A Global Justice Approach to Animal Law & Ethics

By Dr Gail Tulloch and Steven White

This article is concerned with the emergence of a paradigm of global justice, from its earliest expression by Jeremy Bentham in 1789 through to today, to Peter Singer's well-known preference utilitarianism and Martha Nussbaum's less well-known capabilities approach, with its emphasis on global justice. By providing a theoretically determined, practically applicable set of capabilities for realising justice for animals, Nussbaum has made an important contribution to animal ethics, and one which is used in this article to assess the extent to which contemporary Australian animal law satisfies the requirements of justice.

The momentum towards global justice parallels a complementary momentum towards an increasingly "legalised" regulation of animal welfare. Although there is no general, federal animal welfare statute in Australia, the States and Territories have adopted codes of practice for the regulation of many aspects of animal welfare, and there is now a well-established national strategy that endorses consistency in the content and adoption of these codes. At an international level, no coherent animal protection regime has been established. However, several developments highlight an increasing legalisation of animal welfare protection. These include regional initiatives of the European Union, increased interest in animal welfare on the part of the World Organization for Animal Health (OIE) (including the endorsement of voluntary welfare codes) and emergence of a campaign for a universal declaration on animal welfare.

The central thesis of this article, though, is that these domestic and international regulatory developments fall well short of realising the requirements for justice that flow from Nussbaum's capabilities approach. In order to contextualise the work of Nussbaum, Part I surveys some familiar ground by briefly tracing the development of the field of animal ethics, taking it up to the present day. Part II explores

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the capabilities approach in some detail, elucidating how Nussbaum extends the approach to include justice for animals. Having established the requirements for justice for animals suggested by the capabilities approach, Part III then assesses the extent to which domestic Australian law, and international law, satisfies these requirements.

Part I: Animal Ethics

Initially, there was thought to be no connection between humans and other animals. Animals have long been considered inferior to humans, and different in kind, not merely in degree – though this firm boundary was problematised by Darwin’s *The Origin of Species*.

In Judaoc-Christian ethics, God gave humans dominion over animals – moderated by injunctions towards kindness. The medieval notion of the great Chain of Being, with man at the apex, expressed this. The philosopher Kant argued that animals were not rational or autonomous, and so their lives were not ends in themselves. On Kant’s view, in his *Lectures on Ethics*, our duties to animals are merely indirect duties towards humanity, and if we treat animals kindly, we strengthen the disposition to behave kindly towards humans – like exercising a moral muscle on a proxy object.

The corollary for Kant was that animals could appropriately be treated as means to our ends. For Kant, moral duties can only be to self-conscious beings. Only such beings can be members of the moral community. Animals could thus be relegated to beings of secondary concern – if concern at all – for want of a soul, of rationality (construed in a particular, narrow way), of autonomy, or of language.

The Christian notion was, at best, one of human stewardship and at worst, human dominion over the rest of nature, including animals. This exacerbated the long-established prejudice in western culture in favour of rationality as the defining and unique characteristic of human beings, widely associated in the Enlightenment with Rene Descartes, who argued that like clocks or robots, animals were but machines that moved and made sounds but had no feelings. In such a context it was easy to portray animals as quasi-clockwork animated robots – “furry clocks”. Such a conception rationalised vivisection, for creatures with no consciousness could feel no pain.

Sentience

Jeremy Bentham, the founder of utilitarianism, was the first major figure in Western ethics to advocate in 1789 the direct inclusion of animals in our ethical thinking, and to suggest a connection between humans and other animals. As he memorably argued:

> What else is it that should trace the insuperable line? Is it the faculty of reason or perhaps the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal than an infant of a day or a week, or even a month old. But suppose they were otherwise, what would it avail? The question is not Can they reason? nor Can they talk? but Can they suffer?

In this way, Bentham addressed the issue of the boundary between human and animal and introduced the concept of sentience – or the capacity to feel pleasure and pain – as the central criterion of issues of animal ethics. This was the driving force behind the POCTA (prevention of cruelty to animals) tradition of legislation that still prevails today. It is an animal welfare framework, evident in the work of the RSPCA and the work of some animal activists.

Peter Singer’s work is grounded in this Benthamite tradition, and he further argues that the difference between humans and animals is one of degree, not of kind, i.e. not absolute, and that the boundary is quite porous. The connection is thus quite close.

Circles of Compassion

As early as the 2nd century AD, the Stoic philosopher Hierocles created a vivid metaphor for extending the boundaries of our moral concern. Imagine, he argued, that each of us lives in a series of concentric circles, the nearest being our own body, and the furthest the entire universe. The task of moral development is to move the outer circles

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progressively to the centre, so that one's relatives become like oneself, strangers like relatives, and so on. Singer adopts this metaphor, and argues for explicitly extending the circle of one's concern beyond the boundary of one's own species, to include animals, and, ultimately further, to the whole environment. Why we should do this is meant to be intuitively obvious; at least, learning to see it so is the path of enlightenment in some religions. Humans appear to have built-in resistance, however.

**Speciesism**

Speciesism was the second great driving idea in animal ethics after sentence. It was a term coined by Richard Ryder and popularised by Singer. It means a prejudice or attitude of bias in favour of members of one's own species against those of members of another species. Speciesism obviously picks up on the unfavourable connotations of racism and sexism, and the movements to extend equal consideration to the interests of coloured people and of women - which is why animal welfare has been called the last social justice issue.

The bumper-sticker slogan might be "We are speciesist to ignore sentence" - the imperative of sentence. The task to change deep-seated, unreflective notions of the species barrier is the task we face now, and it is perhaps the hardest of all, because the attitudes are so entrenched, and the economic incentives to persist with cost-cutting, production-line, inhumane treatment of animals are so great. Pope Benedict has condemned the 'industrial use of creatures, so that geese are fed in such a way as to produce as large a liver as possible, or hens live so packed together that they become just caricatures of birds'. It is in this context that the argument to expand our circle of compassion appeals to considerations of animal welfare, but also makes a transition to animal rights, as sentient beings who deserve quality of life.

It would be hard to overestimate the contribution of Peter Singer to the welfare of animals, in Australia, America, the United Kingdom, and worldwide. He is clearly the best-known Australian philosopher, and a true public intellectual. The publication of Animal Liberation in 1975 was a watershed moment and provided a framework and an inspiration to many, as it does still.

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One of us accepted Singer’s position for a long time and certainly the concept of sentence is central, as is the opposition to cruelty which is its corollary. But the focus of both is primarily negative, with an indirect appeal to empathetic identification with those animals most like us, and appealing to quality of life — whether human or animal — needs specification if it is to be more than vague.

There’s an even better theoretical approach that has emerged, which is more broad-ranging and specific, and grounds positive guidance for action. It’s the capabilities approach, advocated by philosopher Martha Nussbaum and Amartya Sen, Nobel prize-winning economist. Together, they pioneered a Quality of Life approach to human capabilities in the context of aid and human development, tied to the UN Declaration of Human Rights.

Part II: The Capabilities Approach

The capabilities approach was first articulated in The Quality of Life, published in 1993, based on their research in a World Institute for Development Economics Research study for the UN University. The book comprises papers from a 1988 conference in Helsinki, which they organised for WIDER.

Nussbaum defends the capabilities as universal objective norms, rejecting cultural relativism and the charge that all universals are bound to be insensitive to regional and cultural specificity. That’s an important argument to make, and especially necessary at this time, when cultural or customary tradition may be put up as a defence to unacceptable practices - as occurred in Australia in the debate over live animal exports to Indonesia.

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7 Actually since the early 1970s, when as a postgraduate student Gail Talloch heard Singer give a paper on Speciesism in the Monash University Philosophy Department.
9 Martha C Nussbaum and Amartya Sen (eds), Quality of Life (Oxford University Press, 1993).
10 Sen, op. ed. The Australian, 1 June 2011, 1, 2 & 17; The Lindsay, “Court Exports to Asia are Inevitably a Live Issue”, The Australian, 9 June 2011, 14; Greg Sheridan, “Ignorance, hysteria to trigger backlash”, The Australian, 10 June 2011, 2; Brian Williams, “Home Truths at Odds with Export Bar”, The Australian, 24 June 2011, 15; and Stuart Simond, “Ignorance and Anti-Semitism Behind KIII Ban”, The Australian, 24 June 2011.
It is an important point to bear in mind when she extends the approach to animals, as she did in 2002, when she was at the Australian National University in Canberra to present the Tanner Lectures on Human Values.\(^{11}\) The title of the three-lecture series was “Beyond the Social Contract: Towards Global Justice”, and the three lectures were on “Capabilities and the Mentally Disabled”, “Human Capabilities Across National Boundaries”, and “Justice for Non-Human Animals”.\(^{12}\)

Nussbaum and Animal Ethics

So, what does the capabilities approach, as extended by Nussbaum, have to offer? It appeals for animal welfare based on rights derived from their capabilities - which are outlined. The approach lists ten capabilities, nine of which also apply to animals, so it is a continuum approach. It stresses how much more has to be considered and provided for than is implied by sentence, and covers the whole range of animals, including in zoos, rodeos, museums, and laboratories. It involves a radical paradigm shift in outlook, and has huge practical implications. It's observable, and makes it easy to identify where the shortcomings fall. It is one of the most exciting developments in animal ethics.

In addressing ethics for non-human animals, Nussbaum argues that the capabilities approach is the best basis, theoretically and practically, and for extending the focus beyond traditional appeals to compassion and humanity to considerations of justice for non-human animals - the subtitle of the third Tanner Lecture, taken from a John Rawls epigram which preceded it. The Lecture is preceded by two other epigrams - one from Aristotle, and one from the Nair case considered by the Hindu Kerala High Court in 2000, which affirmed animals as 'beings entitled to dignified existence.'\(^{13}\) Nussbaum derives from this some fundamental entitlements: freedom to adequate opportunities for nutrition and physical activity; freedom from pain, squalor, cruelty and fear; freedom to act in ways characteristic of the species, to opportunities for interacting, and to enjoy light and air in tranquillity.

This may to some echo the Five Freedoms - freedom from hunger and thirst; from discomfort; from pain, injury, disease; from fear; and to perform normal behaviour - which have been influential and a valuable guide to policy since their formulation in 1965. Nussbaum's approach goes further, however. It is in the penultimate section of the Tanner Lecture “Toward Basic Political Principles: The Capabilities List” that the strength of the capabilities approach really emerges, for the plausibility of her practical and policy prescriptions feeds back into the theoretical persuasiveness of her argument.

Nussbaum lists 10 capabilities, and individuals may be said to have an interest in expressing these capabilities. This goes for animals too. The capabilities are considered in turn, with their implications for our use and treatment of animals.

The first is Life, which entails animals are entitled to continue their life, whether or not they take a conscious interest in it. This puts pressure on the meat industry to reform its harmful practices, as well as problematizing killing for sport (hunting and fishing) and for fur.

Bodily Health is the second entitlement, and where animals are under human control, this entails laws banning cruel treatment and neglect, confinement and ill treatment of animals in meat and fur industries; forbidding harsh or cruel treatment for working animals, including circus animals, and regulating zoos, aquaria and parks, as well as mandating adequate nutrition and space. Nussbaum points to the anomaly that animals in the food industry are not protected as domestic animals are, and recommends that this anomaly be eliminated.

Bodily Integrity is the third entitlement, which would prevent the declawing of cats and other mutilations, such as tail-docking, that make the animal more beautiful to humans. It would not ban forms of training that are part of the characteristic capability profile, such as training horses or border collies.

Senses, Imagination, and Thought constitute entitlement four, and entail access to sources of pleasure such as free movement in an environment to please the senses and which offers a range of characteristic activities.

Emotions are entitlement five. Nussbaum argues that all animals experience fear, and many experience anger, resentment, gratitude, grief, envy, and joy, while a small number can experience compassion.

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11 Published as Martha C. Nussbaum, *Framing Justice: Disability, Nationality, Species Membership* (Belknap Press, 2006).
12 The last of these became the core of her chapter contribution to Carol R. Gurney & Martha C. Nussbaum (eds), *Animal Rights: Current Debates and Future Directions* (Oxford University Press, 2004).

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Hence they are entitled to lives where it is open to them to have attachments to others, and not have these attachments warped by isolation or fear. While this is understandable in relation to domestic animals, it is overlooked in relation to zoo and farm animals and research animals.

Practical Reason (entitlement six) involves the extent to which a creature has a capacity to frame goals and projects and plan his or her life. To the extent that such a capacity is present, it ought to be supported, by such policies as room to move around and opportunities for a variety of activities (compare entitlement four above).

Affiliation is entitlement seven. Nussbaum argues that animals are entitled to form attachments, and to relations with humans that are rewarding rather than tyrannical, as well as to live in “a world public culture that respects them and treats them as dignified beings.”16

Other Species (capability eight) calls for the formation of an “interdependent world in which all species will enjoy cooperation and mutually supportive relations with one another.”19 This does not, and has not applied in nature and so calls, in Nussbaum’s words, “for the gradual supplementation of the natural by the just.”16 This would seem to entail human intervention, and is the least persuasive of the capabilities.

Play is capability nine, and is central to the lives of all sentient animals. It entails adequate space, light and sensory stimulation, and the presence of other species members.

Control Over One’s Environment (capability 10) has two aspects in the case of humans – political and natural. For nonhuman animals, it entails being respected and treated justly, even if a human guardian must go to court, as with children, to vindicate those entitlements. The analogue of human property rights is respect for the territorial integrity of their habitat, domestic or wild, and the analogue of work rights is the rights of labouring animals to dignified, respectful labour conditions.

Only Practical Reason does not fit smoothly with animals, and much of what it requires can be derived from the criteria for flourishing. However, even excluding it, if the other nine capabilities were taken seriously, it would transform the common conception of how much needs to be provided as basic conditions for animals – not just life, health, and the maintenance of bodily integrity, but opportunities to experience the senses, imagination and thought, emotions, affiliation, relations with other species, play, and control over the animal’s environment. Yet it is hard to think of a single instance where these capabilities are currently allowed for.

Nussbaum recognises these rights need international cooperation, via accords, such as the UN Declaration of Human Rights, as well as the “ineliminability” of conflict between human and animal interests. Some bad treatment of animals, she argues, can be eliminated without serious loss of human wellbeing. In the use of animals for food, for example, she suggests setting the threshold on focussing on good treatment during life, and painless killing. In the use of animals for research, she argues much can be done to improve the lives of research animals, without stopping useful research. It is unnecessary and unacceptable for primates used in research to live in squalid, lonely conditions. Nussbaum advocates asking whether the research is really necessary; focussing on the use of less complexly sentient animals; improving the conditions of research animals including terminal palliative care; removing psychological brutality; choosing topics cautiously so no animal is harmed for a frivolous reason; and making a constant effort to develop experimental methods (such as computer simulation) that do not have bad consequences. The Australian 3 Rs approach – Replace, Refine, Reduce – has some affinity to Nussbaum’s approach here.19

As earlier emphasised, Nussbaum comes from a justice perspective, fitting the issue into a global justice approach. The capabilities approach is an operational definition of ‘Quality of Life’ and of sentient and what animal welfare entails. It emphasises a “freedom to” approach, by contrast with the “freedom from” emphasis of sentience and speciesism – valuable as they were as precursors.

14 Nussbaum & Stin, above n 8, 316.
15 Ibid 317.
16 Ibid.
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17 The 3Rs are included in the NIH’s Code of Practice for the Care and Use of Animals for Scientific Research (7th ed. 2000), adopted under State/Territory legislatures: Animal Welfare Act 1992 (ACT) s 21; Animal Research Act (NSW) ss 4, 8; Animal Welfare Act (NT) ss 24, 25; Animal Care and Protection Act 2000 (Qld) ss 49, 91; Animal Welfare Act 1985 (SA) s 3; Animal Welfare Act 1993 (Tas) s 24; Prevention of Cruelty to Animals Act 1986 (Vic) s 7; Animal Welfare Act 2002 (WA) s 5.
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Nussbaum emphasises the need for international cooperation, via accords, such as the UN Declaration of Human Rights. Such an accord, in the area of animal welfare, is being sought, and may be a great step forward (this is considered in Part III). But even before such an accord is achieved, perhaps we should consider our current export trade practices. Many Australians watched the 60 Minutes program ‘Ship of Shame’, showing smuggled footage obtained during the Cosmo Express controversy, and exposing that there was expensive equipment donated by Australia that was lying idle, while traditional barbarous practices went on.18 We are reluctant to extradite our citizens to jurisdictions where capital punishment exists. Perhaps it is time we became a little more squeamish and a little less cowardly towards Australian animals that we are knowingly sending to a brutal fate. We cannot avoid the responsibility of this knowledge in the name of trade or cultural relativism, or avoid the dirty hands our complicity incurs.

Now history repeats itself. On 30 May 2011 ABC’s Four Corners program exposed the cruelty involved in the slaughter of Australian cattle in Indonesia by ignorant, untrained slaughtermen, despite a decade of Australian aid, training, and supply of equipment.19 The hard-hitting footage was filmed by Lyn White of Animals Australia, who had earlier exposed similar cruelty in Middle East abattoirs. It caused a furore. The public response was huge, with nearly a quarter of a million signatures on an online petition organised by Get Up,20 Animals Australia, and the RSPCA, which circulated widely and quickly, through new social media channels, as well as widespread and ongoing newspaper and television coverage. Assisted by the fact that the Commonwealth Parliament was sitting, the result was an immediate temporary ban on 12 of the abattoirs involved. One issue was whether halal killing proscribed stunning the animals before slaughter, as recommended by Australia, who had supplied stun guns that were ignored. Also at issue were whether the entire live export trade should be suspended, and the general risk of sending Australian animals to destinations with no animal protection laws.

The events highlighted the need for international regulation, as Nussbaum advocates, as well as the need for animal welfare issues to be adequately addressed politically and legally at the federal, state, and industry level in Australia – which has clearly not been the case. Two private members’ bills introduced into the Parliament seeking a phased or immediate end to the trade were defeated on the floor of Parliament on 18 August 2011.21 Trade to Indonesia resumed in August 2011.22

In this context, Nussbaum’s bottom line threshold of good treatment during life and painless killing must surely be the benchmark.23 It is the pointy end of animal ethics and global justice – where the rubber hits the road. The footage was unforgettable, and what is now so publicly known cannot and will not be ignored (to draw on the words of TS Eliot in his poem Gerontion, ‘After such knowledge, what forgiveness?’).

With the growing prominence of animal ethics issues, community involvement is crucial, as are the many organisations that work in animal welfare and rescue. One of the most prominent is the RSPCA. The name RSPCA stands, of course, for the Royal Society for the Prevention of Cruelty to Animals. That is a Benthamite welfare approach, based on a conviction of the importance of animals’ sentience, and at the time it also went with an anti-vivisection approach. We have argued here for a positive, capabilities approach that spells out what sentience amounts to for animals, but the importance of a concern for cruelty remains. It is not surprising, then, that there has been public pressure for stricter penalties in such cruelty cases. This public pressure is important in educating politicians and bureaucrats charged with implementing the Australian Animal Welfare Strategy,24 as well as

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21 Live Animal Export Restriction and Prohibitions Bill 2011 and Live Animal Export (Slaughter) Bill 2011. At the time of writing, Tony Stagnitti MP is reported to submit a Notice of Motion to the Federal Labor caucus, seeking a prohibition on live export to those countries that cannot guarantee mandatory stunning before slaughter; see Animals Australia, ‘New push to address live export cruelty’ <http://www.animalasstestim.org/features/new-push-to-address-live-export-cruelty.php>. It should be pointed out that this would be a higher standard than currently applies in Australia, given that slaughter without pre-stunning is permitted where “approved arrangements” are in place for slaughter; see Van Allen Brown, ‘Do Sacred Cows Make the Best Hamburgers? The Legal Regulation of the Religious Slaughter of Animals’ (2011) 34 UNSW Law Journal 351, 356-36.
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Nussbaum emphasises the need for international cooperation, via accords, such as the **UN Declaration of Human Rights**. Such an accord, in the area of animal welfare, is being sought, and may be a great step forward (this is considered in Part III). But even before such an accord is achieved, perhaps we should consider our current export trade practices. Many Australians watched the 60 Minutes program ‘Ship of Shame’, showing smuggled footage obtained during the *Cosmos Express* controversy, and exposing that there was expensive equipment donated by Australia that was lying idle, while traditional barbarous practices went on. We are reluctant to extradite our citizens to jurisdictions where capital punishment exists. Perhaps it is time we became a little more squeamish and a little less cowardly towards Australian animals that we are knowingly sending to a brutal fate. We cannot avoid the responsibility of this knowledge in the name of trade or cultural relativism, or avoid the dirty hands our complicity incurs.

Now history repeats itself. On 30 May 2011 ABC’s *Four Corners* program exposed the cruelty involved in the slaughter of Australian cattle in Indonesia by ignorant, untrained slaughtermen, despite a decade of Australian aid, training, and supply of equipment. The hard-hitting footage was filmed by Lyn White of Animals Australia, who had earlier exposed similar cruelty in Middle East abattoirs. It caused a furore. The public response was huge, with nearly a quarter of a million signatures on an online petition organised by Get Up, Animals Australia, and the RSPCA, which circulated widely and quickly, through new social media channels, as well as widespread and ongoing newspaper and television coverage. Assisted by the fact that the Commonwealth Parliament was sitting, the result was an immediate temporary ban on 12 of the abattoirs involved. One issue was whether halal killing proscribed stunning the animals before slaughter, as recommended by Australia, who had supplied stun guns that were ignored. Also at issue were whether the entire live export trade should be suspended, and the general risk of sending Australian animals to destinations with no animal protection laws.

The events highlighted the need for international regulation, as Nussbaum advocates, as well as the need for animal welfare issues to be adequately addressed politically and legally at the federal, state, and industry level in Australia – which has clearly not been the case. Two private members’ bills introduced into the Parliament seeking a phased or immediate end to the trade were defeated on the floor of Parliament on 18 August 2011. Trade to Indonesia resumed in August 2011.

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Part III: The Capabilities Approach and Animal Law

The capabilities analysed in Part II are characterised by Nussbaum as 'basic political principles that will guide law and public policy in dealing with animals'. This implies the need for these principles to be given some form of institutional expression. The focus of this Part will be on how Nussbaum's political principles are reflected in domestic and international law. Domestic law because Nussbaum acknowledges, at least with respect to human capabilities, that the promotion of global justice begins with a responsibility on the part of individual nations to promote capabilities. International law because of the need for collective global action and for what Nussbaum calls a 'thin' system of global governance, necessary to realise a global justice.

Domestic Law

If the capabilities identified by Nussbaum are basic political principles, then it might be expected that they would be grounded in a nation's constitution. As Nussbaum suggests:

the capabilities approach suggests that each nation should include in its constitution or other founding statements of principle a commitment to animals as subjects of political justice and a commitment that animals will be treated with dignity. In Australia there is no constitutional enshrinement of such a commitment, either at the Commonwealth level or at State and Territory level. There is very little prospect that such recognition will be incorporated by referendum in the Commonwealth Constitution for a very long time, given the unhappy record of past referenda proposals on controversial issues.

Some States and Territories have established Charters of Rights, but these are outside their respective Constitutions and, although this is a point not beyond legal argument, they are confined to 'human rights'.

There is, in Australia, some authority for robust public discussion of animal welfare issues being protected under the implied freedom of political communication found in the Constitution. In the case of *Lenah Game Meats v ABC*, Justice Kirby stated:

Many advances in animal welfare have occurred only because of public debate and political pressure from special interest groups. The activities of such groups have sometimes pricked the conscience of human beings. Parliamentary democracies, such as Australia, operate effectively when they are stimulated by debate promoted by

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25 Above n 10: 499.

26 The nature of the political principles suggested by such an extension of justice to animals, and associated institutional expression, may of course vary widely. While this article focuses on the philosophical arguments of Martha Nussbaum, other important accounts can be found in the political theory literature; see, eg., Robert Garner, The Political Theory of Animal Rights (Manchester University Press, 2005); Alastair Cockburn, An Introduction to Animals and Political Theory (Oxford University Press, 2000); and Sietham O'Sullivan, Animals, Equality and Democracy (Palgrave Macmillan, 2010) and Sietham O’Sullivan, Animals, Equality and Democracy (Palgrave Macmillan, 2010).

27 Above n 10: 499.

28 The issue of animal welfare was not considered in the Constitutional Convention of the 1990s. Animals were only considered in the context of free movement between the States, including in debate about whether the power to prohibit the introduction of 'vegetable and animal diseases' should be left to the States or specifically conferred on the Commonwealth. Steven White, 'Regulations of Animal Welfare in Australia and the Emergent Commonwealth Enabling the Traditional Approach of the States and Territories or Laying the Ground for Reform?' (2007) 30 Federal Law Review 247, 263.

magistrates, and so leading to legal reform. A more detailed consideration of the extent to which the capabilities approach is reflected in domestic animal welfare, and internationally, is considered in Part III.

**Part III: The Capabilities Approach and Animal Law**

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In particular, this Part explores the extent to which Nussbaum’s political principles are reflected in domestic and international law. Domestic law because Nussbaum acknowledges, at least with respect to human capabilities, that the promotion of global justice begins with a responsibility on the part of individual nations to promote capabilities. International law because of the need for collective global action and for what Nussbaum calls a ‘thin’ system of global governance, necessary to realise a global justice.

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27 See, eg, Charter of Human Rights and Responsibilities Acts 2006 (Vic) this Act provides that: ‘[e]very person has human rights’; s 5(1); and Human Rights Act 2004 (ACT) this Act provides that: ‘[e]very individual has human rights’; s 6. Transnistria is exploring the introduction of a charter, with a suggested model stating that the Charter should apply only to ‘human person’; Department of Justice, A Charter of Human Rights and Responsibilities for Transnistria, 2010 59. Of course, the concept of legal personhood is flexible, and there is no rational reason for why it could not plausibly extend to non-human entities: see Gary L. Francione, Animals as Persons: Essays on the Abolition of Animal Exploitation (Columbia University Press, 2009); Sigrid Naftel, ‘Law: Imagining of Life, Philosophy, Religion, Democracy and the Legal Person’ (First Published, 2009) 88; Steven M Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Perseus Publishing, 2000). In the United States, the Animal Legal Defense Fund (ALDF) is building support for a national ‘Animal Bill of Rights’: ALDF, ‘Animal Bill of Rights’ 

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community groups. To be successful, such debate often requires media attention. Improvements in the condition of circus animals, in the transport of live sheep for export and in the condition of battery hens followed such community debate. Furthermore, antivivisection and vegetarian groups are entitled, in our representative democracy, to promote their causes, enlisting media coverage, including by the appellant. The form of government created by the Constitution is not confined to debates about popular or congenial topics, reflecting majority or party wisdom. Experience teaches that such topics change over time. In part, they do so because of general discussion in the mass media.31

And the earlier High Court decision of Levy v State of Victoria32 established that protection of freedom of political communication extends to protection of non-verbal political conduct, such as protest. This is so despite the relevant protest in Levy – illegally entering an area designated under regulation for duck hunting – being held to be validly restricted, on the basis that the restrictive law was not disproportionate to achieving the competing public interest of public safety.

However, constitutional protection of discussion of, and protest about, animal welfare matters is one thing, a "commitment to animals as subjects of political justice", as framed by Nussbaum, quite another.

Absent constitutional protection or Commonwealth legislative intervention, the regulation of animal welfare in Australia has developed in a piecemeal way at a State and Territory level. The Commonwealth has never sought to exercise primary legislative responsibility for animal welfare. Ostensibly this is because there is no constitutional head of power specifically addressing animal welfare. However, there is little doubt the Commonwealth could rely indirectly on other heads of power to regulate many aspects of animal welfare currently addressed by the States and Territories.33 A proposal for national legislation, introduced by then Senator Andrew Bartlett in private members bills in 2003 and 2005, failed to attract the support of the major parties and therefore was unsuccessful.34

At a State and Territory level the standard regulatory approach in place today for the treatment of animals is rooted in measures first introduced more than a century ago.

This approach entails an acceptance that animals are, in strictly legal terms, personal property, objects or chattels.35 The common law continues to classify animals as property. Statute law entrenches this status, but modifies the ways in which "animal property" may legitimately be used, principally through animal welfare laws.

Animal welfare statutes universally include a general prohibition standard (no unnecessary cruelty) and, in various forms, a general duty standard (duty to take steps to meet the welfare needs of an animal). The duty of care of standard, explicitly outlined in Queensland legislation, reflects a statutory expression of the Five Freedoms. These general standards are usually supported by particular offences, such as provisions restricting tail docking and dehorning.

Both standards, and the more specific offences, are consistent with two principles identified by Nussbaum, bodily integrity and bodily health. As Gail has suggested, though, the principles argued for by Nussbaum extend significantly beyond the Five Freedoms and mere absence of cruelty. It is reasonably clear that, even before we get to exemptions, most capabilities identified by Nussbaum are not addressed in contemporary Australian animal welfare legislation.

32 In 2007, the then Federal Minister for Agriculture Fisheries and Forestry, responding to representations on the need for a nationally consistent animal welfare legislation, asserted that "Under the Constitution it is possible for the Commonwealth to legislate unilaterally whenever states, territories and the Commonwealth have agreed with the current approach regarding animal welfare and are reluctant to change the arrangements at this time" (letter dated 8 January 2007, copy on file with author).
33 (2011) 6 AAPLJ
34 In a submission to a Senate Committee reviewing the proposed legislation, the Department of Agriculture, Fisheries and Forestry (DAFF) stated: "The bill proposes the development of a national animal welfare system but would not establish a comprehensive national regime for animal welfare given the limitations imposed by the Constitution. Significant areas of animal welfare would not be covered, eg ownership or treatment of animals by individuals, many of whom are not States for purposes unrelated to interstate or overseas trade and commerce . . . . The Commonwealth could regulate such issues only if the States referred the matter of animal welfare to the Commonwealth’s DAFW. Submission No 191 to Senate Economics and Regional Affairs and Transport Legislation Committee, Parliament of Australia, National Animal Welfare Bill 2005, 9 December 2005, 7 <http://www.aph.gov.au/Senate/committee/etsu_ctta_compLS/cart/2004-05/animal_welfare05/191thmftesu_com.pdf>.
35 The leading critique of the property status of non-human animals is provided by Gary L. Francione, Animals, Property and the Law (Temple University Press, 1995).
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A key feature of the standard State and Territory regulatory approach is the grant of an exemption from the cruelty and duty of care standards in respect of significant categories of animals, including farm animals.

Early in the 20th century, the States began including exemptions for particular types of farming practices, such as the dehorning of cattle, castration, spaying, ear-splitting and branding.36

In a further significant expansion of this area of exemption in the 1970s and 1980s, the States shifted to a model of blanket exemptions for farming practices. Jamieson gives the example of Victoria which in 1980 amended anti-cruelty legislation to provide that 'no farming activity would infringe the Act when undertaken in accordance with accepted farming practice'.37

The reason for this process of exemption is not difficult to identify. As Jamieson suggests:

*Australia being a country so heavily dependent even today on the activities of its rural sector, one would expect in any utilitarian humanist calculation substantial concessions to that industry from the operation of the anti-cruelty laws in recognition of its fundamental importance to the Australian economy.*

The significance of these exemptions was not lost on animal welfare advocates, and they were effective in provoking a governmental response. In the late 1970s and early 1980s, codes of practice emerged as a regulatory strategy for addressing farm animal welfare. According to the Neumann Report (a review commissioned by the federal Government as part of its development of the *Australian Animal Welfare Strategy (AAWS)*):39

> The first code of practice developed in Australia appears to be that for poultry with the initiative driven by the chicken meat and egg industries that co-opted government and welfare groups to a committee to develop a code in the late 1970's. This later developed into the Model Code of Practice for the Welfare of Animals - Domestic Poultry. Other early Codes were developed as national guidelines by the Commonwealth Bureau of Animal Health after the Australian Agricultural Council (AAC) in 1980 considered the mounting challenges by animal welfare interests to accepted methods of Australian livestock management and animal experimentation. In particular, the Council considered implications for the intensive animal industries and live animal exports with a focus on the conditions of transport of livestock over long distances, aspects of the slaughter of stock, intensive farming practices in the pig and poultry industries and the control of feral animals.40

Over time a number of model codes of practice were developed, addressing different farm animal species and the range of settings in which they are located. The goal was to achieve a measure of uniformity in the regulation of animal welfare. However, this goal has not been realised, and this makes it hard for Australia to provide a coherent account of, and assurances about, animal welfare regulation, both nationally and in an international context. In substantive terms, too, there have been problems of application, content and enforcement. The Neumann Report summarises the position well:

> Codes are not considered regulatory documents in several jurisdictions but can be used as a defence in proceedings in most States and Territories. This means that if an animal owner is complying with a code, even though a provision in the code may be seen as cruel by some groups, a successful prosecution would be unlikely. Thus unless Codes are subject to a review process, they may provide protection or perpetuate management practices that are no longer acceptable to the public. Partly because of the variable way in which Codes are used under State and Territory legislation there is little consistency in enforcement of any provisions. Most importantly, however, it is a lack of inspectorial resources and will to enforce that appears to impact most on Code enforcement. This inconsistent approach to the purpose and enforcement of Codes in the face of international scrutiny and rising community expectations reflects poorly on Australia's position as a major livestock producing and exporting country. In their current form it appears that Codes do little to provide consistency, provide poor support to regulators, result in

37 Id. Some animal welfare statutes continue to use this form of exemption; see, eg, Animal Welfare Act 2005 (WA) s 23 (definition to a charge of cruelty to show act was done "in accordance with a generally accepted animal husbandry practice" and "in a humane manner").
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considerable additional work producing codes suitable to some States and generally satisfy few expectations.\textsuperscript{41}

As noted above, the federal Government, working with the States and Territories, is pursuing a national AAWS. The process commenced in 2005. A revised AAWS document was published in 2008, and a further revised document in 2011.\textsuperscript{42} The AAWS emphasises a commitment to national consistency and harmonisation, with codes of practice a key issue, under the ‘goal’ of ‘National systems’.\textsuperscript{43}

In line with Neumann Report recommendations, a new code development process has commenced. Mandatory standards and guideline principles are to be used in codes, and the codes are to be adopted by every State and Territory, to create a nationally consistent approach.\textsuperscript{44}

However, it seems clear that the broader structure of exemption from overriding cruelty and duty of care obligations will remain in place. This ensures that a range of farming practices, including intensive farming, will continue to be endorsed. Such practices are clearly at odds with the Five Freedoms. By definition, this means the operation of the codes, old and new, and animal welfare legislation more broadly with respect to farm animals, do not incorporate to any significant extent recognition of the capabilities identified by Nussbaum.

**International Law**

If it is clear that even in a developed country like Australia animal welfare regulation falls well short of extending justice to most animals, at least in the terms conceived by Martha Nussbaum, what is the position internationally?\textsuperscript{45}

In setting out the principles of a global institutional structure necessary to give effect to her capabilities approach for humans, Nussbaum includes the principle of cultivating ‘a thin, decentralized, and yet forceful global public sphere’.\textsuperscript{46} Included under this principle is a ‘range of international accords and treaties that can be incorporated into the nations’ systems of law through judicial and legislative action’.\textsuperscript{47} These include, for example, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *Universal Declaration of Human Rights*.

So far, analogous international accords have not been established addressing the interests of animals, subject to four qualifications.

First, there are accords developed at a regional level. The obvious example here is the work of the European Union. The EU now explicitly recognises the sentience of animals in one of its foundation treaties, the *Treaty on the Functioning of the European Union*.\textsuperscript{48} Art 13 of this Treaty provides:

> 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.

The recognition of animal sentience and the importance of animal welfare in this Treaty is consistent with the expectation expressed by Nussbaum that foundational, constitutional documents should recognise the claims of animals.\textsuperscript{49} It should also then not be surprising that the EU is widely regarded as an international leader on animal welfare

\textsuperscript{41} Ibid 9-10.
\textsuperscript{42} Above n 23.
\textsuperscript{43} Ibid 21-22.
\textsuperscript{44} The process is being managed by Animal Health Australia; for background see Animal Health Australia, "Australian Animal Welfare Standards and Guidelines" [http://www.animal-welfarestandards.aaah.org.au]. For a contextual analysis of the code development process, as part of the broader regulation of animal welfare law, see Xenie Beem and Elizabeth Ellis, "Enforcing Animal Welfare Law: The NSW Experience" (2009) 5 Australian Animal Protection Law Journal 6.
\textsuperscript{45} For a political analysis of international animal protection developments, including the extent to which they are likely to accord with ‘old welfare’, ‘new welfare’ and ‘animal rights’ see Criley Otter et al, "Laying the Foundations for an International Animal Protection Regime" (2011) 1(2) Journal of Animal Ethics (forthcoming).

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\textsuperscript{46} Nussbaum, above n 16, 470.
\textsuperscript{47} Ibid 466.
\textsuperscript{49} Referring to the protocol preamble of this provision, Cheyne argues that it "can be viewed as an explicit recognition by the EU that animals merit justice for their own sake": above n 25, 4.

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In setting out the principles of a global institutional structure necessary to give effect to her capabilities approach for humans, Nussbaum includes the principle of cultivating ‘a thin, decentralized, and yet forceful global public sphere’.\textsuperscript{46} Included under this principle is a ‘range of international accords and treaties that can be incorporated into the nations’ systems of law through judicial and legislative action’.\textsuperscript{47} These include, for example, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *Universal Declaration of Human Rights*.

So far, analogous international accords have not been established addressing the interests of animals, subject to four qualifications.

First, there are accords developed at a regional level. The obvious example here is the work of the European Union. The EU now explicitly recognises the sentience of animals in one of its foundation treaties, the *Treaty on the Functioning of the European Union*.\textsuperscript{48} Art 13 of this Treaty provides:

> 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.

The recognition of animal sentience and the importance of animal welfare in this Treaty is consistent with the expectation expressed by Nussbaum that foundational, constitutional documents should recognise the claims of animals.\textsuperscript{49} It should also then not be surprising that the EU is widely regarded as an international leader on animal welfare

\textsuperscript{41} Ibid 9-10.
\textsuperscript{42} Above n 23.
\textsuperscript{43} Ibid 21-23.
\textsuperscript{45} For a political analysis of incremental animal protection developments, including the extent to which they are likely to accord with ‘old welfare’, ‘new welfare’ and ‘animal rights’ see Colby Otte et al., “Laying the Foundations for an International Animal Protection Regime” (2011) 1(2) Journal of Animal Ethics 181.
\textsuperscript{46} Nussbaum, above n 10, 470.
\textsuperscript{47} Ibid 486.
\textsuperscript{49} Referring to the protocol preamble of this provision, Othman states that it ‘can be viewed as an explicit recognition by the EU that animals merit justice for their own sake’: above n 25, 4.
issues, having banned veal crates in 2007, and with a ban on battery cages to take effect in 2012 and sow stalls in 2013.50

Second, the OIE, or World Organisation for Animal Health, addresses animal welfare to some extent. The OIE was established in 1924 and has 178 member countries.51 The focus of the OIE is on the prevention and control of animal diseases.52 Animal welfare has only recently become a specific area of strategic concern, with an OIE Animal Welfare Working Group established in 2002.53 Since 2005, the OIE has adopted nine animal welfare standards, addressing areas such as transport of animals by land, the use of animals in research and education and the slaughter of animals for human consumption.54

The OIE now sees itself as a global leader on animal welfare.

The progress made by the OIE, to date, in relation to international animal welfare leadership is, by any standards, impressive. The future OIE modus operandi will be characterised by a commitment to communication, consultation, continuous improvement and incremental change ... The notion of approaching animal welfare change management on a truly global, rather than a national basis, represents a significant paradigm shift.55

The animal welfare standards are advisory only, and very broadly expressed. They have many of the shortcomings identified in our domestic codes of practice. They are wholly consistent with the principles underpinning an orthodox approach to animal welfare law, as reflected in Australian domestic regulation - i.e. ‘humane’ treatment should be extended to animals, but only to the extent this does not hinder overriding human interests.56

Third, there are international agreements that give effect to the protection of free-ranging animals, especially where they are endangered. An important example is the Convention on International Trade in Endangered Species of Wild Fauna and Flora.57 Such treaties generally include requirements for humane treatment of animals in one form or another, and so do have welfare implications. However, they are seriously limited in giving effect to the sorts of political principles argued for by Martha Nussbaum, where the focus is on the extension of justice to individual animals. This is because ‘the goal in international law with regard to animals is to conserve them to prevent them becoming extinct as a species, not to conserve them because each individual animal can experience pain and/or pleasure.’58

Fourth, a Universal Declaration on Animal Welfare has been proposed for adoption by the United Nations. Led by the World Society for the Protection of Animals (WSPA), some countries, many animal welfare groups and more than two million individuals have pledged their support for the proposed Declaration.59 The 2008 AAWS points out that ‘Australia has also been working with other international bodies such as the World Society for the Protection of Animals on issues such as the development of a Universal Declaration on Animal Welfare.’60

A universal declaration would be symbolically significant. As the National Human Rights Consultation Report recently pointed out, ‘[w]hile international declarations are not generally binding documents

54 Ibid.
(2011) 6 AAPLJ
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56 For an in-depth account of the way in which law transfers cruel practices into ‘necessary’ or ‘humane’ treatment see Peter Sinkoff, ‘The Welfare Fix: Why Making the World a Better Place for Animals?’ in Peter Sinkoff and Steven White (eds), Animal Law in Australia: A New Dialogue ( Federation Press 2009) 1, 7.
60 DAFF (2008), above n 23, 33. The 2011 AAWS refers to the proposed Universal Declaration as a ‘valuable guiding philosophy for efforts to improve the welfare of animals’, without explicitly noting Australia’s support DAFF (2011), above n 23, 16.
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(2011) 6 AAPPLE 48

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and do not create any enforceable obligations for States that adopt them, they do have moral and political significance.\textsuperscript{61} WSPA argues that:

A UDAW would inspire change at international, regional and national levels by: encouraging governments to improve their national animal welfare legislation; providing a basis for animal welfare legislation in countries where it does not currently exist; encouraging those industries which use animals to keep welfare at the forefront of their policies; mobilising and uniting the animal welfare movement behind a common goal; providing a useful framework to link humanitarian development and animal welfare agendas; and inspiring positive change in public attitudes towards animal welfare.\textsuperscript{62}

The draft recognises that ‘animals are living, sentient beings and therefore deserve due consideration and respect’.\textsuperscript{63} The body of the document requires that ‘appropriate standards’ on animal welfare be developed, that ‘appropriate steps’ be taken to prevent cruelty and that standards of animal welfare for each State be ‘promoted, recognized and observed by improved measures, nationally and internationally’.\textsuperscript{64} These requirements are very broadly expressed and aspirational at best. This flexibility is important in building a consensus and ensuring a large number of States sign up. In turn, adoption by a large number of States may also be a precursor to more specific declarations, and provide a platform for establishing binding treaties or protocols.

This will be a long-term process. The \textit{Universal Declaration of Human Rights} was adopted in 1948,\textsuperscript{65} but it was 1966 before subsequent multilateral treaties were adopted by the UN, starting with the \textit{International Covenant on Civil and Political Rights}\textsuperscript{66} and the \textit{International Covenant on Economic, Social and Cultural Rights}\textsuperscript{67}. Both came into force in 1976.

Significantly, Australian regulation of animal welfare would not be challenged by any provisions in the proposed Declaration. Given that Australian animal welfare is not consistent with the requirements for justice set out by Nussbaum, as argued above, it follows that such a declaration cannot provide the basis for extending justice to animals. At best, it might provide a stepping-stone in the direction of improved animal welfare outcomes, especially in developing countries.\textsuperscript{68}

As a final point in the realm of international law, the role of trade agreements, even if they do not focus specifically on animal welfare, is critically important. Trade agreements, such as those under the auspices of the World Trade Organization, can provide significant obstacles to institutionalising principled approaches to animal welfare. Countries with lower welfare standards may profit at the expense of countries with higher standards, and/or object that higher standards contravene free trade principles, on the basis that they impose an unfair trade barrier. However, despite the difficulties that such treaties have created for progressive reform, the main problem may in fact be ‘that governments are taking too cautious a view of the [trade] restrictions and using them as an excuse not to address… [animal] health and welfare problems’.\textsuperscript{69}

\textbf{Conclusion}

The capabilities approach for animals developed by Martha Nussbaum is theoretically well informed. It provides a coherent, practical set of principles for understanding what might be required to achieve global justice for animals. Those same principles also provide a useful benchmark for assessing the extent to which institutional structures for the protection of animals, such as animal welfare law, incorporate justice for animals, nationally and internationally. It is possible to point

\textsuperscript{62} WSPA, above n 58.
\textsuperscript{64} Ibid ch 3, 2 and 4.
\textsuperscript{65} Universal Declaration of Human Rights, GA res 217A (III), UN GAOR, 3rd sess, 3rd plen sqm, UN Doc A/RES (10 December 1948).
\textsuperscript{66} International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
\textsuperscript{69} Stevensen, above n 49, 331. For a detailed account of the effect of GATT and the WTO on animal welfare see Stevensen, ibid, 315-331.

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62 WSPA, above n 58.
64 Ibid cft 3, 5 and 4.
65 Universal Declaration of Human Rights, GA res 217A (III), UN GAOR, 3rd sess, 118th plen meeting, UN Doc A/810 (10 December 1948).
69 Stevenson, above n 49, 331. For a detailed account of the effect of GATT and the WTO on animal welfare see Stevenson, ibid, 315-331.

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to some progressive, incremental improvements in protection of animal welfare in recent years, nationally and internationally. However, the basic institutional structure through which we express our obligations to animals - animal welfare law, broadly conceived - leaves us a very long way short of realising justice for animals, in the way eloquently argued for by Nussbaum.