De l'esprit* (first published 1987)] 51, 57 ('*Of Spirit*').

¹⁵⁵ See also, Derrida, *Of Spirit*, above n 154, 47-57.

¹⁵⁶ Ibid 142 citing Martin Heidegger, *The Fundamental Concepts of Metaphysics: World, Finitude, Solitude* (William McNeill and Nicholas Walker trans, Indiana University Press, 1995) 311 ('*Metaphysics*'). See also Derrida, *The Beast & The Sovereign Vol II*, above n 2, 222: Derrida declared that 'the assertion that the animal is a stranger to learning technical conventions and to any technical artifice in language is an idea that is quite crude and primitive, not to say stupid.' He included wordless language as a possibility of a technology.

¹⁵⁷ Derrida, *The Animal That Therefore I Am*, above n 1, 142; Derrida, *The Beast & The Sovereign Vol II*, above n 2, 42, 251-52. See also, Derrida, *Of Spirit*, above n 154, 51, 57; Leonard Lawlor, 'Animals Have No Hand' in Leonard Lawlor, *This Is Not Sufficient: An Essay On Animality and Human Nature in Derrida* (Columbia University Press, 2007) 39-70 ('*Not Sufficient*'): Lawlor offers a deeper analysis of Derrida's assessment of Heidegger's theories on animality including the denial of the 'as such'.

¹⁵⁸ Derrida, *The Animal That Therefore I Am*, above n 1, 142.

¹⁵⁹ Heidegger, *Metaphysics*, above n 156, 311 quoted in Derrida, *The Animal That Therefore I Am*, above n 1, 143.

¹⁶⁰ Heidegger, *Metaphysics*, above n 156, 311 quoted in Derrida, *The Animal That Therefore I Am*, above n 1, 143.

¹⁶¹ Derrida, *Of Spirit*, above n 154, 9, 17-21, 42-43.

¹⁶² Heidegger, *Metaphysics*, above n 156, 311. See also Derrida, *The Animal That Therefore I Am*, above n 1, 142-43.

¹⁶³ Derrida, *The Beast & The Sovereign Vol II*, above n 2, 227 citing Heidegger, *Metaphysik*, above n 46, 447.

¹⁶⁴ Derrida, *The Beast & The Sovereign Vol II*, above n 2, 227.

Another human-animal difference asserted by Heidegger was that nonhuman animals do not have a relationship to their own deaths as human animals do. He suggested that animals do not 'die',¹⁶⁵ but merely 'come to an end',¹⁶⁶ because they cannot relate to their deaths 'as such'.¹⁶⁷ He argued that without the capability of the 'as such', animals live in state of benumbment or captivation;¹⁶⁸ and that without any logos, the animal is incapable of speech (that is signification rather than merely emitting noise),¹⁶⁹ prayer (that is, as Derrida explained, speech that can neither be interpreted as lie or truth)¹⁷⁰ or deception.¹⁷¹ Heidegger also contemplated whether animals experience time.¹⁷² Heidegger wished to redefine the human animal, not as animal-endowed-with-reason: that is, the conscious, rational animal, but as being with, what he called, 'attunement'.¹⁷³ That again, was a key difference between human and nonhuman animals. According to Derrida, Heidegger reconfirmed human animals' relationship to the world as one of sovereignty.¹⁷⁴ Whereas nonhuman animals do not 'have' the world but are 'poor in world'¹⁷⁵ which reflects their deprivation (or privation).¹⁷⁶

In what feels to me to be the cruellest of his assertions, and as a result of his assumption that animals do not experience the 'as such', Heidegger denied animals the capability of 'being' with other beings, of experiencing what being-with means.¹⁷⁷ Rather, he insisted that

¹⁶⁵ Heidegger, *Being and Time*, above n 154, 179. See also Derrida, *The Animal That Therefore I Am*, above n 1, 143-44, 154.

¹⁶⁶ Heidegger, *Being and Time*, above n 154, 267. See also Derrida, *The Beast & The Sovereign Vol II*, above n 2, 116, 121-22.

¹⁶⁷ Derrida, *The Beast & The Sovereign Vol II*, above n 2, 116 citing Heidegger, *Being and Time*, above n 154, 267.

¹⁶⁸ Heidegger, *Being and Time*, above n 154, 267. See also Derrida, *The Beast & The Sovereign Vol II*, above n 2, 115-16; 122-23 218 quoting Heidegger, *Metaphysik*, above n 46, 443.

¹⁶⁹ Heidegger, *Metaphysik*, above n 46, 444 quoted in Derrida, *The Beast & The Sovereign Vol II*, above n 2, 220.

¹⁷⁰ Derrida, *The Beast & The Sovereign Vol II*, above n 2, 229- 30. See also Derrida, *The Beast & The Sovereign Vol II*, above n 2, 217-19.

¹⁷¹ Heidegger, *Metaphysik*, above n 46, 310 cited in Derrida, *The Beast & The Sovereign Vol II*, above n 2, 229.

¹⁷² Heidegger, *Being and Time*, above n 154, 396. See also Derrida, *The Animal That Therefore I Am*, above n 1, 144.

¹⁷³ Heidegger, *Being and Time*, above n 154, 62. See also Derrida, *The Animal That Therefore I Am*, above n 1 148; Derrida, *The Beast & The Sovereign Vol I*, above n 2, 264-66, 322-25.

¹⁷⁴ Derrida, *The Animal That Therefore I Am*, above n 1, 148; Derrida, *The Beast & The Sovereign Vol I*, above n 2, 266.

¹⁷⁵ Heidegger, *Being and Time*, above n 154, 177. See also Derrida, *The Animal That Therefore I Am*, above n 1, 153.

¹⁷⁶ Heidegger, *Being and Time*, above n 154, 195. See also Derrida, *The Animal That Therefore I Am*, above n 1, 156.

¹⁷⁷ Heidegger, *Being and Time*, above n 154, 210. See also Derrida, *The Animal That Therefore I Am*, above n 1, 158.

they simply exist alongside others.¹⁷⁸ Following from that stream of logic, since nonhuman animals are incapable of recognising other beings 'as such', Heidegger argued that animals cannot let other beings be, that there is no 'letting be of [other] beings as such'.¹⁷⁹ That is, that *nonhuman* animals only perceive of other animals as things, as subjects of their own drives and desires.¹⁸⁰ Of course, Derrida argues that that quality, must apply to the beingness of *human* animals, to our history.¹⁸¹ It seems that the human animal does not let other beings be. That we perceive through the 'as such', through our own significations, our own utilitarian drives.¹⁸²

D3.6 Levinas

Levinas also denied nonhuman animals the capability of responding to any others, to announce themselves as present to an other.¹⁸³ Derrida went on to argue that what Descartes, Heidegger, Levinas and others failed to recognise was that in their awarding of responsiveness or responsibility (or response-ability) to human animals, they refused to consider the role of iterability.¹⁸⁴ That is, that human responsiveness is comprised of iterability and therefore it should be questioned whether human animals do in fact respond as contended.¹⁸⁵ The traditional Western logic also then refuses nonhuman animals the right and the capability of nonresponse, that is to remain private, to refuse to respond.¹⁸⁶ The exclusion of responsiveness for nonhuman animals is linked to a lack of human animal responsibility, and a so-called logical exclusion of nonhuman animals from concepts of law.¹⁸⁷ Supposedly without a 'face', without experience of death, without language, without responsibility, or response-ability, without the 'I think', nonhuman animals are denied the possibility of justice, and Levinas' ethics at least, remained undisturbed by their sacrifice.¹⁸⁸

¹⁷⁸ Heidegger, *Being and Time*, above n 154, 210. See also Derrida, *The Animal That Therefore I Am*, above n 1, 158.

¹⁷⁹ Heidegger, *Being and Time*, above n 1, 253. See also Derrida, *The Animal That Therefore I Am*, above n 1, 159.

¹⁸⁰ Heidegger, *Metaphysics*, above n 156, 198. See also Derrida, *The Animal That Therefore I Am*, above n 1, 159.

¹⁸¹ Derrida, *The Animal That Therefore I Am*, above n 1, 160.

¹⁸² See Derrida, *The Beast & The Sovereign Vol II*, above n 2, 198-201.

¹⁸³ Derrida, *The Animal That Therefore I Am*, above n 1, 111.

¹⁸⁴ Ibid 112.

¹⁸⁵ Ibid. See also, Michael Naas, 'Derrida's Flair' (2010) 49(2) *Research in Phenomenology* 219, 238-39.

¹⁸⁶ Derrida, *The Animal That Therefore I Am*, above n 1, 112.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid. See also Appendix 1, Part A, section A4.1, n 249 and accompanying text.

D3.7 Lacan

Derrida argued that Lacan continued the disavowal of nonhuman animals' beingness.¹⁸⁹ Attributes that Lacan denied to nonhuman animals included ability to identify him or herself as a 'subject of the signifier', to be able to erase their own traces and to pretend to pretend.¹⁹⁰ Lacan also suggested that animals do not have an unconscious and one that is driven by desire.¹⁹¹ He denied animals the experience of the other and of language(s).¹⁹² Derrida argued that for Lacan, animals remained in a state of fixity of the imaginary rather than the symbolic, and were capable of merely simple coding rather than language.¹⁹³ According to Derrida, Lacan was dogmatically Cartesian,¹⁹⁴ wedded to the idea of animals' prewired behaviour.¹⁹⁵ Importantly for Derrida, Lacan maintained the distinction between reaction and response for nonhuman animals, without acknowledging the degree to which human animals, through iterative behaviour, also react rather than respond in a properly free sense.¹⁹⁶

In *The Beast & The Sovereign Vol I*, Derrida further recounted Lacan's traditional series of oppositions that constructed his logic of what is proper to human animals rather than nonhuman animals.¹⁹⁷ These included that human animals have law, 'fellows', liberty, responsibility, capacity for acquired tendencies rather than the innate, and the potential for cruelty.¹⁹⁸ Whereas Lacan claimed, according to Derrida, that nonhuman animals are never criminal as they are without law, they exist without the 'superego',¹⁹⁹ they are contained to a

¹⁸⁹ Derrida, *The Animal That Therefore I Am*, above n 1, 119-20.

¹⁹⁰ Ibid 120 citing Jacques Lacan, 'The Subversion of the Subject and the Dialectic of Desire in the Freudian Unconscious' in Jacques Lacan, *Ecrits* (Alan Sheridan trans, Norton, 1977) 305 ('*Sheridan Ecrits*'). See also Derrida, *The Animal That Therefore I Am*, above n 1, 128-35; Derrida, *The Beast & The Sovereign Vol I*, above n 2, 121-33.

¹⁹¹ Derrida, *The Animal That Therefore I Am*, above n 1, 121 citing Jacques Lacan, 'Position de l'inconscient' in Jacques Lacan, *Ecrits* (Seuil, 1966) 834 ('*Position*').

¹⁹² Derrida, *The Animal That Therefore I Am*, above n 1, 121 citing Lacan, *Position*, above n 191, 834.

¹⁹³ Derrida, *The Animal That Therefore I Am*, above n 1, 122, 137-39; Derrida, *The Beast & The Sovereign Vol I*, above n 2, 112-15. Krell notes that he felt that Derrida did recognise that Lacan did, in a later work, soften his distinctions between human and nonhuman animals in regard to the imaginary/symbolic difference: David Farrell Krell, *Derrida and Our Animal Others: Derrida's Final Seminar "The Beast and the Sovereign"* (Indiana University Press, 2013) 17.

¹⁹⁴ Derrida, *The Animal That Therefore I Am*, above n 1, 122-23; Derrida, *The Beast & The Sovereign Vol I*, above n 2, 117-20.

¹⁹⁵ Derrida, *The Animal That Therefore I Am*, above n 1, 123-24.

¹⁹⁶ Ibid 125. Lacan also argued that human animals do not have the power to erase their own traces and according to Derrida, that was another false distinction that denied the workings of trace in life more generally: ibid 136.

¹⁹⁷ Derrida, *The Beast & The Sovereign Vol I*, above n 2, 101-16.

¹⁹⁸ Ibid citing Jacques Lacan, 'A Theoretical Introduction to the Functions of Psychoanalysis in Criminology' in Lacan, *Sheridan Ecrits*, above n 190, 122, 102-22.

¹⁹⁹ Derrida, *The Beast & The Sovereign Vol I*, above n 1, 103.

fixity of innate programming,²⁰⁰ and therefore exist without responsibility.²⁰¹ According to Derrida, Lacan considered that animals have capacity for violence but not cruelty, as cruelty was, for Lacan, only violence against one's 'fellows'.²⁰² Derrida of course objected to Lacan's definition of cruelty that in turn attributed duty and responsibility as being owed by the human animal only to his human fellows.²⁰³ The Lacanian extension is that a human animal can neither be cruel to nonhuman animals nor act criminally, or culpably, or with evil intent toward nonhuman animals.²⁰⁴ Derrida explained that within that Lacanian logic, where a human animal might be violent toward a nonhuman animal, that violence would render only cruelty toward another human fellow, merely in the figure of the animal.²⁰⁵

D4 Derrida as animot

In the process of deconstructing and reinterpreting the Cartesian-Kantian mode of human ipseity, Derrida confessed to his own intellectual efforts as animot. It seems he sought to responsibly lay a trace, to gently lead by example, where *his* animot-perspective could be received without rendering further violence. It appears he sought to live, to 'be' in the enlightening company of his own trace.

I have a particularly animalist perception and interpretation of what I do, think, write, live, but, in fact, of everything, of the whole of history, culture, and so-called human society, at every level, macro- or microscopic. My sole concern is not that of interrupting this animalist "vision" but of taking care not to sacrifice to it any difference or alterity, the fold of any complication, the opening of any abyss to come.²⁰⁶

As autobiographical animot, Derrida had the deconstructive power to un-think the violent, cultural traces laid before him, and in him. Thinking as animot, the being sees itself. Derrida invited us to follow him. From the perspective of l'animot, it is possible to gain a purchase on all of the Derridean centrisms, that undo the inheritance of ontotheology. Derrida demonstrated that *that* inheritance, *reduces and constrains* the so-called essence and intelligence of (at least Western) human beingness to something already-written in metaphysics. Through that, I heard Derrida's warning. We are at risk of living our lives with limited reflective and autonomous response-ability. We are at risk of continuing to function as perpetual, consuming machines of the 'as such', as signifying consumers of every 'thing',

²⁰⁰ Ibid 104.

²⁰¹ Ibid.

²⁰² Ibid 104-05.

²⁰³ Ibid 107.

²⁰⁴ Ibid 107-09.

²⁰⁵ Ibid 106-08.

²⁰⁶ Derrida, *The Animal That Therefore I Am*, above n 1, 92.

and perhaps every other. Our questions should not be *of this*, or *of that*, *in* life or *in* law as we see it through merely what we have been led to believe are uniquely 'human' eyes. Rather we need to look to *the* question of life itself, and perhaps that is, as Derrida suggested, the question of questioning itself. For him, questioning only arises through writing, trace and *différance*, and is not unique to human animals. We need to think beyond the teleology of traditional notions beingness and ascendance. Derrida tried for nearly four decades to take us on that journey. To experience *l'animot* that therefore we are.

... Let me note very quickly in passing, concerning intellectual autobiography, that whereas the deconstruction of "logocentrism" had, for necessary reasons, to be developed over the years as deconstruction of "phallogocentrism," then of "Carnophallogocentrism," its very first substitution of the concept of trace or mark for those of speech, sign, or signifier was destined in advance, and quite deliberately, to cross the frontiers of anthropocentrism, the limits of a language confined to human words and discourse. Mark, gramma, trace, and *différance* refer differentially to all living things, all the relations between living and nonliving.²⁰⁷

Derrida left this note in *his passing*. His trace, that performed, that still performs, that passes by, that writes. That is now a profound writing *of my being*. As subject of that tracing trace, I am left with the aching question: who or what is *l'animot*, now that he is *l'animort*?

²⁰⁷ Ibid 104 (italics in original).

APPENDIX 2: JUDGMENTS THAT HAVE CONSIDERED ACPA S 17

This Appendix 2 lists all published judgments that I could locate that have considered the *Animal Care and Protection Act 2001* (Qld) s 17 ('ACPA'). The purpose of this Appendix 2 is to justify why I selected *Department of Employment, Economic Development and Innovation v Schloss & Schloss* QDC [2012] 30 (delivered *ex tempore*) as the only 'judgment'¹ suitable for the deconstructive reading in Chapter 10. In short, that 'judgment' was the only report that included sufficient relevant text for a deconstructive reading that considered issues central to this research.

The last search was conducted on 19th August 2018. I searched www.austlii.edu.au² for cases that considered ACPA s 17 and ACPA. I also searched the LexisAdvance Pacific Research³ electronic database for all cases that considered the ACPA. I also searched the Supreme Court Library Queensland⁴ website for "Animal Care" and 17'.

Table 4: Judgments that have considered ACPA s 17

Case/Judgment	Description	Why this case was not a target for deconstructive reading
<i>Johnston v Moretti</i> [2008] QDC 062 (delivered <i>ex tempore</i>)	Appeal to the Queensland District Court. Johnston had been found guilty of a breach of ACPA s 17 in 2006 for leaving two dogs in a hot car and was convicted and fined. He appealed that decision and the appeal was dismissed.	This judgment does not address issues relevant to this research in that it does not consider 'negligence' and neither does it add to the characterisation of ACPA s 17.
<i>Dart & Anor v Singer</i> [2010] QCA 75	Appeal in the Queensland Court of Appeal. Application to grant a stay in respect of an order that authorised that seized animals be disposed of by the State.	Judgment does not consider the actual offending or ACPA s 17 in any detail.

¹ I use quotation marks here for the purpose of highlighting that the document is an *ex tempore* judgment that includes a two page summary and the transcript of the Judge's reasons and comments as her Honour delivered them on the day, rather than a formal judgment in the usual sense.

² Australasian Legal Information Institute, <<http://classic.austlii.edu.au/>>.

³ LexisNexis, *Lexis Advance Pacific* <https://advance.lexis.com/pacificresearchhome>>. This is a subscription database that I could access through my student login at Victorian University.

⁴ Supreme Court Library Queensland, *CaseLaw* <<https://sclqld.org.au/caselaw/>>.

	At [4]: 'On 31 July 2008, RSPCA inspectors attended at premises where the applicants kept a number of animals, and executed a warrant under the ACP Act. The animals were in a shed, and were kept in what were considered by the inspectors to be unsanitary and inappropriate living conditions for the animals. The inspectors seized 113 live dogs, one cat, 488 rats, 73 mice, 12 guinea pigs and 11 birds. Veterinary examinations were carried out on most of the dogs, as a result of which treatment, of varying degrees of severity (including in one case euthanasia), was administered to 53 animals.'	
<i>Singer v Dart & Ors</i> [2011] QMC 37	Heard in the Magistrates Court of Queensland. This judgment recalls that in a previous case, the defendants had pleaded guilty to 131 offences under <i>ACPA</i> s 17(2). They had been sentenced in 2008. The charges considered in this judgment included five breaches of <i>ACPA</i> s 17 for each defendant. The Magistrate found the defendants guilty of all of those breaches (at [109]-[128], [154]-[171], [188]-[190], [193]-[194]).	This judgment does not address issues relevant to this research in that it does not consider 'negligence' and neither does it add to the characterisation of <i>ACPA</i> s 17.
<i>Department of Employment, Economic Development and Innovation v Schloss & Schloss</i> QDC [2012] 189 (delivered <i>ex tempore</i>)	This version of the Schloss transcript is published without the two cover pages as it is reported in <i>Department of Employment, Economic Development and Innovation v Schloss & Schloss</i> QDC [2012] 30.	This version includes the same transcript that is used in Chapter 10 for the deconstructive reading.
<i>Dart v Singer; Hajridin v Singer</i> [2013] QCA 255	Appeal in the Queensland Court of Appeal. Application for leave to appeal granted.	Judgment does not consider the actual offending or <i>ACPA</i> s 17 in any detail.
<i>Dart v Singer; Hajridin v Singer</i> [2014] QCA 263	Appeal in the Queensland Court of Appeal. Appeal against conviction for contravention of a prohibition order, appeal against sentence of three years probation set aside for breaching <i>ACPA</i> s 17(2) and substituted sentence of two and a half years. Other orders of Magistrates Court confirmed. Appeal with costs allowed.	Judgment does not consider the actual offending or <i>ACPA</i> s 17 in any detail.

	<p>Dart, among other offences was convicted in the Magistrates Court of five offences of breach of s 17(2). Summarised at [19] as: 'a breach of duty of care to 567 rats; a breach of duty of care to 272 mice; a breach of duty of care to one rat with a lesion; a breach of duty of care to a dog suffering from infected teeth and gums; a breach of duty of care to a dog suffering a severely infected ear'.</p> <p>Hajridin, among other offences were convicted in the Magistrates Court of five offences of breach of s 17(2). Summarised at [21] as: 'a breach of duty of care to 567 rats; a breach of duty of care to 272 mice; a breach of duty of care to a rat with a lesion; a breach of duty of care to a dog with infected teeth and gums; a breach of duty of care to a dog with an infected ear'.</p>	
<p>Johnson v RSPCA Queensland [2016] QDC 185</p>	<p>Appeal heard in the Queensland District Court.</p> <p>Appeal by Johnson against sentence after being found guilty of six charges under <i>ACPA</i> s 17(2). At [25]: Appeal allowed orders made to set aside the \$4,000 fine, payment schedule for payment of costs defined, prohibition order was dismissed and order for convictions not be recorded confirmed.</p> <p>At [1]: Appeal by Johnson against sentence after being found guilty of six charges under <i>ACPA</i> s 17(2) for 'failing to take reasonable steps to provide appropriately for the turtles' needs or living conditions and failing to provide appropriate living conditions for the turtles. Convictions were not recorded. A single fine of \$4,000 was imposed plus \$472.50 compensation for veterinary fees and court costs of \$86. A prohibition order was made under s 183 of the Animal Care and Protection Act 2001 to the effect that the appellant "must not purchase or acquire or take possession of any animal other than animals provided by Guide Dogs Australia or a registered care animal".</p>	<p>Judgment does not consider the actual offending or <i>ACPA</i> s 17 in any detail. It is mentioned in Chapter 10 (see footnotes 31, 59,79 and accompanying text).</p>

	<p>At [24]: 'Notwithstanding the appellant's impaired vision, the offences are serious and general deterrence is clearly a very relevant sentencing consideration for offences such as these. I recognise though that the effect of decisions of the Court of Appeal is that general deterrence would be of lesser importance in this case because of the appellant's vision impairment. In circumstances where the appellant clearly has no capacity to pay a fine as well as costs and compensation, a period of probation would, I consider, meet the community's expectation of a sufficient sentencing response for his offending. In my view, provided the appellant agrees, a sentence of 9 months probation should be substituted for the fine imposed on the appellant.'</p>	
<p><i>Jolley v Queensland Police</i> [2018] QDC 12</p>	<p>Appeal to the Queensland District Court on the ground that <i>ACPA</i> the 's 17 prohibition on inappropriate handling must be read down to apply only to handling which causes harm to an animal': [2].</p> <p>Appeal dismissed.</p> <p>At [1]: 'Darren Lee Jolley engaged in sexual acts with a dog and recorded the occasion with photographs and video. On 18 July 2017 the Emerald Magistrate found him guilty of breaching his duty of care to the animal by inappropriate handling, contrary to s 17 of the Animal Care and Protection Act 2001.'</p>	<p>This recent case is discussed in this research in Chapter 8 (see footnotes 85 and 126), Chapter 9 (see footnotes 121, 138, 142, 149, 152, 157, 163, 187, 201 and accompanying text), and Chapter 10 (see footnote 83 and accompanying text). This judgment is discussed in relation to Clare SC DCJ's interpretation of the 'reasonable steps' required under <i>ACPA</i> s 17.</p> <p>Further, at [1] her Honour clarified that the that offence 'is not called negligence'. As such this judgment helps to clarify the issues considered in this research, and assists in the legal characterisation of <i>ACPA</i> s 17, therefore was not a target for the deconstructive reading. It also appeared three years after this research began and served to confirm and clarify the issues considered in the research rather than introduce new issues for consideration.</p>
<p><i>Flaherty v Petersen</i> [2018] QDC 21</p>	<p>Appeal to the Queensland District Court. RSPCA appealed against acquittal where Petersen was charged with breaches of <i>ACPA</i> s 17.</p> <p>Appeal was dismissed.</p>	<p>This recent case mentioned in Chapter 9 of this research: see footnotes 137, 141, ,150, 158, 163-165, 189, 209 and accompanying text. This judgement is discussed in context to the particularisation of charges. This judgment does not include relevant text for a deconstructive reading since it does not involve other issues most relevant to this research. This case appeared three years after this research began and served to confirm and clarify the issues considered in the research rather than introduce new issues for consideration.</p>

Search for Northern Territory cases considering Animal Welfare Act (NT) s 8.

As *Animal Welfare Act* (NT) s 8(1) also provides that '[a] person in charge of an animal owes a duty of care to it', I also searched for judgments that had considered that duty. The last search was conducted on 20th August 2018. I searched www.austlii.edu.au⁵ for cases that considered that provision. I also searched the LexisAdvance Pacific Research⁶ electronic database for cases that considered that provision. I could not locate any judgments.

⁵ Australasian Legal Information Institute, <<http://classic.austlii.edu.au/>>.

⁶ LexisNexis, *Lexis Advance Pacific* <https://advance.lexis.com/pacificresearchhome>>. This is a subscription database that I could access through my student login at Victorian University.

APPENDIX 3: EXCERPTS FROM AUSTRALIAN JURISDICTIONS' ANIMAL PROTECTIONS STATUTES

APPENDIX 3, TABLE 5: AUSTRALIAN JURISDICTIONS' STATUTES AS AT 12 JULY 2018 – PURPOSES AND EXCEPTIONS

Note: In the column 'Provision Text' – bold text in 10pt is text that I have notated. Text from the statute appears in 9pt and is enclosed in quotation marks.

Table 5: Legislative purposes, summary of broad exceptions to protections, liability

Jurisdiction	Statute	Section # Description	Provision Text
ACT	<i>Animal Welfare Act 1992 (ACT)</i> A1992-45. Republication No 27. Effective 30 April 2018. Last Amendment by A2017-44. Accessed 12 July 2018.	4A 'Objects of Act' 20 'Exception-conduct in accordance with approved code of practice or mandatory code of practice' Some exceptions are provided in the <i>Animal Welfare Regulation 2001 (ACT)</i> and I have referred to the version effective 01/07/2014. Application of the Criminal Code	<p>'The objects of this Act are to— (a) promote and protect the welfare, safety and health of animals; and (b) ensure the proper and humane care and management of animals; and (c) reflect the community's expectation that people who keep or care for animals will ensure that they are properly treated.'</p> <p>[None of the offences in Part 2 (which includes all offences from ss 6A – 19A)]: 'apply if the conduct making up the offence was in accordance with an approved code of practice or a mandatory code of practice: (a) section 9A (Keeping laying fowls for commercial egg production—appropriate accommodation); (b) section 9B (Keeping pigs—appropriate accommodation); (c) section 9C (Removing or trimming beak of fowl); (d) section 14 (Use or possession of prohibited item); (e) section 17 (1) or (2) (Matches, competitions etc); (f) section 18 (1) or (2) (Rodeos and game parks); (g) section 19A (Medical and surgical procedures—veterinary surgeons).'</p> <p>The <i>Animal Welfare Act 1992 (ACT)</i>s 4 and the <i>Animal Welfare Regulation 2001 (ACT)</i> s 4 both state that: 'The Criminal Code, ch 2 applies to all offences against this regulation (see Code, pt 2.1). The chapter sets out the general principles of criminal responsibility (including burdens of proof and general defences), and defines terms used for offences to which the Code applies (<i>eg conduct, intention, recklessness</i> and <i>strict liability</i>).'</p>

			<p>Identification of strict liability offences: Both the Act and the Regulation stipulate in some individual sections whether the offence is a strict liability offence. The offences under s 6B ‘Duty of care for animal’, s 7 ‘Cruelty’, s 7A ‘Aggravated cruelty’ are not specifically identified as strict liability offences. Some of the other offences are specifically identified as strict liability offences.</p>
NSW	<p><i>Prevention of Cruelty to Animals Act 1979 (NSW)</i> No 200. Current version for 1 July 2018. Accessed 12 September 2018.</p>	<p>3 ‘Objects of Act’</p> <p>s 34A ‘Guidelines relating to welfare of farm or companion animals’</p> <p>s 24 ‘Certain defences’</p>	<p>‘The objects of this Act are: (a) to prevent cruelty to animals, and (b) to promote the welfare of animals by requiring a person in charge of an animal: (i) to provide care for the animal, and (ii) to treat the animal in a humane manner, and (iii) to ensure the welfare of the animal.’</p> <p>Under s 34A ‘(3) ‘Compliance, or failure to comply, with any guidelines prescribed or adopted by the regulations for the purposes of subsection (1) is admissible in evidence in proceedings under this Act of compliance, or failure to comply, with this Act or the regulations.’</p> <p>‘(1) In any proceedings for an offence against this Part or the regulations in respect of an animal, the person accused of the offence is not guilty of the offence if the person satisfies the court that the act or omission in respect of which the proceedings are being taken was done, authorised to be done or omitted to be done by that person: (a) where, at the time when the offence is alleged to have been committed, the animal was: (i) a stock animal—in the course of, and for the purpose of, ear-marking or ear-tagging the animal or branding, other than firing or hot iron branding of the face of, the animal, (ii) a pig of less than 2 months of age or a stock animal of less than 6 months of age which belongs to a class of animals comprising cattle, sheep or goats—in the course of, and for the purpose of, castrating the animal, (iii) a goat of less than 1 month of age or a stock animal of less than 12 months of age which belongs to the class of animal comprising cattle—in the course of, and for the purpose of, dehorning the animal, (iv) a sheep of less than 6 months of age—in the course of, and for the purpose of, tailing the animal, or (v) a sheep of less than 12 months of age—in the course of, and for the purpose of, performing the Mules operation upon the animal, in a manner that inflicted no unnecessary pain upon the animal,</p>

		<p>s 33F 'Offences in respect of more than one animal'</p> <p>s 34 'Proceedings for offences'</p>	<p>(b) in the course of, and for the purpose of:</p> <p>(i) hunting, shooting, snaring, trapping, catching or capturing the animal, or</p> <p>(ii) destroying the animal, or preparing the animal for destruction, for the purpose of producing food for human consumption, in a manner that inflicted no unnecessary pain upon the animal,</p> <p>(c) in the course of, and for the purpose of, destroying the animal, or preparing the animal for destruction:</p> <p>(i) in accordance with the precepts of the Jewish religion or of any other religion prescribed for the purposes of this subparagraph, or</p> <p>(ii) in compliance with any duty imposed upon that person by or under this or any other Act,</p> <p>(d) (Repealed)</p> <p>(e) in the course of, and for the purpose of:</p> <p>(i) carrying out animal research, or</p> <p>(ii) supplying animals for use in connection with animal research, in accordance with the provisions of the Animal Research Act 1985, or</p> <p>(f) for the purpose of feeding a predatory animal lawfully kept by the person if:</p> <p>(i) the act concerned was the release of live prey for the predatory animal, and</p> <p>(ii) the diet of the predatory animal included animals of the kind released, and</p> <p>(iii) the person believed on reasonable grounds that the feeding of live prey to the predatory animal was necessary for the predatory animal's survival because the predatory animal would not eat a dead animal or meat from a dead animal.</p> <p>(2) Subsection (1) (b) does not apply to a person accused of an offence against section 19A.'</p> <p>'(1) In proceedings for an offence against section 5, 6, 7 or 8, an allegation may be made that the act or omission that constituted the alleged offence related to more than one animal.</p> <p>(2) In sentencing a person for an offence against section 5, 6, 7 or 8, a court may take into account whether the act or omission that constituted the offence related to more than one animal. However, if the person has already been prosecuted in respect of that act or omission, the court is to take into account any penalty that was imposed on the person as a result of that prosecution.'</p>
NT	<p><i>Animal Welfare Act (NT)</i> Reprint REPA046 As in force at: 12 April 2017 Accessed: 12 July 2018.</p>	<p>s 3 'Objectives'</p> <p>s 79 'Defences'</p>	<p>'The objectives of this Act are: (a) to ensure that animals are treated humanely; (b) to prevent cruelty to animals; and (c) to promote community awareness about the welfare of animals.'</p> <p>'It is a defence to a prosecution for an offence under this Act if the defendant establishes that the act or omission constituting the offence, or an element of the offence, was:</p> <p>(a) in accordance with an adopted code of practice; or</p> <p>(b) for the purpose of alleviating the suffering of an animal and was reasonable in the</p>

		<p>s 74A 'Alternative verdicts'</p> <p>s 75(3) 'Penalties'</p>	<p>circumstances. (2) It is not a defence to a prosecution for an offence under this Act that the act or omission constituting the offence, or an element of the offence, was in accordance with cultural, religious or traditional practices.'</p> <p>'(1) This section applies if, in a proceeding against a person charged with an offence against a provision listed in the following Table (the prosecuted offence), the court:</p> <ul style="list-style-type: none"> (a) is not satisfied beyond reasonable doubt that the person committed the prosecuted offence; but (b) is satisfied beyond reasonable doubt that the person committed an offence, or the offence of attempting to commit an offence, listed in the Table as an alternative offence for the prosecuted offence. <p>(2) The court may find the person not guilty of the prosecuted offence but guilty of the alternative offence...'</p> <p>'(3) A person found guilty of an offence under this Act is liable to an additional maximum penalty of 5 penalty units for each day on which the offence continues after the first day on which it was committed'.</p>
QLD	<p><i>Animal Care and Protection Act 2001 (Qld)</i> Current as at 1 July 2016. Accessed 12 July 2018.</p>	<p>s 3 'Purposes of Act'</p> <p>s 4 'How purposes are to be primarily achieved'</p>	<p>'The purposes of this Act are to do the following—</p> <ul style="list-style-type: none"> (a) promote the responsible care and use of animals; (b) provide standards for the care and use of animals that— (i) achieve a reasonable balance between the welfare of animals and the interests of persons whose livelihood is dependent on animals; and (ii) allow for the effect of advancements in scientific knowledge about animal biology and changes in community expectations about practices involving animals; (c) protect animals from unjustifiable, unnecessary or unreasonable pain; (d) ensure the use of animals for scientific purposes is accountable, open and responsible.' <p>The Schedule to the Act 'Dictionary' defines: 'welfare, of an animal, means issues about the health, safety or wellbeing of the animal.'</p> <p>'The purposes are to be primarily achieved by the following—</p> <ul style="list-style-type: none"> (a) providing for regulations about codes of practice for animal welfare; (b) allowing regulations to require compliance with codes of practice; (c) imposing a duty of care on persons in charge of animals; (d) prohibiting certain conduct in relation to animals; (e) requiring a person using an animal for scientific purposes to comply with the scientific use

		<p>s 16 'Use of code of practice in proceeding'</p> <p>EXAMPLES OF PROVISIONS WITHIN CODES OF PRACTICE</p> <p>Similar codes of practice may exist in other Australian jurisdictions. I have provided a summary here for Qld only as an example, since Qld is the jurisdiction that is the subject of this research.</p>	<p>code; (f) providing for the registration of certain users of animals for scientific purposes; (g) providing for the appointment of authorised officers to monitor compliance with compulsory code requirements and the scientific use code; (h) providing for the appointment of inspectors to investigate and enforce this Act; (i) allowing the Minister to establish an animal welfare advisory committee or another body to advise the Minister on animal welfare issues.'</p> <p>'A code of practice is admissible in evidence in a proceeding for an offence against this Act if it is relevant to the act or omission to which the proceeding relates.'</p> <p>The <i>Animal Care and Protection Regulation 2012</i> (QLD), (current as at 1 July 2017, accessed 7 September 2017) provides codes of practice for the keeping of fowl; keeping, killing, housing and husbandary of pigs; and for the transport of livestock. Example provisions that are not deemed as cruel or a breach of the duty of care include: for young pigs with an average weight of 51kgs, the minimum floor area is 0.42m²; for breeding gilts greater than 100kg the minimum floor area is 1 m²; for farrowing sows or sows suckling piglets, they may be kept in a farrowing crate that is at least 2m x 0.5m, and the sow can be kept in the crate for 6 weeks or 12 weeks if she is required to foster an additional litter. A pig can also be kept in a stall which only need be of a size where for example, 'the pig can stand, stretch and lie with its limbs extended in the stall without being obstructed by the stall'. Boars must be released from stalls at least twice a week for either mating or exercise, and no minimum time period is stipulated. There is no such equivalent provision for sows or young pigs. Pigs can be surgically castrated by a person who is not a veterinary surgeon, without anaesthetic if the pig is under 3 weeks old. A pig must be killed in a way that: 'causes rapid unconsciousness and death immediately after unconsciousness happens; and (b) is otherwise humane.'</p> <p>Cattle that re not visually assessed to be pregnant up to a particular stage, are not lactating, and those that are more than 6 months of age, may be transported for a maximum journey time of 48 hours, and be without water for that period.</p> <p>Bobby calves, who are developed enough to be alert and able to rise from a lying position, provided they had 'a liquid feed within 6 hours' of loading, may be</p>
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		<p>s 38 'Operation of pt 6' re: Exemptions</p>	<p>transported for up to 12 hours for delivery to an abattoir. Horses that are not visually assessed to be pregnant up to a particular stage, are not lactating, and those that are more than 6 months of age, may be transported for a maximum journey time of 24 hours, and be without water for that period.</p> <p>Schedule 4 of the Regulations lists many other documents 'made as codes of practice'.</p> <p>'(1) Sections 40 and 41A to 47 each provide an exemption (an offence exemption) to the offences created under this chapter for a proceeding against a person for the offence.</p> <p>(2) If an offence exemption applies to a particular act or omission, the person does not commit the offence that would otherwise be committed by the act or omission.</p> <p>(3) The Justices Act 1886, section 76, applies to each exemption.</p> <p>(4) This part does not limit another provision of this Act that creates an exemption to which the Justices Act 1886, section 76, applies.'</p> <p>The offence exemptions are: s 41A – 'Killing an animal under Aboriginal tradition, Island custom or native title' where it done '(i) in the exercise of native title rights and interests; or (ii) under the authority of another law of the State or the Commonwealth to take the animal to exercise Aboriginal tradition or Island custom; or (iii) under the Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984, section 61' and various other qualifiers are listed. s 42 'Feral or pest animals' s 43 'Animals used to feed another animal' s 44 'Fishing using certain live bait' s 45 'Slaughter under religious faith' s 46 'Use of fishing apparatus under shark fishing contract' s 47 'Supplying animal' if that supply is for 'a prescribed entity' or 'by an inspector for the State'.</p>
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		<p>s 40 'Vicarious liability of employers in certain circumstances'</p> <p>s 42A 'Codes of practice'</p> <p>s 43 'Act does not render unlawful practices that are in accordance with prescribed code of animal husbandry practice'</p>	<p>(b) is, if the act or omission continues after conviction, guilty of a further offence against that provision and liable, in addition to the penalty otherwise applicable to that further offence, to a penalty for each day during which the act or omission continued after that conviction of not more than the amount equal to one-tenth of the maximum penalty prescribed for that offence.</p> <p>(2) Where an offence against a provision of this Act consists of an omission to do something that is required to be done, the omission will, for the purposes of subsection (1), be taken to continue for so long as the thing required or directed to be done remains undone after the expiration of the period for compliance with the requirement.'</p> <p>'If a person commits an offence against this Act in the course of employment by another, the employer is guilty of an offence and liable to the same penalty as is prescribed for the principal offence unless it is proved that the employer could not by the exercise of reasonable diligence have prevented the commission of that offence.'</p> <p>'Where a code is incorporated into or referred to in this Act or the regulations— ... (b) evidence of the contents of the code may be given in any legal proceedings by production of a copy of a document apparently certified by or on behalf of the Minister to be a true copy of the code'.</p> <p>'Nothing in this Act renders unlawful anything done in accordance with a prescribed code of practice relating to animals'.</p>
TAS	<p><i>Animal Welfare Act 1993 (Tas)</i> Version current from 24 June 2015. Accessed 12 July 2018.</p>	<p>s 3A(3) 'Care or charge of animals'</p>	<p>This Act does not have any provision that states its purpose. Rather, on the title page it states: 'An Act to prevent neglect of, and cruelty to, animals, to ensure the welfare of animals, to repeal the Cruelty to Animals Prevention Act 1925 and for related purposes'.</p> <p>'(3) For the purposes of proceedings for an offence against this Act – (a) the conduct and state of mind of an officer, employee or agent of a body corporate acting within the scope of his or her actual, usual or ostensible authority will be imputed to the body corporate; and</p>

		<p>s 4 'Non-application of Act'</p> <p>s 48A 'Liability of employer or body corporate'</p>	<p>(b) the conduct and state of mind of an employee or agent of a natural person acting within the scope of his or her actual, usual or ostensible authority will be imputed to that person.</p> <p>(4) For the purposes of subsection (3), a reference to "conduct" or "acting" includes a reference to failure to act.'</p> <p>'(1) Sections 8, 9 and 10 do not apply to practices used in the hunting of animals done in a usual and reasonable manner and without causing excess suffering unless the practices are prohibited by this or any other Act.</p> <p>(2) Sections 8, 9 and 10 do not apply to practices used in –</p> <ul style="list-style-type: none"> (a) recreational fishing; or (b) angling; or (c) commercial fishing – done in a usual and reasonable manner and without causing excess suffering unless the practices used are prohibited by this or any other Act. <p>(3) Sections 8 and 9 do not apply to any animal research carried out in a licensed institution if that research is carried out –</p> <ul style="list-style-type: none"> (a) with the approval of the Animal Experimentation Ethics Committee; and (b) in accordance with any procedures approved by the Animal Experimentation Ethics Committee; and (c) in accordance with a Code of Practice relating to animal research. <p>(4) Section 10(1)(a) and section 10(3) do not apply to the feeding of an animal if the feeding is carried out in a reasonable manner, having regard to the natural behaviour of the animal.'</p> <p>'(1) If an employee is charged with an offence under this Act and the employee proves to the satisfaction of a court that he or she was acting on the instructions of his or her employer, the court may –</p> <ul style="list-style-type: none"> (a) while continuing to hear the proceedings against the employee, order the employer to appear and answer the charge as if the employer had also been charged with the offence; or (b) dismiss the charge against the employee and order the employer to appear and answer the charge as if the employer had been charged with the offence; or (c) continue to hear the proceedings against the employee and take no further action in respect of the employer; or (d) dismiss the charge against the employee and take no further action in respect of the charge. <p>(2) If a body corporate commits an offence against this Act –</p> <ul style="list-style-type: none"> (a) each person concerned in the management of the body corporate is taken to have also committed the offence and may be convicted of the offence unless the person shows that – <ul style="list-style-type: none"> (i) the act or omission constituting the offence took place without the person's knowledge or consent; or (ii) the person used all due diligence to prevent the act or omission by the body corporate; and (b) the obligations of the body corporate under this Act are not dissolved by the dissolution of the body corporate, or by the body corporate becoming an externally administered body
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		<p>48D 'Continuing offences'</p> <p>50 'Regulations'</p>	<p>corporate within the meaning of the Corporations Act, after the day the offence took place.'</p> <p>(1) A person who commits a continuing offence against this Act is liable, in addition to the penalty otherwise prescribed, to a further penalty, not exceeding one-fifth of the maximum penalty otherwise prescribed, for each day during which the offence continues.</p> <p>(2) For the purposes of this section, an obligation to do an act continues until the act is done, notwithstanding that any period within which, or time before which, the act is required to be done has ended or passed.</p> <p>'(3) Regulations made under this section may provide that any provision of this Act does not apply to any specified animal or class or kind of animal, matter, practice or person.'</p>
VIC	<p><i>Prevention of Cruelty to Animals Act 1986 (Vic)</i> Authorised Version No. 093... incorporating amendments 1 May 2017. Accessed 12 July 2018.</p>	<p>s 1 'Purpose'</p> <p>s 6 'Application of Act'</p>	<p>'The purpose of this Act is to— (a) prevent cruelty to animals; and (b) to encourage the considerate treatment of animals; and (c) to improve the level of community awareness about the prevention of cruelty to animals.'</p> <p>'(1) This Act does not apply to— ...</p> <p>(a) the slaughter of animals in accordance with the Meat Industry Act 1993 or any Commonwealth Act ;or</p> <p>(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</p> <p>(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...</p> <p>(d) anything done in accordance with the Catchment and Land Protection Act 1994; or</p> <p>(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</p> <p>(f) the slaughter of a farm animal on a farm if—</p> <p>(i) it is slaughtered for consumption on that farm; and</p> <p>(ii) it is slaughtered in a humane manner; and</p> <p>(iii) it is not slaughtered for sale; and</p> <p>(iv) it is not slaughtered for use in the preparation of food for sale; and</p> <p>(v) it is not removed from that farm; or</p> <p>(g) any fishing activities authorised by and conducted in accordance with the Fisheries Act 1995.</p> <p>.</p> <p>s 6(1B) This Act, except Part 3, does not apply to anything done in accordance with the Wildlife Act 1975.'</p>

		<p>s 42 'Regulations'</p> <p>s3 'Definitions'</p> <p>s 11 'Defences to cruelty or aggravated cruelty'</p> <p>ss 41AB, 41AB re bodies corporate</p> <p>s 1 'Objectives'</p>	<p>See also Under s 42(3), '[t]he regulations do not apply to any act or practice with respect to the farming, transport, sale or killing of any farm animal if that act or practice is carried out in accordance with a Code of Practice.'</p> <p>'farm animal' means— (a) if kept for or used in connection with primary production—cattle, sheep, pigs, poultry, goats and deer; and (b) horses other than horses kept for or used in connection with sporting events, equestrian competitions, pony clubs, riding schools, circuses or rodeos'.</p> <p>'(1) In any proceedings against a person in relation to an act of cruelty under section 9, or an act of aggravated cruelty under section 10, it is a defence if the person— (a) acted reasonably; or (b) reasonably omitted to do an act— in defending himself or herself or any other person against an animal or against any threat of attack by an animal. (2) It is a defence to a prosecution for an offence under section 9 or 10 in relation to an activity if the person charged was carrying out the activity in accordance with a code of practice prescribed for the purposes of this subsection (other than a Code of Practice made under section 7) that regulates that activity.'</p> <p>These long provisions describe the liability of officers of bodies corporate (due to size I have not recited them here).</p> <p>'The objectives of these Regulations are— (a) to make provision as to procedures conducted on animals, devices used on animals, implements and methods of capture of animals, methods and procedures of transport of animals and other related matters; (b) to prescribe conditions for rodeo licences, rodeo permits and rodeo school permits; (c) to make provision as to persons operating, participating in or otherwise involved in rodeos and rodeo schools; (d) to prescribe conditions and standards for scientific procedures and breeding; (e) to prescribe forms, fees and other matters authorised by the Prevention of Cruelty to Animals Act 1986.'</p>
WA	<p><i>Animal Welfare Act 2002 (WA)</i> As at 29 November 2016. Version 01-h0-01. Accessed 12 July 2018.</p>	s 3 'Content and intent'	<p>'(1) This Act provides for the protection of animals by — (a) regulating the people who may use animals for scientific purposes, and the manner in which they may be used; and (b) prohibiting cruelty to, and other inhumane or improper treatment of, animals.</p>

		<p>s 84 'Breach of code of practice not sufficient to prove cruelty'</p> <p>s 85 'Death of animal not sufficient to prove cruelty'</p> <p>s 88 'Penalties for body corporate'</p>	<p>(2) This Act intends to — (a) promote and protect the welfare, safety and health of animals; (b) ensure the proper and humane care and management of all animals in accordance with generally accepted standards; and (c) reflect the community's expectation that people who are in charge of animals will ensure that they are properly treated and cared for.'</p> <p>'Where a person is charged with an offence under Part 3 the fact that the person has failed to act in accordance with a relevant code of practice — (a) must be taken into consideration by the court; but (b) is not sufficient, on its own, to prove that the person committed the offence.'</p> <p>'Where a person is charged with an offence under Part 3 the fact that the person killed the animal, or did something that contributed to the death of the animal — (a) must be taken into consideration by the court; but (b) is not sufficient, on its own, to prove that the person committed the offence'.</p> <p>A body corporate that is convicted of an offence is liable to a penalty of — (a) if a minimum penalty is specified in relation to that offence, not less than 5 times that minimum penalty; and (b) in any event, a maximum penalty of not more than 5 times the maximum penalty specified in relation to that offence.</p>
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APPENDIX 3, TABLE 6: AUSTRALIAN JURISDICTIONS' ANIMAL PROTECTION STATUTES: OMISSIONS OFFENCES AND POSITIVE DUTIES AS AT 12 JULY 2018

Note: In the column 'Provision Text' – text in bold 10pt is what I have notated. Text from the statute appears in 9pt and is enclosed in quotation marks.

Table 6: Omissions Offences and Positive Duties

Jurisdiction	Statute	Section # Description	Provision Text
ACT	<i>Animal Welfare Act 1992 (ACT)</i> Republication No 27. Effective 30 April 2018. Last Amendment by A2017-44. Accessed 12 July 2018.	6B 'Duty to care for animal'	'(1) A person in charge of an animal has a duty to care for the animal. (2) A person in charge of an animal commits an offence if the person— (a) fails to take reasonable steps to provide the animal with appropriate— (i) food and water; or (ii) shelter or accommodation; or (iii) opportunity to display behaviour that is normal for the animal; or (iv) treatment for illness, disease, and injury; or (b) abandons the animal. Maximum penalty: 100 penalty units, imprisonment for 1 year or both. (3) In this section: appropriate means suitable for the needs of the animal having regard to the species, environment and circumstances of the animal. reasonable steps means the steps a reasonable person would be expected to take having regard to all the circumstances. treatment includes veterinary treatment if a reasonable person would expect veterinary treatment to be sought in the circumstances.'
		9 'Confined animals'	'(1) A person in charge of a confined animal commits an offence if the person does not provide the animal with adequate exercise. Maximum penalty: 10 penalty units. (2) An offence against subsection (1) is a strict liability offence. (3) A person commits an offence if the person confines an animal in a way that causes injury, pain, or excessive distress to the animal. Maximum penalty: 100 penalty units, imprisonment for 1 year or both.'

		<p>10 ‘Alleviation of pain’</p> <p>‘(1) A person (other than a person in charge of an animal) commits an offence if— (a) the person injures an animal; and (b) the person does not take reasonable steps (including, if appropriate, seeking veterinary treatment) to alleviate any pain suffered by the animal. Maximum penalty: 100 penalty units, imprisonment for 1 year or both.</p> <p>(2) A person (other than a person in charge of an animal) commits an offence if— (a) the person injures the animal; and (b) the person does not take reasonable steps to tell the person in charge of the animal within 24 hours after the injury; and (c) if there is no person in charge of the animal or if, after taking the reasonable steps, the person cannot tell the person in charge of the animal—tell the authority, or an inspector, within 72 hours after the injury. Maximum penalty: 10 penalty units.</p> <p>(3) An offence against subsection (2) is a strict liability offence.’</p> <p>Other Provisions (exceptions not listed here)</p> <p>Various sections from ss 9A provide for positive obligations for some nonhuman animals in particular situations and usages. As examples:</p> <p>s 9A requires that ‘laying fowls for commercial egg production’ are kept in ‘appropriate accommodation’ (which is defined under another statute). Maximum penalty: 50 penalty units.</p> <p>s 9B requires that a pig must be kept in ‘appropriate accommodation’ (which is defined in the section). Maximum penalty: 50 penalty units. It is a strict liability offence.</p> <p>s 11(2) makes it an offence if a person in charge of an animal commits an offence if the person does not take adequate precautions to prevent the release of the animal from custody or control. Maximum penalty: 100 penalty units, imprisonment for 1 year or both.</p> <p>s 24A makes it an offence to fail to comply with a requirement of the mandatory code; and the person is reckless about whether the mandatory code is complied with. Maximum penalty: 100 penalty units.</p> <p>s 24B makes it an offence to fails to comply with a requirement of the mandatory code. Maximum penalty: 50 penalty units. It is a strict liability offence.</p>
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		<p>s 8 'Animals to be provided with food, drink or shelter'</p>	<p>'(1) A person in charge of an animal shall not fail to provide the animal with food, drink or shelter, or any of them, which, in each case, is proper and sufficient and which it is reasonably practicable in the circumstances for the person to provide. Maximum penalty: 250 penalty units in the case of a corporation and 50 penalty units or imprisonment for 6 months, or both, in the case of an individual.</p> <p>(2) In any proceedings for an offence against subsection (1), evidence that an animal was not provided with clean water during a period of 24 hours is evidence that the person accused of the offence has failed to provide the animal with proper and sufficient drink during that period.</p> <p>(3) In any proceedings for an offence against subsection (1), evidence that an animal was not provided with food or shelter during a period of 24 hours (or, in the case of an animal of a class prescribed by the regulations, during the period prescribed for that class of animal) is evidence that the person accused of the offence has failed to provide the animal with proper and sufficient food or shelter during that period.</p> <p>(4) Before commencing proceedings for an offence against subsection (1) in respect of a stock animal depastured on rateable land (within the meaning of the Local Land Services Act 2013), the prosecution must obtain advice from Local Land Services and the Department about the state of the animal (if practicable) and the appropriate care for it.</p> <p>(5) The prosecution may, with leave of the court granted in such circumstances as the court considers just, commence or continue proceedings for an offence against subsection (1), despite having failed to comply with subsection (4).'</p>
		<p>s 9 'Confined animals to be exercised'</p>	<p>'(1) A person in charge of an animal which is confined shall not fail to provide the animal with adequate exercise. Maximum penalty: 250 penalty units in the case of a corporation and 50 penalty units or imprisonment for 6 months, or both, in the case of an individual.</p> <p>(1A) Subsection (1) does not apply to a person in charge of an animal if the animal is: (a) a stock animal other than a horse, or (b) an animal of a species which is usually kept in captivity by means of a cage.</p> <p>(2) In any proceedings for an offence against subsection (1), evidence that an animal referred to in that subsection was not released from confinement during a period of 24 hours is evidence that the person accused of the offence has failed to provide the animal with adequate exercise during that period.</p>

		<p>s 33B 'Permitting or failing to prevent commission or continuance of offence'</p>	<p>(3) A person in charge of an animal (other than a stock animal) shall not confine the animal in a cage of which the height, length or breadth is insufficient to allow the animal a reasonable opportunity for adequate exercise. Maximum penalty: 250 penalty units in the case of a corporation or 50 penalty units or imprisonment for 6 months, or both, in the case of an individual.</p> <p>(4) In any proceedings for an offence against subsection (3) in respect of an animal, the person accused of the offence is not guilty of the offence if the person satisfies the court that the person confined the animal:</p> <p>(a) for the purpose of:</p> <p>(i) carrying or conveying the animal, or</p> <p>(ii) displaying the animal in a public exhibition or public competition, in a manner that inflicted no unnecessary pain upon the animal, and</p> <p>(b) for a period not exceeding 24 hours.'</p> <p>'(1) A person who owns or has the charge of an animal and who:</p> <p>(a) knowingly permits an offence against this Act or the regulations to be committed in respect of the animal, or</p> <p>(b) fails, without reasonable excuse, to prevent the commission or continuance of such an offence, is guilty of an offence against this Act.</p> <p>(2) A person who owns or occupies land on which an animal is located and who:</p> <p>(a) knowingly permits an offence against this Act or the regulations to be committed on the land in respect of the animal, or</p> <p>(b) fails, without reasonable excuse, to prevent the commission or continuance of such an offence, is guilty of an offence against this Act.</p> <p>(3) The maximum penalty for an offence against this section is the maximum penalty under this Act for the offence permitted under subsection (1) (a) or (2) (a) or not prevented under subsection (1) (b) or (2) (b).'</p>
NT	<p><i>Animal Welfare Act (NT)</i> Reprint REPA046 As in force at: 12 April 2017 Accessed: 12 July 2018.</p>	<p>7 'Meaning of <i>minimum level of care</i>'</p>	<p>'(1) The minimum level of care required for an animal is that the animal:</p> <p>(a) has appropriate and sufficient food and water; and</p> <p>(b) has appropriate accommodation and living conditions; and</p> <p>(c) is appropriately treated for disease, injury or suffering; and</p> <p>(d) is allowed appropriate exercise; and</p> <p>(e) is handled only in ways that are appropriate; and</p> <p>(f) is confined or restrained only in ways that are appropriate; and</p> <p>(g) is worked, ridden or otherwise used only in ways that are appropriate; and</p> <p>(h) is not abandoned; and</p> <p>(i) is not used in an organised animal fight.</p> <p>(2) For this section, appropriate, for an animal, means appropriate to ensure the welfare, health</p>

		<p>s 8 'Duty of care for animal'</p> <p>s 9 'Cruelty'</p>	<p>and safety of the animal having regard to all relevant circumstances, including the animal's species and the environment in which it is kept or lives.</p> <p>(3) Further, something is not appropriate for an animal if:</p> <ul style="list-style-type: none"> (a) it causes, or is likely to cause, the animal unnecessary suffering; or (b) it is prescribed by the Regulations not to be appropriate.' <p>'(1) A person in charge of an animal owes a duty of care to it.</p> <p>(2) The person commits an offence if the person breaches the duty of care. Maximum penalty: 100 penalty units or imprisonment for 1 year.</p> <p>(3) Without limiting subsection (2), a person breaches the duty of care if the person fails to take reasonable steps to ensure the animal receives the minimum level of care.</p> <p>(4) For subsection (3), in determining whether a person has taken reasonable steps, regard must be had to:</p> <ul style="list-style-type: none"> (a) all the relevant circumstances; and (b) the steps an ordinary person might reasonably be expected to have taken in those circumstances.' <p>'(1)A person commits an offence if the person is cruel to an animal. Maximum penalty:150 penalty units or imprisonment for 18 months.</p> <p>(2)Without limiting subsection (1), a person in charge of an animal is cruel to the animal if the person:</p> <ul style="list-style-type: none"> (a) fails to ensure the animal receives the minimum level of care; and (b) intends to cause harm to the animal. <p>(3)Without limiting subsection (1), a person is cruel to an animal (whether or not the person is in charge of the animal) if the person does any of the following:</p> <ul style="list-style-type: none"> (a) causes the animal unnecessary suffering; (b) having caused the animal unnecessary suffering (including accidentally), fails to take reasonable action to mitigate the suffering; (c) uses on the animal a device prescribed by the Regulations to be inhumane; (d) subjects the animal to treatment prescribed by the Regulations to be cruel.'
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		s 15 'Action in respect of injury'	<p>'If a person injures an animal not in his or her charge, and the person believes or ought reasonably to believe that the animal is domesticated or is a stock animal, he or she must:</p> <p>(a) as soon as practicable, inform a person in charge of the animal about the injury; or</p> <p>(b) if he or she is unable to inform a person in accordance with paragraph (a) – as soon as practicable, inform an inspector about the injury.'</p>
QLD	<p><i>Animal Care and Protection Act 2001 (Qld)</i> Current as at 1 July 2016. Accessed 12 July 2018.</p>	<p>s 17 'Breach of duty of care prohibited'</p> <p>s 33 'Obligation to exercise closely confined dogs'</p>	<p>'(1) A person in charge of an animal owes a duty of care to it.</p> <p>(2) The person must not breach the duty of care. Maximum penalty—300 penalty units or 1 year's imprisonment.'</p> <p>'(3) For subsection (2), a person breaches the duty only if the person does not take reasonable steps to—</p> <p>(a) provide the animal's needs for the following in a way that is appropriate—</p> <p>(i) food and water;</p> <p>(ii) accommodation or living conditions for the animal;</p> <p>(iii) to display normal patterns of behaviour;</p> <p>(iv) the treatment of disease or injury; or</p> <p>(b) ensure any handling of the animal by the person, or caused by the person, is appropriate.</p> <p>(4) In deciding what is appropriate, regard must be had to—</p> <p>(a) the species, environment and circumstances of the animal; and</p> <p>(b) the steps a reasonable person in the circumstances of the person would reasonably be expected to have taken.'</p> <p>'(1) A person in charge of a dog that is closely confined for a continuous period of 24 hours must, unless the person has a reasonable excuse, ensure the dog is exercised or allowed to exercise itself for—</p> <p>(a) the next 2 hours; or</p> <p>(b) the next hour and for another hour in the next 24 hours. Maximum penalty—20 penalty units.</p> <p>(2) In deciding whether a dog is closely confined for subsection (1), regard must be had to the dog's age, physical condition and size.'</p>
SA	<p><i>Animal Welfare Act 1985 (SA)</i> Version 14.12.2017. Accessed: 12 July 2018.</p>	<p>s 13 'Ill treatment of animals'</p> <p>See also Table 8 for the parts of this offence that provide that positive acts constitute the offence.</p>	<p>'(2) A person who ill treats an animal is guilty of an offence. Maximum penalty: \$20 000 or imprisonment for 2 years.</p> <p>(3) Without limiting the generality of subsection (1) or (2), a person ill treats an animal if the person—</p> <p>(b) being the owner of the animal—</p> <p>(i) fails to provide it with appropriate, and adequate, food, water, living conditions (whether temporary or permanent) or exercise; or</p> <p>(ii) fails to take reasonable steps to mitigate harm suffered by the animal; or</p> <p>(iii) abandons the animal; or</p> <p>(iv) neglects the animal so as to cause it harm; or</p>

		<p>s 15A 'Duty of person in charge of vehicle in case of accidents involving animals'</p>	<p>(c) having caused the animal harm (not being an animal of which that person is the owner), fails to take reasonable steps to mitigate the harm;</p> <p>5) It is a defence to a charge of an offence against subsection (2) if the defendant proves that the offence did not result from any failure on the part of the defendant to take reasonable care to avoid the commission of the offence.</p> <p>(6) In this section— cause—a person's act or omission causes the death of, or harm to, an animal if the act or omission substantially contributes to the death or harm.'</p> <p>'Where an animal is injured in an accident involving a vehicle, the person in charge of the vehicle must—</p> <p>(a) take such steps as are reasonably practicable in the circumstances to inform the owner of the animal that the animal was injured; and</p> <p>(b) where, after taking such steps, that person has been unable to contact the owner—inform an inspector, within 24 hours of the accident occurring, of the circumstances of the accident.</p> <p>Maximum penalty: \$5 000.</p> <p>Expiation fee: \$315.'</p>
TAS	<p><i>Animal Welfare Act 1993 (Tas)</i> Version current from 24 June 2015. Accessed 12 July 2018.</p>	<p>s 6 'Duty of care to animals'</p> <p>7 'Management of animals'</p> <p>s 8 'Cruelty to animals'</p> <p>See also Table 8 for the positive acts that constitute the offence.</p>	<p>'A person who has the care or charge of an animal has a duty to take all reasonable measures to ensure the welfare of the animal'.</p> <p>The term 'welfare' is used 48 times in the Act and is not defined.</p> <p>'A person who has the care or charge of an animal or group of animals must not use a method of management of the animal or group which is reasonably likely to result in unreasonable and unjustifiable pain or suffering to the animal or an animal in the group.</p> <p>Penalty: In the case of –</p> <p>(a) a body corporate, a fine not exceeding 1 000 penalty units; or</p> <p>(b) a natural person, a fine not exceeding 200 penalty units or imprisonment for a term not exceeding 6 months, or both.'</p> <p>'(1) A person must not do any act, or omit to do any duty, which causes or is likely to cause unreasonable and unjustifiable pain or suffering to an animal.</p> <p>Penalty: In the case of –</p> <p>(a) a body corporate, a fine not exceeding 500 penalty units; or</p> <p>(b) a natural person, a fine not exceeding 100 penalty units or imprisonment for a term not exceeding 12 months, or both.</p> <p>(2) Without limiting the generality of subsection (1), a person is guilty of an offence under that</p>

		<p>subsection if the person –...</p> <p>(e) has possession or custody of an animal that is confined, constrained or otherwise unable to provide for itself and fails to provide the animal with appropriate and sufficient food, drink, shelter or exercise; or</p> <p>(f) abandons an animal of a species usually kept in a state of confinement or for domestic purposes; or</p> <p>(g) has possession or custody of a sick or injured animal and fails to provide veterinary or other appropriate treatment for the animal’.</p> <p>(3) In this section –</p> <p>abandons, in relation to an animal, includes the relinquishing of the care or charge of the animal without ensuring that another person has, or will immediately take, care or charge of the animal;</p> <p>appropriate and sufficient means –</p> <p>(a) in relation to the provision of food to an animal, that food of sufficient quality is provided –</p> <p>(i) in sufficient quantity to meet the nutritional requirements of maintaining the animal in reasonable body condition and, if appropriate, allowing for growth and reproduction; and</p> <p>(ii) as often as appropriate for the digestive system and metabolism of the animal; or</p> <p>(b) in relation to the provision of drink, that fluids of sufficient quality are provided in sufficient quantity to keep the animal hydrated at all times; or</p> <p>(c) in relation to the provision of shelter, that shelter which affords protection for the animal from the adverse effects of weather conditions is provided;...</p> <p>s 9 ‘Aggravated cruelty’</p> <p>‘(1) A person must not do any act, or omit to do any duty, referred to in section 8 , if the person knows that, or is reckless as to whether, the act or omission will, or is reasonably likely to, result in –</p> <p>(a) the death, deformity or serious disablement of an animal; or</p> <p>(b) harm to an animal that endangers the life of the animal; or</p> <p>(c) an injury to an animal that, either alone or in combination with the health of the animal at the time of the injury, results in a significant and longstanding injury to the animal.</p> <p>Penalty: In the case of –</p> <p>(a) a body corporate, a fine not exceeding 1 000 penalty units; or</p> <p>(b) a natural person, a fine not exceeding 200 penalty units or imprisonment for a term not exceeding 60 months, or both.</p> <p>(2) It is not a defence in proceedings for an offence under this section if an animal is euthanised before –</p> <p>(a) the animal dies as a result of an act or omission referred to in subsection (1); or</p> <p>(b) the full extent of the deformity, disablement, harm or injury to the animal as a result of that act or omission is known’.</p>
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		<p>s 19 ‘Cruelty to animals’</p> <p>See also Table 8 for the positive acts that can constitute the offence.</p>	<p>‘(1) A person must not be cruel to an animal. Penalty: Minimum — \$2 000. Maximum — \$50 000 and imprisonment for 5 years.</p> <p>(2) Without limiting subsection (1) a person, whether or not the person is a person in charge of the animal, is cruel to an animal if the person —...</p> <p>(e) in any other way causes the animal unnecessary harm.</p> <p>(3) Without limiting subsection (1) a person in charge of an animal is cruel to an animal if the animal —...</p> <p>(d) is not provided with proper and sufficient food or water; (e) is not provided with such shelter, shade or other protection from the elements as is reasonably necessary to ensure its welfare, safety and health; (f) is abandoned, whether at the place where it is normally kept or elsewhere; (h) suffers harm which could be alleviated by the taking of reasonable steps; (j) is, in any other way, caused unnecessary harm.’</p>
		<p>20 ‘Defence – self-defence or protecting another person or an animal’</p>	<p>I have not recited this provision due to its length.</p>
		<p>22 ‘Defence – veterinary care’</p>	<p>‘It is a defence to a charge under section 19(1) (other than an offence committed in circumstances described in section 19(3)(g)) for a person to prove that the person was a veterinary surgeon, or was acting on the instructions of a veterinary surgeon, and was providing the animal with veterinary care in accordance with generally accepted veterinary practices.’</p>
		<p>22 ‘Defence – authorised by law’</p>	<p>‘It is a defence to a charge under section 19(1) for a person to prove that the person — (a) was authorised by or under a written law to do the act that is alleged to constitute the offence; and (b) did the act in a humane manner.’</p>
		<p>23 – ‘Defence – normal animal husbandry’</p>	<p>‘It is a defence to a charge under section 19(1) for a person to prove that the act alleged to constitute the offence was done — (a) in accordance with a generally accepted animal husbandry practice, other than a prescribed practice, that is used in — (i) farming or grazing activities; (ii) the management of zoos, wildlife parks or similar establishments; (iii) the management of animal breeding establishments; or (iv) the training of animals;</p>

			and (b) in a humane manner.'
		24 'Defence – killing pests'	'(1) It is a defence to a charge under section 19(1) for a person to prove — (a) that the act alleged to constitute the offence was done while the person was attempting to kill pests; (b) that the person was attempting to kill pests in a manner that is generally accepted as usual and reasonable for killing pests of the kind the person was attempting to kill; and (c) if the animal the subject of the charge was not a pest, that the person took reasonable steps to ensure that animals other than pests would not be harmed. (2) In this section — pest means a prescribed animal, fish or invertebrate.'
		25 'Defence – code of practice'	'It is a defence to a charge under section 19(1) for a person to prove that the person was acting in accordance with a relevant code of practice.'
		26 'Defence – stock fending for itself'	'(1) It is a defence to a charge under section 19(1) committed in circumstances described in section 19(3)(d), (e) or (f) for a person to prove that — (a) the animal is stock of a kind that is ordinarily left to roam at large on a pastoral property and to fend for itself; (b) the act alleged to constitute the offence does not involve anything more than allowing the animal to so roam and fend for itself; and (c) the property on which the animal was roaming was reasonably capable of sustaining all the animals that were roaming on it. (2) In this section — stock has the meaning given to that term in the Biosecurity and Agriculture Management Act 2007 section 6.'
		27 'Defence – releasing animals into the wild'	'It is a defence to a charge under section 19(1) committed in circumstances described in section 19(3)(f) for a person to prove that — (a) the animal is fauna; (b) the act alleged to constitute the offence does not involve anything more than releasing the animal into the wild; and (c) the release occurred in circumstances in which it was reasonable to expect the animal to be able to fend for itself.'
		28 'Defence – where person in charge is not in actual custody'	'(1) It is a defence to a charge under section 19(1) committed in circumstances described in section 19(3)(d), (e), (f) or (h) for a person to prove that the person — (a) is a "person in charge" by reason of paragraph (a), (c) or (d), but not paragraph (b), of the definition of that term; and

		<p>29 ‘Defence – prescribed use of devices’</p> <p>30 ‘Defence – prescribed surgical or similar operations, practices and activities’</p>	<p>(b) took reasonable steps to ensure that the animal would be properly treated and cared for.</p> <p>(2) It is a defence to a charge under section 19(1) committed in circumstances described in section 19(3)(d), (e), (f) or (h) for a person to prove that the person —</p> <p>(a) is a “person in charge” by reason only of paragraph (d) of the definition of that term; and</p> <p>(b) did not know, and could not reasonably be expected to have known, that —</p> <p>(i) the animal was at a place, or in a vehicle, owned or occupied by the person; or</p> <p>(ii) the animal was not being properly treated and cared for.’</p> <p>‘It is a defence to a charge under section 19(1) committed in circumstances described in section 19(2)(b) for a person to prove that the person was a prescribed person, or was in a prescribed class of persons, and used the device in a prescribed manner.’</p> <p>‘It is a defence to a charge under section 19(1) committed in circumstances described in section 19(3)(g) for a person to prove that the person was a prescribed person, or was in a prescribed class of persons, and carried out the operation, practice or activity in a prescribed manner.’</p>
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APPENDIX 3, TABLE 7: AUSTRALIAN JURISDICTIONS' STATUTES – PROHIBITIONS AGAINST CRUELTY AND AGGRAVATED CRUELTY AS AT 12 JULY 2018

Note: In the column 'Provision Text' – text in bold and 10pt is what I have notated. Text from the statute appears in 9pt and is enclosed in quotation marks.

Table 7: Prohibitions against cruelty and aggravated cruelty

Jurisdiction	Statute	Section # Description	Provision Text
ACT	<i>Animal Welfare Act 1992 (ACT)</i> Republication No 27. Effective 30 April 2018. Last Amendment by A2017-44. Accessed 12 July 2018.	6A 'Meaning of cruelty - pt 2' 7 'Cruelty' 7A 'Aggravated Cruelty'	<p>'In this part: cruelty, in relation to an animal, includes the following: (a) causing pain that is unjustifiable, unnecessary or unreasonable in the circumstances; (b) beating that causes pain; (c) abusing, terrifying or tormenting; (d) injuring or wounding that is unjustifiable, unnecessary or unreasonable in the circumstances.'</p> <p>'A person commits an offence if the person commits an act of cruelty on an animal. Maximum penalty: 100 penalty units, imprisonment for 1 year or both.'</p> <p>'(1) A person commits an offence if— (a) the person commits an act of cruelty on an animal; and (b) the act causes the death of the animal; and (c) the person intends to cause, or is reckless about causing, the death of, or serious injury to, the animal. Maximum penalty: 200 penalty units, imprisonment for 2 years or both. (2) A person commits an offence if— (a) the person commits an act of cruelty on an animal; and (b) the act causes serious injury to the animal; and (c) the person intends to cause, or is reckless about causing, the death of, or serious injury to, the animal. Maximum penalty: 200 penalty units, imprisonment for 2 years or both. (3) In this section: causes death or serious injury—a person's act causes death or serious injury if it substantially contributes to the death or injury. serious injury, to an animal, means any injury (including the cumulative effect of more than 1 injury) that— (a) endangers, or is likely to endanger, the animal's life; or (b) is, or is likely to be, significant and longstanding.'</p>

		<p>7B 'Alternative verdicts-cruelty'</p> <p>Examples of other specific provisions (headings only) where positive acts are required.</p>	<p>'(1) This section applies if, in a prosecution for an offence against section 7A (Aggravated cruelty), the trier of fact is not satisfied that the defendant committed the offence, but is satisfied beyond reasonable doubt that the defendant committed an offence against section 7 (Cruelty).</p> <p>(2) The trier of fact may find the defendant guilty of the offence against section 7, but only if the defendant has been given procedural fairness in relation to that finding of guilt.'</p> <p>s 11(1) 'Release' s 12 'Administering poison' s 12A 'Laying poison'. s 13 'Electrical devices' s 14 'Use or possession of prohibited item' s 15 'Transport and containment' s 15A 'Transport of dogs'. s 15B 'Intensive breeding of cats or dogs' s 16 'Working etc unfit animals' s 17 'Matches, competitions etc' s 18 'Rodeos and game parks' s 18A 'Greyhound racing' s 19 'Medical and surgical procedures- people other than veterinary surgeons' s 19A 'Medical and surgical procedures-veterinary surgeons'.</p>
NSW	<p><i>Prevention of Cruelty to Animals Act 1979 (NSW)</i> No 200. Current version for 1 July 2018. Accessed 12 September 2018.</p>	s 4(2) 'Definitions'	<p>Under s 4 'Definitions', subsection (2) states: '(2) For the purposes of this Act, a reference to an act of cruelty committed upon an animal includes a reference to any act or omission as a consequence of which the animal is unreasonably, unnecessarily or unjustifiably: (a) beaten, kicked, killed, wounded, pinioned, mutilated, maimed, abused, tormented, tortured, terrified or infuriated, (b) over-loaded, over-worked, over-driven, over-ridden or over-used, (c) exposed to excessive heat or excessive cold, or (d) inflicted with pain.</p> <p>(2A) For the purposes of subsection (2) (a), the pinioning of a bird is not an act of cruelty if it is carried out in the manner prescribed by the regulations.</p> <p>(3) For the purposes of this Act, a person commits an act of aggravated cruelty upon an animal if the person commits an act of cruelty upon the animal or (being the person in charge of the animal) contravenes section 5 (3) in a way which results in: (a) the death, deformity or serious disablement of the animal, or (b) the animal being so severely injured, so diseased or in such a physical condition that it is cruel to keep it alive.'</p>

		<p>s 5 'Cruelty to animals' [Positive obligations under this section where the offence can be made out by omission are included in Table 6].</p> <p>s 6 'Aggravated cruelty to animals' [Positive obligations under this section where the offence can be made out by omission are included in Table 6].</p> <p>Examples of other specific provisions</p>	<p>'(1) A person shall not commit an act of cruelty upon an animal.</p> <p>(2) A person in charge of an animal shall not authorise the commission of an act of cruelty upon the animal.</p> <p>Maximum penalty: 250 penalty units in the case of a corporation and 50 penalty units or imprisonment for 6 months, or both, in the case of an individual.'</p> <p>'(1) A person shall not commit an act of aggravated cruelty upon an animal. Maximum penalty: 1,000 penalty units in the case of a corporation and 200 penalty units or imprisonment for 2 years, or both, in the case of an individual.</p> <p>(2) In any proceedings for an offence against subsection (1), the court may: (a) where it is not satisfied that the person accused of the offence is guilty of the offence, and (b) where it is satisfied that that person is guilty of an offence against section 5 (1), convict that person of an offence against section 5 (1).'</p> <p>s 7 'Carriage and conveyance of animals' s 10 'Tethering of animals' s 11 'Animals not to be abandoned' s 12 'Certain procedures not to be performed on animals' s 13 'Certain animals not to be ridden etc' s 14 'Injuries to animals to be reported' s 15 'Poisons not to be administered to animals' s 16 'Certain electrical devices not to be used upon animals' s 18 'Animal baiting and fighting prohibited' s 18A 'Bull-fighting prohibited' s 19 'Trap-shooting prohibited' s 19A 'Game parks prohibited' s 20 'Certain animal-catching activities prohibited' s 21 'Live baiting, coursing and other similar activities prohibited' s 21A 'Firing prohibited' s 21B 'Tail nicking prohibited' s 21C 'Steeplechasing and hurdle racing prohibited'</p>
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			<p>and the hunting to reduce stress to the animal;’</p> <p>s 22 ‘Presence at prohibited event’</p> <p>s 23 ‘Cropping dog’s ear’</p> <p>s 24 ‘Cropping dog’s tail’</p> <p>s 25 ‘Debarking operations’</p> <p>s 26 ‘Removal of cat’s claw’</p> <p>s 27 ‘Docking tail of cattle or horse’</p> <p>s 30 ‘Causing captive animal to be injured or killed by a dog’</p> <p>s 31 ‘Releasing animal for injury or killing by dog’</p> <p>s 32 ‘Keeping or using kill or lure for blooding or coursing’</p> <p>s 34 ‘Possession of prohibited trap or spur unlawful’</p> <p>s 35 ‘Use of prohibited trap or spur unlawful’</p> <p>s 36 ‘Prohibitions’ – administration of poisons or laying of baits</p> <p>s 37 ‘Unlawfully allowing an animal to injure or kill another animal’</p>
SA	<p>Animal Welfare Act 1985 (SA) Version 14.12.2017. Accessed: 12 July 2018.</p>	<p>s 13(1), s13(4) ‘Ill treatment of animals’ – the aggravated offence.</p> <p>Subsection 2 defines ‘ill treats’.</p>	<p>‘(1) If—</p> <p>(a) a person ill treats an animal; and</p> <p>(b) the ill treatment causes the death of, or serious harm to, the animal; and</p> <p>(c) the person intends to cause, or is reckless about causing, the death of, or serious harm to, the animal, the person is guilty of an offence.</p> <p>Maximum penalty: \$50 000 or imprisonment for 4 years.</p> <p>‘(2) A person who ill treats an animal is guilty of an offence. Maximum penalty: \$20 000 or imprisonment for 2 years.</p> <p>(3) Without limiting the generality of subsection (1) or (2), a person ill treats an animal if the person—</p> <p>(a) intentionally, unreasonably or recklessly causes the animal unnecessary harm; or ...</p> <p>(b) being the owner of the animal—...</p> <p>(iii) abandons the animal; or ...</p> <p>(f) causes the animal to be killed or injured by another animal; or</p> <p>(g) kills the animal in a manner that causes the animal unnecessary pain; or</p> <p>(h) unless the animal is unconscious, kills the animal by a method that does not cause death to occur as rapidly as possible; or</p> <p>(i) carries out a medical or surgical procedure on the animal in contravention of the regulations; or</p> <p>(j) ill treats the animal in any other manner prescribed by the regulations for the purposes of this section.</p> <p>(4) A person charged with an offence against subsection (1) (the aggravated offence) may be</p>

	<p>Animal Welfare Regulations 2012 (SA) Version 1.8.2017. Accessed 7 September 2017.</p>	<p>s 13 'Ill treatment of animals'..</p> <p>s 13(1) is the aggravated offence (see above).</p> <p>See also Table 6 for the parts of this offence that provide that omissions constitute the offence.</p> <p>Examples of other specific provisions</p>	<p>convicted of an offence against subsection (2) (the lesser offence) if the court is not satisfied that the aggravated offence has been established beyond reasonable doubt but is satisfied that the lesser offence has been so established.</p> <p>(6) In this section— cause—a person's act or omission causes the death of, or harm to, an animal if the act or omission substantially contributes to the death or harm.</p> <p>'(2) A person who ill treats an animal is guilty of an offence. Maximum penalty: \$20 000 or imprisonment for 2 years.</p> <p>(3) Without limiting the generality of subsection (1) or (2), a person ill treats an animal if the person— (a) intentionally, unreasonably or recklessly causes the animal unnecessary harm; or (c) having caused the animal harm (not being an animal of which that person is the owner), fails to take reasonable steps to mitigate the harm; or (f) causes the animal to be killed or injured by another animal; or (g) kills the animal in a manner that causes the animal unnecessary pain; or (h) unless the animal is unconscious, kills the animal by a method that does not cause death to occur as rapidly as possible; or (i) carries out a medical or surgical procedure on the animal in contravention of the regulations; or (j) ill treats the animal in any other manner prescribed by the regulations for the purposes of this section.</p> <p>(5) It is a defence to a charge of an offence against subsection (2) if the defendant proves that the offence did not result from any failure on the part of the defendant to take reasonable care to avoid the commission of the offence.</p> <p>(6) In this section— cause—a person's act or omission causes the death of, or harm to, an animal if the act or omission substantially contributes to the death or harm.</p> <p>r 14 'Prohibited activities' r 14A 'Possession of certain items prohibited' r 15 'Electrical devices not to be used in contravention of regulations'</p>
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		<p>r 5 'Codes of Practice'</p> <p>Examples of other specific provisions</p>	<p>r 5 '(1) A person described in an entry in Schedule 2 must, in carrying out an activity described in that entry, ensure compliance with the code of practice and any modifications specified in the entry. Maximum penalty: \$2 500. Expiation fee: \$210. (2) For the purposes of section 43 of the Act, each of the codes of practice specified in Schedule 2 is a prescribed code of practice.'</p> <p>r 7 'Use of electroimmobilisers' r 8 'Use of certain other electrical devices' r 9 'Use of traps prohibited in certain circumstances' r 10 'Use of gel to catch or deter birds prohibited' r 11 'Certain research prohibited except for limited purposes' r 15 'Only horses and cattle to be used in rodeo events' r 17 'General requirements for conducting rodeos' r 18 'Inspections by designated rodeo judge' r 19 'Regulation of use and care of rodeo animals' r 20 'Requirements and prohibitions relating to equipment' r 21 'Special restrictions relating to use of electrical prods and goads' rr 22-24 'General requirements' for keeping and managing domestic fowls rr 25-33 in regard to keeping and managing pigs.</p> <p>Schedule 2 lists various other Codes of Practice.</p>
TAS	<p><i>Animal Welfare Act 1993 (Tas)</i> Version current from 24 June 2015. Accessed 12 July 2018.</p>	<p>6 'Duty of care to animals'</p> <p>s 7 'Management of animals'</p> <p>s 8 'Cruelty to animals'</p> <p>See also Table 6 that</p>	<p>'A person who has the care or charge of an animal has a duty to take all reasonable measures to ensure the welfare of the animal'.</p> <p>A person who has the care or charge of an animal or group of animals must not use a method of management of the animal or group which is reasonably likely to result in unreasonable and unjustifiable pain or suffering to the animal or an animal in the group. Penalty: In the case of – (a) a body corporate, a fine not exceeding 1 000 penalty units; or (b) a natural person, a fine not exceeding 200 penalty units or imprisonment for a term not exceeding 6 months, or both.</p> <p>(1) A person must not do any act, or omit to do any duty, which causes or is likely to cause unreasonable and unjustifiable pain or suffering to an animal. Penalty: In the case of –</p>

		<p>lists the omissions that can constitute this offence.</p>	<p>(a) a body corporate, a fine not exceeding 500 penalty units; or (b) a natural person, a fine not exceeding 100 penalty units or imprisonment for a term not exceeding 12 months, or both.</p> <p>(2) Without limiting the generality of subsection (1), a person is guilty of an offence under that subsection if the person – (a) wounds, mutilates, tortures, overrides, overdrives, overworks, abuses, beats, torments or terrifies an animal; or (b) overloads or overcrowds an animal; or (c) drives, conveys, carries or packs an animal in a manner or position or in circumstances that subjects or subject it to unreasonable and unjustifiable pain or suffering; or (d) works, rides, drives or uses an animal when it is unfit for the purpose; or... (h) administers to or otherwise uses in respect of an animal an injurious drug or a toxic or noxious substance except for– (i) medical curative purposes; or (ii) scientific research purposes; or (iii) normal management procedures; or (iv) euthanasia; or (v) the purposes of controlling a List A disease as defined in the Animal Health Act 1995; or (vi) the purposes of controlling a pest animal in accordance with the pest register; or (i) in the course of any sport or public performance or in the training for any sport or public performance, applies or exposes an electronic device to an animal; or (j) uses a spur, or other like appliance, with sharpened rowels on an animal; or (k) does any other prescribed act.'</p>
		<p>s 9 'Aggravated cruelty'</p>	<p>(1) A person must not do any act, or omit to do any duty, referred to in section 8 , if the person knows that, or is reckless as to whether, the act or omission will, or is reasonably likely to, result in – (a) the death, deformity or serious disablement of an animal; or (b) harm to an animal that endangers the life of the animal; or (c) an injury to an animal that, either alone or in combination with the health of the animal at the time of the injury, results in a significant and longstanding injury to the animal. Penalty: In the case of – (a) a body corporate, a fine not exceeding 1 000 penalty units; or (b) a natural person, a fine not exceeding 200 penalty units or imprisonment for a term not exceeding 60 months, or both.</p> <p>(2) It is not a defence in proceedings for an offence under this section if an animal is euthanised before – (a) the animal dies as a result of an act or omission referred to in subsection (1); or (b) the full extent of the deformity, disablement, harm or injury to the animal as a result of that act or omission is known.'</p>

		<p>s 11 'Defences to cruelty or aggravated cruelty'</p>	<p>'(1) A person who commits an act or acts of cruelty on any animal, which result in the death or serious disablement of the animal, commits aggravated cruelty on that animal and is guilty of an offence and is liable to a penalty of not more than, in the case of a natural person, 500 penalty units or imprisonment for 2 years or, in the case of a body corporate, 1200 penalty units.</p> <p>(2) A person who is guilty of an offence under subsection (1) may be liable to the penalty for that offence in addition to or instead of any other penalty to which the person is liable under section 9.'</p> <p>'(1) In any proceedings against a person in relation to an act of cruelty under section 9, or an act of aggravated cruelty under section 10, it is a defence if the person—</p> <p>(a) acted reasonably; or</p> <p>(b) reasonably omitted to do an act— in defending himself or herself or any other person against an animal or against any threat of attack by an animal.</p> <p>(2) It is a defence to a prosecution for an offence under section 9 or 10 in relation to an activity if the person charged was carrying out the activity in accordance with a code of practice prescribed for the purposes of this subsection (other than a Code of Practice made under section 7) that regulates that activity.'</p>
	<p><i>Prevention of Cruelty to Animals Regulations 2008 (Vic)</i> Authorised Version incorporating amendments as at 1 July 2017. Accessed 8 September 2017.</p>	<p>Examples of other Offences</p>	<p>r 11A 'Further prohibited procedure offences'. This section prohibits <i>prohibited procedures</i>, and the showing and exhibited of animals on which a prohibited procedure has been carried out.</p> <p>Note, under r 3 'Definitions': <i>prohibited procedures</i> means: the procedure of thermocautery or firing of a horse; any of the following performed by a veterinary practitioner for the purpose of having a therapeutic effect on the animal – cropping the ears of a dog, docking the tail of a dog or horse, grinding, clipping or trimming the teeth of a sheep using an electrical or motorised device, removing the claws of a cat, removing the venom sacs of a reptile; or debarking a dog unless the procedure is done by a veterinary practitioner and in accordance with the Code of Practice; or spaying an animal unless the procedure is done by a veterinary practitioner</p> <p>r 13 'Baiting and luring'. Under r 8, 'baiting means encouraging an animal to fight another animal'.</p> <p>r 14 'Trap-shooting'</p> <p>r 15 'Selling traps'</p>

			<p> r 15AB 'Setting or using traps' r 15A 'Dogs on moving vehicles' r 15C 'Breeding of animals with heritable defects' r 16 'Offence to operate rodeos without a licence or permit' r 26 'Offences relating to scientific procedures carried out at scientific premises' r 27 'Offences relating to scientific procedures carried out outside scientific premises' r 8 'Use of mouthpieces' r 9 'Pronged collars prohibited' r 10 'Prescribed kinds of traps' </p> <p> Division 2—Electronic devices sold or used on animals Division 3—Leghold traps Division 4—Confinement traps Division 5—Net traps Division 6—Non-kill snare traps Division 7—Rodent kill traps Division 8—Kill traps Division 9—Glue traps Division 10—Lethal trap devices Part 3—Rodeos and rodeo schools </p>
WA	<p><i>Animal Welfare Act 2002 (WA)</i> As at 29 November 2016. Version 01-h0-01. Accessed 12 July 2018.</p>	<p>s 5 'Interpretation'</p> <p>s 19 'Cruelty to animals'</p> <p>See also Table 6 that lists the omissions that can constitute the offence.</p>	<p>'harm includes — (a) injury; (b) pain; and (c) distress evidenced by severe, abnormal physiological or behavioural reactions.'</p> <p>'(1) A person must not be cruel to an animal. Penalty: Minimum — \$2 000. Maximum — \$50 000 and imprisonment for 5 years.</p> <p>(2) Without limiting subsection (1) a person, whether or not the person is a person in charge of the animal, is cruel to an animal if the person — (a) tortures, mutilates, maliciously beats or wounds, abuses, torments, or otherwise ill-treats, the animal; (b) uses a prescribed inhumane device on the animal; (c) intentionally or recklessly poisons the animal; (d) does any prescribed act to, or in relation to, the animal; or (e) in any other way causes the animal unnecessary harm.</p> <p>(3) Without limiting subsection (1) a person in charge of an animal is cruel to an animal if the animal — (a) is transported in a way that causes, or is likely to cause, it unnecessary harm; (b) is confined, restrained or caught in a manner that —</p>

	<p>Animal Welfare (General) Regulations 2003 (WA) As at 01 May 2013. Version 01-e0-05.</p>	<p>Defences</p> <p>Examples of other provisions</p>	<p>(i) is prescribed; or (ii) causes, or is likely to cause, it unnecessary harm; (c) is worked, driven, ridden or otherwise used — (i) when it is not fit to be so used or has been over used; or (ii) in a manner that causes, or is likely to cause, it unnecessary harm... (g) is subjected to a prescribed surgical or similar operation, practice or activity; (h) suffers harm which could be alleviated by the taking of reasonable steps; (i) suffers harm as a result of a prescribed act being carried out on, or in relation to, it; or (j) is, in any other way, caused unnecessary harm.</p> <p>I have not listed here the very long list of defences available to s 19. See Table B where I have listed them in full.</p> <p>s 6 ‘Unlicensed use of animals for scientific purposes prohibited’ s 7 ‘Carrying on business supplying animals for scientific purposes’ s 31 ‘Possession of things intended to inflict cruelty’ s 32 ‘Shooting, hunting or fighting captive animals’</p> <p>r 3 ‘Inhumane devices (s. 19(2)(b))’ r 4 ‘Prescribed acts (s. 19(2)(d) and (3)(b)(i))’ r 7 ‘Use of devices — electric shock (s. 29)’ r 8 ‘Use of devices — metal-jawed traps (s. 29)’ r 14 ‘Further offences (s. 94) — tail docking’ Schedule 1 – lists many Codes of Practice.</p>
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APPENDIX 3, TABLE 8: AUSTRALIAN JURISDICTIONS' STATUTES – ANIMAL WELFARE DIRECTIONS AND WARNINGS PROVISIONS AS AT 6 SEPTEMBER 2017

Note: In the column 'Provision Text' – text in bold and 10pt is what I have notated. Text from the statute appears in 9pt and is enclosed in quotation marks.

Table 8: Animal welfare directions and warnings

Jurisdiction	Statute	Section # Description	Provision Text
ACT	<i>Animal Welfare Act 1992 (ACT)</i> Republication No 27. Effective 30 April 2018. Last Amendment by A2017-44. Accessed 12 July 2018.	24C 'Direction to comply with mandatory code'	'(1) An inspector or authorised officer must give a person a written direction to rectify a breach of a mandatory code if the inspector or authorised officer believes on reasonable grounds that— (a) the person is in breach of a requirement of the code; and (b) the code applies to the person only in relation to a non-business activity engaged in by the person; and (c) the person has not previously been convicted, or found guilty, of an offence under section 24A or section 24B for failing to comply with a requirement of the code. (2) A direction must— (a) state the requirement of the code that has been breached and the conduct constituting the breach; and (b) state a reasonable time within which the direction must be complied with; and (c) include a statement that the person may be prosecuted under section 24B if the person fails to comply with the direction. (3) The inspector or authorised officer may withdraw a written direction if, after giving the direction to a person, the inspector or authorised officer discovers that the person has previously been convicted, or found guilty, of an offence under section 24A or section 24B.'
		85(5) 'Inspectors and authorised officers'	[An inspector or authorised officer may give a person in charge of the relevant animal directions in writing requiring that person]— '(a) to provide the animal with such specified rest, food, water, shelter or treatment as is necessary in the interests of the animal's welfare; and (b) if necessary, to consult a veterinary surgeon about the condition of the animal within such a specified period as is reasonable in the circumstances. (6) A person must not contravene a direction given to the person under subsection (5). Maximum penalty: 50 penalty units. (7) An offence against this section is a strict liability offence.'
NSW	<i>Prevention of Cruelty to Animals Act 1979 (NSW)</i> No 200.	24N 'Notices in relation to animals'	'(1) If an inspector is satisfied on reasonable grounds that a person is contravening a provision of this Act or the regulations in relation to an animal, the inspector may give the person a notice in

	Current version for 1 July 2018. Accessed 12 September 2018.		<p>writing requiring the person to take such specified action in relation to the animal as the inspector considers necessary to avoid any further contravention.</p> <p>(2) A person who, without reasonable excuse, fails to comply with a notice is guilty of an offence. Maximum penalty: 25 penalty units.</p> <p>(3) A person cannot be convicted for both an offence against this section and another offence under this Act or the regulations in respect of the same act or omission.'</p>
NT	<p><i>Animal Welfare Act (NT)</i> Reprint REPA046 As in force at: 12 April 2017 Accessed: 12 July 2018.</p>	s 67 'Power to alleviate suffering'	<p>'(1)If an authorised person believes on reasonable grounds that:</p> <ul style="list-style-type: none"> (a) an animal has not been provided with appropriate or sufficient food or drink during the previous 24 hours; (b) an animal is so severely injured, overworked, diseased or in such a physical condition that it is necessary for the animal to be provided with veterinary treatment; or (c) an animal is being treated in a manner that is likely to cause it suffering, the authorised person may take the action he or she believes is necessary to alleviate the animal's suffering. <p>(2) The action that may be taken under subsection (1) includes any of the following:</p> <ul style="list-style-type: none"> (a) providing the animal with food or drink; (b) seizing the animal and removing it to a place the authorised person considers appropriate; (c) giving a person in charge of the animal a written notice requiring the person: <ul style="list-style-type: none"> (i) to provide the animal with the specified rest, food, drink, shelter or treatment that is necessary in the interests of the animal's welfare; and (ii) if necessary – to obtain veterinarian treatment for the animal within the specified period that is reasonable in the circumstances. <p>(3) A person must comply with a requirement in a notice given under subsection (2)(c). Maximum penalty: 50 penalty units or imprisonment for 6 months.</p> <p>(4) Subject to subsection (6), if an authorised person is of the opinion that:</p> <ul style="list-style-type: none"> (a) an animal is so severely injured, diseased or in such a poor physical condition that it is cruel to keep it alive; and (b) the animal: <ul style="list-style-type: none"> (i) is not about to be destroyed; or (ii) is about to be destroyed in a manner that will inflict unnecessary suffering on it, the authorised person may destroy the animal, or cause it to be destroyed, in a manner that causes it to die quickly and without unnecessary suffering. <p>(5) In exercising a power under subsection (4), an authorised person may first remove the animal to a place he or she thinks is suitable for the purpose.</p> <p>(6) An inspector may exercise a power under subsection (4) only with the consent of a person in charge of the animal unless:</p> <ul style="list-style-type: none"> (a) after making reasonable enquiries the inspector is unable to locate the person; or

			(b) the inspector is a veterinarian.
QLD	Animal Care and Protection Act 2001 (Qld) Current as at 1 July 2016. Accessed: 12 July 2018.	<p>s 159 'Power to give animal welfare direction'</p> <p>s 161 'Failure to comply with animal welfare direction'</p> <p>s 181A 'Interim prohibition order' I have listed this provision and s 183 (below) for Queensland and not the other equivalents</p>	<p>'(1) The inspector may give a written direction (an animal welfare direction) requiring stated action about the animal or its environment.</p> <p>(2) The direction may be given to—</p> <ul style="list-style-type: none"> (a) a person in charge of the animal; or (b) a person whom the inspector reasonably believes is in charge of the animal; or (c) if the animal has been seized under division 4, subdivision 1— <ul style="list-style-type: none"> (i) a person who, immediately before the seizure, was a person in charge of the animal; or (ii) a person whom the inspector reasonably believes was, immediately before the seizure, a person in charge of the animal. <p>(3) Without limiting subsection (1), the direction may require any of the following action to be taken—</p> <ul style="list-style-type: none"> (a) care for, or treat, the animal in stated way; (b) provide the animal with stated accommodation, food, rest, water or other living conditions; (c) consult a veterinary surgeon about the animal's condition before a stated time; (d) move the animal from the place where it is situated when the direction is given to another stated place for a purpose mentioned in paragraph (a), (b) or (c); (e) not to move the animal from the place where it is situated when the direction is given. <p>(4) However, action may be required only if the inspector considers it to be necessary and reasonable in the interests of the animal's welfare.</p> <p>(5) The direction may state how the person given the direction may show that the stated action has been taken.'</p> <p>'A person to whom an animal welfare direction has been given must comply with the direction unless the person has a reasonable excuse. Maximum penalty—100 penalty units or 1 year's imprisonment.'</p> <p>'(1) 'This section applies if a person is charged with an animal welfare offence (the alleged offence).</p> <p>(2) The court may order (an interim prohibition order) that, pending completion of the proceeding for the alleged offence, the person must not possess or purchase or otherwise acquire—</p> <ul style="list-style-type: none"> (a) any animal; or (b) a stated type of animal; or (c) any animal, or a stated type of animal, for trade or commerce or another stated purpose.

		<p>that appear in some other jurisdictions. The reason I have listed this Qld provision is because they are mentioned in the case study in Chapter 10.</p> <p>s 183 'Prohibition order'</p>	<p>(3) The court may make an interim prohibition order against the person only if the court is satisfied there are reasonable grounds for believing there is an unacceptable risk the person will commit an animal welfare offence before the completion of the proceeding for the alleged offence.</p> <p>(4) An interim prohibition order may be made against the person— (a) only at the court's initiative or on an application by the prosecution; and (b) in the person's absence.</p> <p>(5) However, the court must not make an interim prohibition order unless the person has been given an opportunity to be heard about whether the order should be made.</p> <p>(6) An interim prohibition order— (a) takes effect— (i) if the person or the person's legal representative is at the hearing when the order is made—when the order is made; or (ii) otherwise—when the order is served on the person; and (b) ends on the earlier of the following— (i) the completion of the proceeding for the alleged offence; (ii) the revocation of the order under section 187A.</p> <p>(7) For this section, if the alleged offence is heard and decided on indictment, the proceeding for the alleged offence is completed when the proceeding on indictment is completed.'</p> <p>'(1) The court may order (a prohibition order) that a person convicted of an animal welfare offence must not possess or purchase or otherwise acquire— (a) any animal; or (b) a stated type of animal; or (c) any animal, or a stated type of animal, for trade or commerce or another stated purpose.</p> <p>(2) A prohibition order may be made permanently or for a stated period.'</p>
SA	<p><i>Animal Welfare Act 1985 (SA)</i> Version 14.12.2017. Accessed: 12 July 2018.</p>	s 31B 'Animal welfare notices'	<p>'(1) If an inspector believes on reasonable grounds that the exercise of powers under this section is warranted because the welfare of an animal is being adversely affected, the inspector may, by written notice (an animal welfare notice) given to the owner of the animal— (a) direct the owner to provide the animal with such food, water, shelter, rest or treatment as the inspector thinks necessary; (b) require the owner to ensure the animal is not worked or used for any purpose specified in</p>

			<p>the notice for such period as is specified in the notice;</p> <p>(c) require the owner to ensure the animal is exercised in accordance with the stipulations of the notice;</p> <p>(d) direct or require the owner to take any other action specified in the notice, within the time specified in the notice, that the inspector considers necessary for the improvement of the animal's welfare.</p> <p>(2) A person to whom an animal welfare notice has been given must not refuse or fail to comply with the direction or requirement set out in the notice.</p> <p>Maximum penalty: \$2 500.</p> <p>Expiation fee: \$210.'</p>
TAS	<p><i>Animal Welfare Act 1993 (Tas)</i></p> <p>Version current from 24 June 2015.</p> <p>Accessed 12 July 2018.</p>	s 14 'Instructions by officers'	<p>' (1) An officer may give to one or more of the following persons such instructions as may be necessary to enable the officer to assess or ensure the welfare of an animal:</p> <p>(a) a person who has the care or charge of the animal;</p> <p>(b) a person who usually has the care or charge of the animal;</p> <p>(c) a person who the officer has reasonable grounds for believing will have the care or charge of the animal in the future.</p> <p>(2) An instruction under subsection (1) is to be in writing unless –</p> <p>(a) it is not practicable to give the instruction in writing at the time the instruction is given; or</p> <p>(b) the officer giving the instruction considers that is in the interest of animal welfare to issue an immediate oral instruction.</p> <p>(3) If an officer gives an oral instruction to a person under this section, the officer is to give the person written confirmation of the instruction as soon as practicable after giving the oral instruction.</p> <p>(4) A person must comply with an instruction given to the person under subsection (1).</p> <p>Penalty: In the case of –</p> <p>(a) a body corporate, a fine not exceeding 200 penalty units; or</p> <p>(b) a natural person, a fine not exceeding 40 penalty units.'</p>
VIC	<p><i>Prevention of Cruelty to Animals Act 1986 (Vic)</i></p> <p>Authorised Version No. 093... incorporating amendments 1 May 2017.</p> <p>Accessed 12 July 2018.</p>	s 12 'Court orders for disqualification from or conditions on ownership etc. of animal'	<p>'(1) If, in a proceeding in a court, a person is convicted, found guilty or found not guilty because of mental impairment of an offence under this Act, the court, if it thinks fit, may by order—</p> <p>(a) disqualify the person from owning or being in charge of an animal of a kind or class specified in the order for—</p> <p>(i) if subparagraph (ii) does not apply to the person, up to 10 years; or</p> <p>(ii) if the person is or has previously been subject to an order under this section or an interstate control order, permanently or for any period (including a period of more than 10 years); or</p> <p>(b) apply conditions that the person must comply with, whenever the person owns or is in charge of an animal of a kind or class specified in the order, permanently or for any period (including a period of more than 10 years).</p> <p>(2) An order under subsection (1) may be made in addition to or instead of any other penalty.</p>

			(3) The court, in making an order under this section, must consider whether or not to authorise the monitoring of compliance with the order under section 21A.'
WA	<i>Animal Welfare Act 2002 (WA)</i> As at 29 November 2016. Version 01-h0-01. Accessed 12 July 2018.	s 40 'Care of animals'	'(1) An inspector may — (a) provide to an animal; or (b) direct a person in control of an animal to provide to the animal, any food, water, shelter, care or treatment the inspector considers necessary to ensure the welfare, safety and health of the animal. (2) A person must comply with a direction given under subsection (1)(b). Penalty: \$20 000 and imprisonment for one year.'

APPENDIX 3, TABLE 9: AUSTRALIAN JURISDICTIONS' ANIMAL PROTECTION STATUTES – DEFINITIONS OF 'ANIMAL'

Note: In the column 'Provision Text' – text in bold and 10pt is what I have notated. Text from the statute appears in 9pt and is enclosed in quotation marks.

Table 9: Definitions of 'animal'

Jurisdiction	Statute	Section # Description	Provision Text
ACT	<i>Animal Welfare Act 1992 (ACT)</i> Republication No 27. Effective 30 April 2018. Last Amendment by A2017-44. Accessed 12 July 2018.	Schedule 1 Dictionary	'animal' means— (a) a live member of a vertebrate species, including— (i) an amphibian; and (ii) a bird; and (iii) a fish; and (iv) a mammal (other than a human being); and (v) a reptile; or (b) a live cephalopod; or (c) a live crustacean intended for human consumption.'
NSW	<i>Prevention of Cruelty to Animals Act 1979 (NSW)</i> No 200. Current version for 1 July 2018. Accessed 12 September 2018.	s 4 'Definitions'	'(1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires: animal means: (a) a member of a vertebrate species including any: (i) amphibian, or (ii) bird, or (iii) fish, or (iv) mammal (other than a human being), or (v) reptile, or (b) a crustacean but only when at a building or place (such as a restaurant) where food is prepared or offered for consumption by retail sale in the building or place.'
NT	<i>Animal Welfare Act (NT)</i> Reprint REPA046 As in force at: 12 April 2017 Accessed: 12 July 2018.	s 4 'Definitions'	'animal' means: (a) a live member of a vertebrate species including an amphibian, bird, mammal (other than a human being) and reptile; (b) a live fish in captivity or dependent on a person for food; or (c) a live crustacean if it is in or on premises where food is prepared for retail sale, or offered by retail sale, for human consumption.'
QLD	<i>Animal Care and Protection Act 2001 (Qld)</i> Current as at 1 July 2016. Accessed: 12 July 2018.	s 11 'What is an animal'	'(1) An animal is any of the following— (a) a live member of a vertebrate animal taxon; Examples— • an amphibian • a bird • a fish • a mammal, other than a human being

			<ul style="list-style-type: none"> • a reptile (b) a live pre-natal or pre-hatched creature as follows if it is in the last half of gestation or development— <ul style="list-style-type: none"> (i) a mammalian or reptilian foetus; (ii) an avian, mammalian or reptilian pre-hatched young; (c) a live marsupial young; (d) a live invertebrate creature of a species, or a stage of the life cycle of a species, from the class Cephalopoda or Malacostraca prescribed under a regulation for this paragraph. <p><i>Examples of creatures of the class Cephalopoda—</i></p> <ul style="list-style-type: none"> • octopi • squid <p><i>Examples of creatures of the class Malacostraca—</i></p> <ul style="list-style-type: none"> • crabs • crayfish • lobsters • prawns <p>(2) However, a human being or human foetus is not an animal.</p> <p>(3) To remove any doubt, it is declared that the following are not animals—</p> <p>(a) the eggs, spat or spawn of a fish;</p> <p>(b) a pre-natal, larval or pre-hatched creature, other than a creature mentioned in subsection (1)(b) or (c);</p> <p>(c) another immature form of a creature, other than a creature mentioned in subsection (1)(a) to (c).'</p>
SA	<i>Animal Welfare Act 1985 (SA)</i> Version 14.12.2017. Accessed: 12 July 2018.	s 3 'Interpretation'	' animal means a member of any species of the sub-phylum <i>vertebrata</i> except—
Tas	<i>Animal Welfare Act 1993 (Tas)</i> Version current from 24 June 2015. Accessed 12 July 2018.	s 3 'Interpretation'	' animal means –
Vic	<i>Prevention of Cruelty to Animals Act 1986 (Vic)</i> Authorised Version No. 093... incorporating amendments 1 May 2017. Accessed 12 July 2018.	s 3 'Definitions'	'(3) In this Act, other than Part 3, animal means—

			(iii) a crayfish.'
WA	<i>Animal Welfare Act 2002 (WA)</i> As at 29 November 2016. Version 01-h0-01. Accessed 12 July 2018.	s 5 'Interpretation'	'animal means — (a) a live vertebrate; or (b) a live invertebrate of a prescribed kind, other than a human or a fish (as defined in the Fish Resources Management Act 1994)'.

**APPENDIX 3, TABLE 10: KEY PROVISIONS OF THE *ANIMAL WELFARE ACT 2006* (C. 45) OF ENGLAND AND WALES AS
AT 12 JULY 2018.**

Table 10: AWA key provisions

Section	Section Heading	Provision
s 1	Animals to which the Act applies	<p>‘(1) In this Act, except subsections (4) and (5), “animal” means a vertebrate other than man.</p> <p>(2) Nothing in this Act applies to an animal while it is in its foetal or embryonic form.</p> <p>(3) The appropriate national authority may by regulations for all or any of the purposes of this Act—</p> <p>(a) extend the definition of “animal” so as to include invertebrates of any description;</p> <p>(b) make provision in lieu of subsection (2) as respects any invertebrates included in the definition of “animal”;</p> <p>(c) amend subsection (2) to extend the application of this Act to an animal from such earlier stage of its development as may be specified in the regulations.</p> <p>(4) The power under subsection (3)(a) or (c) may only be exercised if the appropriate national authority is satisfied, on the basis of scientific evidence, that animals of the kind concerned are capable of experiencing pain or suffering.</p> <p>(5) In this section, “vertebrate” means any animal of the Sub-phylum Vertebrata of the Phylum Chordata and “invertebrate” means any animal not of that Subphylum.’</p>
s 2	Protected animals	<p>‘An animal is a “protected animal” for the purposes of this Act if—</p> <p>(a) it is of a kind which is commonly domesticated in the British Islands,</p> <p>(b) it is under the control of man whether on a permanent or temporary basis, or</p> <p>(c) it is not living in a wild state.’</p>
s 3	Responsibility for animals	<p>‘(1) In this Act, references to a person responsible for an animal are to a person responsible for an animal whether on a permanent or temporary basis.</p> <p>(2) In this Act, references to being responsible for an animal include being in charge of it.</p> <p>(3) For the purposes of this Act, a person who owns an animal shall always be regarded as being a person who is responsible for it.</p> <p>(4) For the purposes of this Act, a person shall be treated as responsible for any animal for which a person under the age of 16 years of whom he has actual care and control is responsible.’</p>
s 4	Unnecessary suffering	<p>‘(1) A person commits an offence if—</p> <p>(a) an act of his, or a failure of his to act, causes an animal to suffer,</p> <p>(b) he knew, or ought reasonably to have known, that the act, or failure to act, would have that effect or be likely to do so,</p>

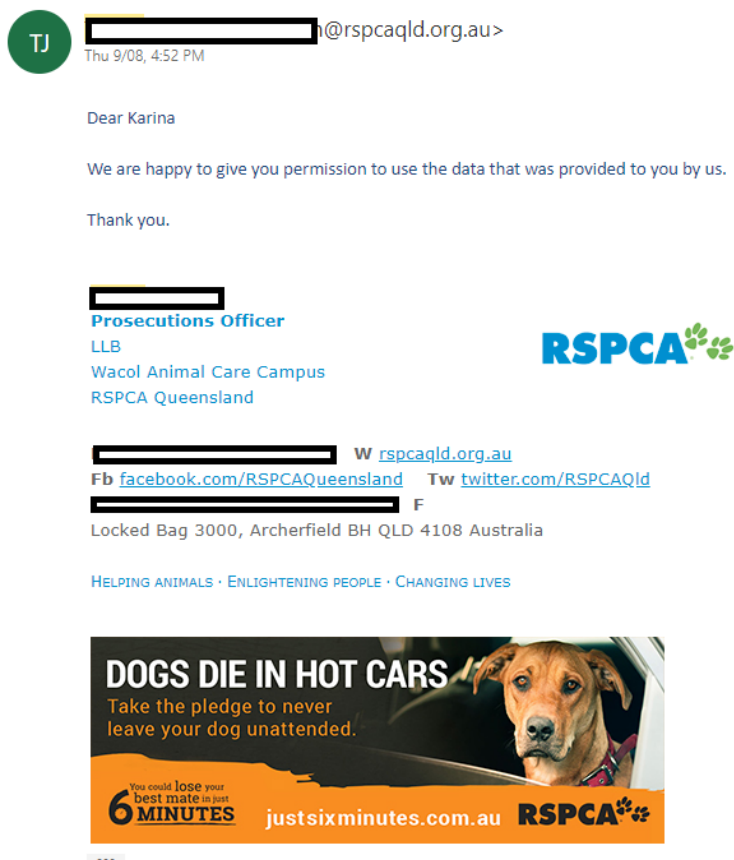
		<p>(c) the animal is a protected animal, and (d) the suffering is unnecessary.</p> <p>(2) A person commits an offence if— (a) he is responsible for an animal, (b) an act, or failure to act, of another person causes the animal to suffer, (c) he permitted that to happen or failed to take such steps (whether by way of supervising the other person or otherwise) as were reasonable in all the circumstances to prevent that happening, and (d) the suffering is unnecessary.</p> <p>(3) The considerations to which it is relevant to have regard when determining for the purposes of this section whether suffering is unnecessary include— (a) whether the suffering could reasonably have been avoided or reduced; (b) whether the conduct which caused the suffering was in compliance with any relevant enactment or any relevant provisions of a licence or code of practice issued under an enactment; (c) whether the conduct which caused the suffering was for a legitimate purpose, such as— (i) the purpose of benefiting the animal, or (ii) the purpose of protecting a person, property or another animal; (d) whether the suffering was proportionate to the purpose of the conduct concerned; (e) whether the conduct concerned was in all the circumstances that of a reasonably competent and humane person.</p> <p>(4) Nothing in this section applies to the destruction of an animal in an appropriate and humane manner.</p>
s 9	Duty of person responsible for animal to ensure welfare	<p>‘(1) A person commits an offence if he does not take such steps as are reasonable in all the circumstances to ensure that the needs of an animal for which he is responsible are met to the extent required by good practice.</p> <p>(2) For the purposes of this Act, an animal's needs shall be taken to include— (a) its need for a suitable environment, (b) its need for a suitable diet, (c) its need to be able to exhibit normal behaviour patterns, (d) any need it has to be housed with, or apart from, other animals, and (e) its need to be protected from pain, suffering, injury and disease.</p> <p>(3) The circumstances to which it is relevant to have regard when applying subsection (1) include, in particular— (a) any lawful purpose for which the animal is kept, and (b) any lawful activity undertaken in relation to the animal.</p> <p>(4) Nothing in this section applies to the destruction of an animal in an appropriate and humane manner.’</p>
s 10	Improvement notices	<p>‘(1) If an inspector is of the opinion that a person is failing to comply with section 9(1), he may serve on the person a notice which— (a) states that he is of that opinion, (b) specifies the respects in which he considers the person is failing to comply with that provision, (c) specifies the steps he considers need to be taken in order to comply with the provision,</p>

		<p>(d) specifies a period for the taking of those steps, and</p> <p>(e) explains the effect of subsections (2) and (3).</p> <p>(2) Where a notice under subsection (1) (“an improvement notice”) is served, no proceedings for an offence under section 9(1) may be instituted before the end of the period specified for the purposes of subsection (1)(d) (“the compliance period”) in respect of—</p> <p>(a) the non-compliance which gave rise to the notice, or</p> <p>(b) any continuation of that non-compliance.</p> <p>(3) If the steps specified in an improvement notice are taken at any time before the end of the compliance period, no proceedings for an offence under section 9(1) may be instituted in respect of—</p> <p>(a) the non-compliance which gave rise to the notice, or</p> <p>(b) any continuation of that non-compliance prior to the taking of the steps specified in the notice.</p> <p>(4) An inspector may extend, or further extend, the compliance period specified in an improvement notice.’</p>
s 57	Offences by bodies corporate	<p>‘(1) Where an offence under this Act is committed by a body corporate and is proved to have been committed with the consent or connivance of or to be attributable to any neglect on the part of—</p> <p>(a) any director, manager, secretary or other similar officer of the body corporate, or</p> <p>(b) any person who was purporting to act in any such capacity, he (as well as the body corporate) commits the offence and shall be liable to be proceeded against and punished accordingly.</p> <p>(2) Where the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.’</p>

APPENDIX 4: PERMISSION FROM RSPCA QUEENSLAND TO USE DATA PROVIDED BY RSPCA QUEENSLAND

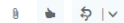
Figure 3: Screenprints of RSPCA Queensland permission to use data

I have redacted the contact details for privacy reasons. A copy of the full permission can be provided on request to me at: karina.heikkila@gmail.com





Karina Heikkila
Thu 9/08, 6:38 AM



2 attachments (132 KB) Download all Save all to OneDrive - Victoria University

To: [REDACTED] LLB, Prosecutions Officer, Wacol Animal Care Campus
RSPCA Queensland

Dear [REDACTED]

Thank you once again for your support and the provision of the data that RSPCA Queensland did provide to me via email in the spreadsheet on 4th May 2018 and 7th August 2018, and within the content of the email of 7th August 2018 (regarding the breakdown of s 17 and s 18 offences for 2017-2018) for the purposes of compiling the data and to publish an extract from it in my PhD thesis.

Please find attached an extract of what I intend to publish. There is the section from the relevant chapter in the body of the thesis as well as the Appendix which includes the data extracted into tables for each year. As we have discussed, within the body section I have included a good number of notes that explain that the data is not complete and can only be interpreted as an indication and so on. I hope that what I have explained meets RSPCA Queensland's requirements and that it clearly explains what I have done.

In order for me to be able to use this information in my thesis I require the permission of RSPCA Queensland.

Could I please prevail upon you to ensure that an authorised manager from RSPCA Queensland does review the attached document in detail, that includes what I intend to publish (which may be adjusted in terms of minor expression or formatting prior to publishing only), and respond to this email, confirming that RSPCA Queensland does authorise my publishing of that content and data in my thesis?

A copy of this email and the response to it from RSPCA Queensland providing the permission will also be published in the thesis in an Appendix.

Thank you so much again for your support.

Karina Heikkila
PhD Candidate, LLB (Hons), GDLP
Victoria University

APPENDIX 5, PART A: RSPCA QUEENSLAND DATA - NOTES AND QUALIFICATIONS ON ITS USE IN CHAPTER 9, SECTION 8.

The figures in Table 2 for the years 2014-2017 are compiled from a spreadsheet provided to me by RSPCA Queensland on 4th May 2018. The figures in Table 2 for the years 1998-2014 are compiled from a spreadsheet provided to me by RSPCA Queensland on 7th August 2018. All of the data provided to me by RSPCA Queensland was provided in confidence, and hence the raw data provided to me is not included in this thesis.

The data was provided to me by RSPCA in varying spreadsheet formats. Particular notes and qualifications that must be considered when reviewing the data and the totals that I present in Chapter 9, section 8, are as follows:

- The total numbers of cases should *not* be assumed to include all of the prosecutions for each year but they are representative and adequate for this research.
- RSPCA Queensland compiles statistics using different methods. The data should be viewed as an indication or a portion of the total numbers of prosecutions only.
- RSPCA Queensland advises that in some periods there were some 'repeat prosecutions' and also some 'lengthy ongoing matters' that are not reflected in the data. Additionally, during some periods inspectors were assisting with other taskforces and that activity is not reflected in the statistics. This explains why some years have lower figures than others as a reflection of the diversion of limited resources.
- In regard to the summary of cases presented in this Appendix 5, Part B, and in Chapter 9, section 8, as it was compiled from the spreadsheet that included the data from years 2014-2015 to 2016-2017, the following must be considered:
 - Another different spreadsheet of RSPCA Queensland prosecution data that I have not utilised in compiling the totals presented here, indicates that there are some cases missing from the data presented in the figures in Chapter 9, section 8 and in Appendix 5, Part B. However, it is not possible to reliably merge or cross-reference the data given the different methods by which the data is articulated. For that reason, I have only reported the data from the two sets of data that were provided in the emails of the dates indicated above.
 - I only included those cases where the 'outcome' was listed as 'guilty'.
 - I de-identified the information by creating my own year/no identifier for each entry using the 'Financial Year Summons Filed' column, and the row number of the spreadsheet.

- I de-identified the information by not citing defendants' names or the breeds of the nonhuman animals.
- Entries were excluded where there was not sufficient data to ascertain the charges, or if the charges did not relate to *ACPA* s 17 or s 18 offences, or if the year was not noted. Eleven cases were omitted across the years due to a lack of information.
- One case was excluded as it was noted that the DPP had taken over that prosecution.
- I excluded some information as to court and professional costs awarded against the defendants as it is not relevant to this research.
- I retained most abbreviations as they appear in the spreadsheet data.
 - 'FPF' is an abbreviation for 'failure to provide food'.
 - 'FTF' is an abbreviation for 'failure to feed'.
 - 'FTT' is an abbreviation for 'failure to treat'.
 - 'FTW' and 'FPW' are abbreviations for 'failure to provide water'.
 - 'FPA' is an abbreviation for 'failure to provide accommodation'.
 - 'PO' is an abbreviation for 'prohibition order'.
 - 'CBO' is an abbreviation for 'community based order'.
 - 'AWD' is an abbreviation for 'animal welfare direction'.
- I made some minor corrections to spelling errors.
- The cases have been counted separately in terms of the s 17 and s18 offences (but counted as one case in the total figure for the year).
- Some cases involved more than one defendant: those cases and charges have been counted only once for each case if that is how they were presented in the spreadsheet data.

In regard to the total figures presented in Table 3, the following apply:

- Column A, for the years from 1999-2000 to 2010-2011, repeats those figures for 'Total cruelty prosecutions' as they were reported in the RSPCA Australia national statistics (see above table). From 2011-2012, the figures were reported in the RSPCA Australia national statistics as 'successful prosecutions'.
- In Column B, 'Total prosecutions' reflects number of cases where the outcome was noted as 'guilty' (excluding 'pending', 'case dismissed' or 'withdrawn' or where the outcome and charges were not noted) as I extracted those from the RSPCA Queensland spreadsheets provided to me.

- 'Total prosecutions' does include cases where the offences charged did not include cruelty/'ill-treat' or duty of care/'failure to' offences, such as abandonment, tail docking, poisoning, and animal fighting related offences. Those offences are not included in the subsequent columns and so the total prosecutions figure in Column B does not necessarily equal the sum of columns C and D.
- For the spreadsheet provided to me for the years 2014-2015 to 2016-2017, I was not able to accurately-enough determine the total number of cases due to the structure of the spreadsheet and so I have omitted the totals for those years. The figures below employ the total figures from the national statistics for those years instead.
- Column C provides the total number of cases where at least one of the charges was reported as 'cruelty' under the former Act or the *ACPA*, as it may be described as 'ill-treat' or as 's 18'. This total figure is what I extracted from the spreadsheets provided to me from RSPCA Australia.
- Column D provides the total number of cases where at least one of the charges related to 'fail to' or similar under the former Act or the *ACPA*, or as 's 17'. This total figure is what I extracted from the spreadsheets provided to me from RSPCA Australia.
- In Columns B, C, and D, cases are counted once regardless of number of charges for *that* offence/case.
 - However, if a case included *both* cruelty/ill-treat/s 18 charge(s) and 'fail to'/s 17 charges then it was counted once in each column B, C and D.
- For columns B, C and D, if the charge was not clear, the case was excluded.
- If a case involved multiple offenders and if the spreadsheet entries listed those defendants separately, then the total figures in columns B, C and D reflect one 'case' for each defendant. In other words, where it was indicated in the spreadsheet, a case was counted more than once to capture the offending by each offender.
- Cases noted in the spreadsheets where the section number of the offence was not identified and where the description of the offence was listed as 'confined and caused suffering' or similar, then that case was counted as an ill-treat case/cruelty offence case.

APPENDIX 5, PART B: RSPCA QUEENSLAND PROVIDED DATA

2014-2015

Table 11: RSPCA Queensland provided data - detail of prosecutions 2014-2015

	Fin Yr –Number Summons Filed	Detail	Fine/Other
1	14-15/8	2 horses, s 17 x 1, failed to provide food to his 2 horses	\$ 1098, CBO 150 hrs
2	14-15/9	1 possum, s 18 x 1, swing Possum by tail	Conviction served 4 days prison (2 months sentence appealed and set aside).
3	14-15/10	1 dog, s 18 x 1, Deft killed his dog by stabbing it numerous times before cutting its throat.	\$2,000 PO 2 yrs, dog.
4	14-15/14	1 cat, s 17 x 1, boarding cattery - failed to treat	Conviction \$1,800 \$1,200 restitution
5	14-15/20	1 dog, s 17 x 2 (for both defendants) BDOC. Emaciated/mange pup. PTS.	CBA 200 hrs each. PO – 5 yrs any animal each.
6	14-15/21	1 dog, s 17 x 1, a 164 x 1, Deft FTT her dog and failed to comply with AWD	\$ 500 \$ 4,526 RSPCA costs
7	14-15/22	Animals and facts not stated. s 17 x 2 (for both defendants). Failed to appear.	Conviction \$2,500 RSPCA costs \$ 652 PO 3 yrs any animal each
8	14-15/23	27 cats, s 17 x 3. Failed to provide food, water and living conds for cats. Extensive history.	\$ 1,000 PO lifetime other than for 2 dogs and 2 cats (desexed).
9	14-15/29	1 horse, 2 defendants, s 17 x 3, FTT, FPFW	3 months suspended sentence for 3 yrs
10	14-15/33	1 dog, s 17 x 2, FTT. Emaciated dog with multiple medical issues	\$2500 fine \$ 606 RSPCA costs PO 3 yrs any animal except 2 cats
11	14-15/42	1 dog, 2 defendants, s 17 x 3 each, failed to feed and treat Ex parte.	For each: restitution \$ 2,566 \$ 5,000 fine each PO 3 yrs any animal
12	14-15/47	Many cats, s 17 x 3, FTT,	CBO \$ 1,000 good behaviour bond for 6 months PO 3 yrs any animal except for 2 cats
13	14-15/49	1 horse, s 17 x 1, FTT and FTF an emaciated horse with a heart condition	\$ 2,000 fine \$ 570 RSPCA costs PO 3 yrs horses

14	14-15/53	1 dog, s 17 x 1, Failed to provide living conditions and comply with AWD.	Conviction \$ 2,500 fine \$ 800 RSPCA costs PO 1 year, dog.
15	14-15/55	4 cats, s 19 x 4, Deft abandoned 4 cats when she moved from address	\$ 900 fine \$ 287 RSPCA costs PO 2 yrs, cat
16	14-15/57	2 horses, s 17 x 5, FPF and FTT for emaciation and rain scald to 2 stallions. 4 day trial.	Conviction. \$ 3,656 RSPCA costs Concurrent prison sentences, wholly suspended for 2 years
17	14-15/60	1 dog, s 18 x 1, Deft was witnessed beating his dog by hitting it in the head with a blunt object.	Conviction \$1,250 fine \$ 6,881 RSPCA costs PO 3 yrs, dogs
18	14-15/67	1 dog, s 17 x 3, FTT, dog's fractured leg, jaw and dental disease Failed to appear	Conviction \$ 3,500 fine PO 10 years dogs
19	14-15/79	?? animal, s 18 x 1, Ex parte	\$ 2,200 fine
20	14-15/84	30 cats. 10 x s 17. FTT & FPF to a large number of cats with a variety of issues.	Prison: 6 months suspended for 2 years OI 2 years any animal except 2 desexed dogs and cats RSPCA costs \$ 28,056
21	14-15/86	8 dogs, s 17 x 3, DOC.	PO permanent any dog, other than 2 desexed if female.
22	14-15/90	1 horse, s 17 x 1 FTT horses injury	\$ 3,500 fine. \$ 194 RSPCA costs.
23	14-15/98	1 dog. S 17. Fail to provide food or treatment for toy poodle.	\$ 5,000 fine. PO: 30 months, own dog for trade or commerce.
24	14-15/102	2 piglets. S 17, s 31. Piglets, FTT, use as lure. Involved in greyhound baiting. Repeat offending after previous charge of serious animal cruelty. Already sentenced under those charges noted the Magistrate.	Convictions. Fine \$ 1,500.
25	14-15/109	1 dog, 2 defendants, s 17 x 2 each.	PO: any animal 5 yrs.
26	14-15/110	34 birds, 2 defendants. S 17 x ?, DOC offences where Deft FTT diseases and/or injury to 34 birds.	\$ 5,000 fine.
27	14-15/111	1 dog, s 18. Kicked dog which died 2 days later.	\$ 2,400 fine. \$ 250 RSPCA costs. PO: 3 years any additional dog.
28	14-15/121	1 horse, 3 defendants. S 17 x 1 each. FTT.	One def: \$ 2,250 fine, PO: horses, 12 months.

			One def: \$ 1,000 fine.
29	14-15/123	1 horse, s 17. Malnourished horse.	\$ 5,000 fine. PO: horses, 2 years.
30	14-15/124	1 cat. S 17 x 2. No treatment for cat with severe dental disease, kidney failure, flea burden and ear mites to the extent where cat was close to death	\$ 5,000 fine.
31	14-15/131	3 chickens. 2 defendants. S 17 x 3 each. FPAF.	One def: \$1,000 fine. One def: \$3,000 fine. PO: 2 years any animal.
32	14-15/132	1 dog. 2 defendants. S 177 x 3. Untreated broken leg for approx 7 months, maggots etc	Convictions for both. PO: lifetime for any animal for both.
33	14-15/153	Horse(s). s 17 x 6.	\$ 4,000 fine. \$ 6,739 RSPCA costs.
34	14-15/154	2 horses. 2 defendants. s 17 x 2. FPF and FTT two horses	\$ 10,928 RSPCA costs. CBO: 12 month good behaviour bond. PO: 3 years, horses.

RSPCA QUEENSLAND PROVIDED DATA

2015-2016

Table 12: RSPCA Queensland provided data - detail of prosecutions 2015-2016

	Fin Yr –Number Summons Filed	Detail	Fine/Other
1	15-16/5	3 horses, s 17 x 6, FPF & FTT to three horses	\$7,000 Conviction PO – 3yrs horse
2	15-16/11	1 cat, s 18 x 2, cat in trap	\$1,000 \$600 restitution
3	15-16/16	1 dog, s 17 x 1 (2 defendants), POIs brought sick dog to RSPCA. Eventually TBE	Conviction \$2,000 PO – 3yrs except for one particular animal
4	15-16/18	1 cat, s 17 x 2 (2 defendants – disability pensions) Failed to treat cat with severe malignant eye tumour.	\$1,500 each
5	15-16/27	40 cats, s 17 / s 19 (total offences 17). Abandoned cats in forestry.	\$450 fine
6	15-16/31	1 dog, s 17 x 2, FTT, FPW, FPA	\$ 2,400 fine
7	15-16/34	1 dog, s 17 x 2, FTT, FPF. Pregnant dog.	\$ 100 fine \$ 79,405 RSPCA costs PO any animal 5 years
8	15-16/35	10 dogs, 2 defendants, s 17 x 13, FTT, FPF. Fail to feed and provide treatment dog bitch and pups	\$469 fine each PO 1 year each
9	15-16/43	9 chickens and ducks, s 17 FTT FPF / s 19 x 31 total	Conviction \$ 5,000 fine \$ 3,372 RSPCA costs
10	15-16/48	2 dogs, s 17 x 6, FTT, FPF. Fail to feed or provide treatment for hookworm and emaciation for 2 dogs	\$ 2,000 fine PO 3 yrs, any pet
11	15-16/54	Many birds, s 17 x 6, Fail to provide water to numerous birds Due to the age and pension status of the defendant, RSPCA Qld was not expecting any significant financial penalty, but was prosecuting to seek a prohibition order	Conviction \$ 3,000 fine
12	15-16/56	1 horse, s 17 x 3, FTT, FPC, AWD. DOC to a horse.	\$ 3,000 fine
13	15-16/62	3 horses, 2 defendants, s 17 x 4, s 19 x 4. FPF and abandonment of 1 horse, FPF, FTT to another horse.	Each: Conviction \$ 2,000 fine \$ 1,161 RSPCA costs
14	15-16/63	1 horse, s 17 x 1, FPF for horse, which was euth	\$ 2,000 fine \$ 1,960 RSPCA costs PO 12 months all animals
15	15-16/64	1 dog, s 18 x 1, Cruelty to dachshund by strangling	\$ 376 RSPCA costs CBO 150 hours
16	15-16/69	1 horse, s 17 x 1, Stallion, starved to emaciation	\$ 2,500 fine, \$ 3,167 RSPCA

			costs PO horses, 3 years
17	15-16/72	2 dogs, s 17 x 4, Dogs suffering from large burden of fleas & hookworm, poor body cond and anaemia	\$ 670 RSPCA costs CBO 240 hours PO 5 yrs, dogs
18	15-16/75	1 dog, 2 defendants, 17 x 3 ea, FTT for flea burden and FPF to dog resulting in its euth	Each: Conviction One def: \$ 2,500 fine, \$ 167 RSPCA costs each One def: PO 5 yrs
19	15-16/76	1 dog, s 17 x 11, FTT, severe matting, ulceration, toenails, gum erosion, eye infection and other conditions	\$ 3,000 fine \$ 2,196 RSPCA costs PO any animal
20	15-16/81	1 dog, s 17 x 4, Dog with tumour, fractured tooth, ear infection and growth on ear.	\$ 3,000 fine \$ 161 RSPCA costs
21	15-16/83	5 dogs, 2 cats. 2 defendants S 17, s 33 x 9 each. Various FFT FPW and exercise for cats and dogs.	Each: \$ 9,887 RSPCA costs PO 3 yrs any animal
22	15-16/85	1 rat. S 18 x 3. Deft bit a rat's head off on Facebook.	CBO 100 hours. 3 yrs any animal.
23	15-16/89	1 possum. 2 defendants. S 18 x 1 each. Filmed possum being run over by car repeatedly	CBO: 12 months probation each.
24	15-16/91	1 horse, s 17 x 1 (handling). Mini horse dragged behind car while allowing dog to bite it.	\$ 1,000 fine.
25	15-16/96	1 dog, S 17 x 4. FTT/FTPF dog with chronic malnutrition.	CBO: 150 hrs. PO: 5 years, any animal except 1 parrot.
26	15-16/97	1 dog, S 17 x 4. FTT/FTPF dog with chronic malnutrition.	\$ 6,000 fine. PO: 5 yrs any dog.
27	15-16/108	4 horses, s 17 x 5, s 18 x 1, Underweight horses, beating a horse	CBO: 2 year probation. PO: 3 years.
	15-16/117	2 dogs, 2 defendants, s 17 x 4 each, FPF to 2 dogs, FTT for 2 dogs	\$ 1,000 fine each. \$ 1,017 RSPCA costs each. PO: 3 years except for one particular animal.
28	15-16/128	1 dog. S 17 x 1. No treatment for 12cm large cavity on dogs face, containing puss, maggots, eaten away to bone. Ex parte.	Conviction. \$ 6750 fine.
29	15-16/137	1 dog. 2 defendants. s 17 x 7. Two dobermans died from starvation and neglect.	\$ 1,800 each. PO: 3 years, any animal each.
30	15-16/146	1 dog. S 17 x 1. FTT his dogs fractured right hind leg femur and Osteitis of the jaw.	\$ 874 RSPCA costs. CBO: 12 months probation. PO: 2 years other than 2 particular animals.
31	15-16/147	1 sheep. 2 defendants. s 17 x 1. FTT.	\$ 2,000 fine.
32	15-16/149	20 cats, 2 dogs. FTT. 2 defendants. s 17 x 22.	\$ 1,863 RSPCA

			costs each. CBO: 2 year good behaviour bond.
33	15-16/155	2 dogs. S 17 x 5. Failed to treat lameness, growth and ear infection for 2 dogs	Conviction. Prison: 2 months suspended for 1 year.
34	15-16/157	1 cat. S 18. Cat was stabbed with scissors, causing wound to RHS of body.	Conviction. \$ 3,000 fine. \$ 1,628 RSPCA costs. PO: All animals, 3 years.

RSPCA QUEENSLAND PROVIDED DATA

2016-2017

Table 13: RSPCA Queensland provided data - detail of prosecutions 2016-2017

	Fin Yr –Number Summons Filed	Detail	Fine/Other
1	16-17/4	1 Dog, s 17 x 2. Fail to treat hookworm, unsanitary living conditions (faeces build up).	RSPCA costs - \$2,800 1 month prison PO – 5 yrs all animals
2	16-17/15	1 dog, s 17 x 2, Deft failed to provide food and failed to treat severely matted coat, overgrown toenails, tooth abscess	Costs CSO 40 hours
3	16-17/19	Cats, 1 dog, 6 x s 17, Failed to treat dog for bladder infection and arthritis, 3 cats for ringworm and poor living conditions	Conviction \$3,000 RSPCA costs
4	16-17/24	1 dog, s 17 x 2, s 19 (abandonment) x 1. Deft took his dog, which was in appalling emaciated condition, for a walk, then let it off the lead, effectively abandoning it. Dog later died during surgery.	RSPCA costs \$1,250 CBO 200 hrs PO – 3 yrs all animals
5	16-17/25	1 dog, s 17 x 2, 2 defendants failed to feed & treat emaciation Disadvantaged defts (exceptional personal/health circs) no substantive penalty sought, primary purpose PO.	Conviction RSPCA costs \$358 each / costs No PO
6	16-17/41	1 horse, s 17 x 5, failed to treat a foal for multiple wounds, resulting in it being down for approximately 4 days	\$ 3,000 fine
7	16-17/44	1 cat, s 17 x 4, FTT, FPA	\$ 2,537 RSPCA costs CBO 9 months probation PO 5 years for cats (except for 3).
8	16-17/45	3 dogs, s 17 x 10, FPF, FTT. 2 live & 1 dec'd dogs. FPF x3 , FTT x 3 emaciation, x2 anaemia, x2 hookworm.	\$ 800 fine \$ 1,533 RSPCA costs PO 3 yrs dogs only
9	16-17/52	2 dogs, 2 defendants, s 17 x 4, FTT, FPF, Deft's failed to provide treatment and food to their two emaciated terriers	\$ 1,000 fine \$ 1,026 RSPCA costs PO 2 yrs, all animals
10	16-17/58	1 dog, s 17 x 1, Deft FTT dog which was unwell for approx 6 days before its death	\$ 317 RSPCA costs CBO probation 12 months PO 2 years
11	16-17/61	1 dog, s 17 x 2, FTT their dog which was matted and had arthritis	\$ 2,500 fine \$ 352 RSPCA costs
12	16-17/65	Many fowl, s 17 x 1. Fail to treat injured Game Fowl.	\$ 3,000 fine \$ 1,053 RSPCA costs PO cock birds for 5 years
13	16-17/70	3 dogs, s 17 x 6, Deft, abandoned dogs, and FPF or W, FTT	Conviction \$ 5,000 fine \$ 3,167 RSPCA costs

			PO all animals, 5 years
14	16-17/80	1 goat, s 17 x 2, Deft FPF and FTT injury to his underweight goats neck which resulted in chain embedding into neck	\$ 6,500 fine \$ 889 RSPCA costs
15	16-17/82	8 total, dogs and pigs. S 17 x 19. FTT, FTFW, FPA	\$ 1,500 PO 15 months with exceptions
16	16-17/87	1 dog, 2 defendants. S 17 x 1, s 18 x 1 both. One defendant docked dogs tail while other held dog down. Wound was untreated.	RSPCA costs \$ 6,274. One def: CBO 200 hours. One def: prison 3 months wholly suspended. One def: PO any animal, 1 year.
17	16-17/93	11 total – reptiles, birds, GP. S 17 FTT, s 19. Fail to treat eye injury, dehydration, emaciation of reptiles and abandonment of Guinea pig & python.	\$ 4,000 fine. \$ 8,142 RSPCA costs. PO 3 yrs except for one animal.
18	16-17/95	3 dogs, s 17 x 3. Deft FPF to three dogs in her care.	Conviction. \$ 5,702 RSPCA costs. CBO 120 hours. PO 5 years for dogs, cats and horses.
19	16-17/101	1 dog, s 17 x 4. Deft failed to treat her dog for its skin condition, instead locked it in the laundry to wait for it to die.	Conviction. RSPCA costs: \$ 2,308. CBO: probation 2 years. PO: 3 years, all animals.
20	16-17/103	1 dog, 2 defendants. S 17 x 5, Dog, fail to treat for bowel obstruction, emaciation, eye infections, hookworm. Fail to feed.	\$ 2,000 fine. \$ 2,571 RSPCA costs.
21	16-17/104	3 dogs, 2 defendants, s 17 x 14 each. 2 deft's failed to provide food or treatment to their three dogs, for a variety of ailments including entropion, hookworm, flea allergies, dental issues, ear infection.	\$ 300 one def, \$ 500 one def, fines. \$ 2,816 RSPCA costs each. PO: 5 yrs all animals except as approved.
22	16-17/113	3 dogs. S 17 x 3, Deft had two dogs living in a car, and poor living conditions and fail to feed one dog.	\$ 1,100 fine. \$ 171 RSPCA costs. PO: 2 years any animal except one particular animal.
23	16-17/119	1 dog, s 17 x 2, FPF and shelter to dog	Conviction \$ 1,500 fine. PO: 12 months
24	16-17/120	1 dog, s 17 x 5, Def't failed to provide food or treatment for his dog's hair loss, skin condition, eye and ear infections	\$ 1,800 fine. \$ 2,778 RSPCA costs. PO: All animals, 2 years except for two particular animals.

25	16-17/126	3 dogs. S 17 x 3. Fail to provide food and water to three dogs	\$ 5000 fine. \$ 1,852 RSPCA costs.
26	16-17/130	6 cats and 6 dogs. 2 defendants. S 18 , s 17. 16 charges each def. Deft FTT, FP food, water and accom for her 12 animals.	Conviction: TBA. \$ 2,916 RSPCA costs total. One def: prison 6 months, suspended for 2 years plus 2 months suspended for 2 years for breach of PO. PO: lifetime for same defendant.
27	16-17/133	2 dogs. 2 defendants. s 17 x 2. Defts FPF to their 2 dogs resulting in emaciation.	RSPCA costs: \$ 289 each. CBO: 45 hours each. PO: 3 years each except for one def's fish.
28	16-17/140	1 dog. S 17 x 2. Inappropriate handling.	\$ 500 fine. \$ 6,133 RSPCA costs.
29	16-17/142	1 dog. S 17 x 1. Deft FTT dog for an enlarged, blood filled eye, for a month prior to agreeing to have her euthanised.	\$ 1,500 fine. PO: 3 years except one particular animal.

APPENDIX 6: SCHLOSS [2016] QDC 30 (DELIVERED *EX TEMPORE*)

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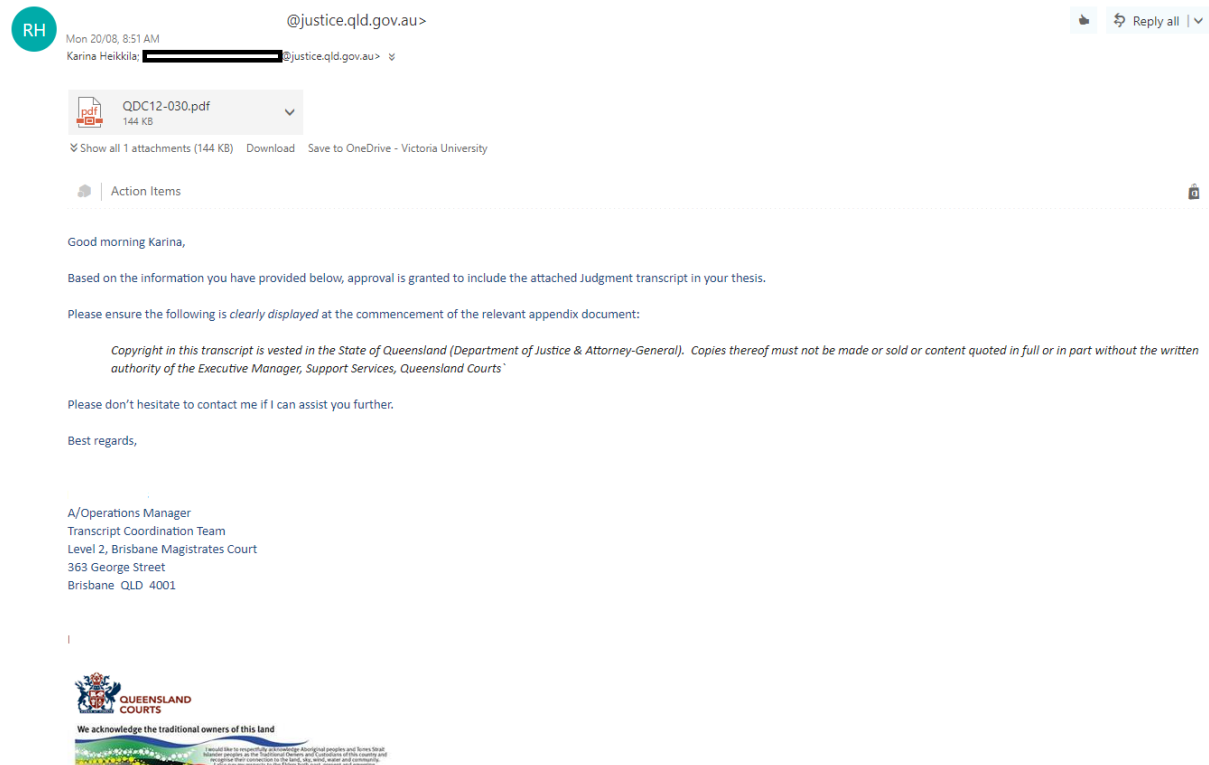
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