

Regulation of the Treatment of Companion Animals

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Chapter 6

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INTRODUCTION

[6.10] Companion animals play a highly significant role in the lives of Australians. Companion animal ownership in Australia is among the highest in the world. Around 69% of Australia’s 9.5 million households include companion animals, most commonly a cat or dog.¹ The percentage of

1. Animal Medicines Australia, “Pets and the Pandemic: A Social Research Snapshot of Pets and People in the COVID-19 Era”, <https://animalmedicinesaustralia.org.au/wp-content/uploads/2021/08/AMAU005-PATP-Report21_v1.4_WEB.pdf>, p 9.

households having a pet surged from 61% to 69%, mostly through an increase in dogs, after 2019 and the onset of the COVID-19 pandemic. Companion animals variously inspire pleasure, invoke an ethic of care and responsibility, advance psychological and physical wellbeing, promote social engagement and provide economic benefit, including for the veterinary profession, pet shops and pet food and other industries. Commensurate with the very close attachment between humans and their companion animals, the protection extended to companion animals through animal protection law is arguably greater than for any other category of animal. Despite this, there are some significant limitations in the regulatory system governing the protection of companion animals, and these will be explored in this chapter.

This chapter begins with a consideration of the meaning of “companion animal”. The chapter then considers the significance of companion animals as reflected in law, distinguishing between instrumental and non-instrumental value. The next section addresses the two major qualifications imposed on the instrumental, personal property rights enjoyed by companion animal owners – the prohibition against cruelty and the duty to meet basic welfare needs. These legal obligations are potentially quite stringent, although their application in practice is complicated by resource constraints, regulatory inconsistencies and limited judicial recognition of the significance of harm done to animals. The last part of this chapter considers “animal management”, an area traditionally distinguished from issues of animal welfare, but which is more appropriately understood as an important component of an enlarged conception of the law of animal protection. How best to address the treatment of dangerous dogs, the surrender and abandonment of companion animals and companion animal overpopulation has so far proven to be difficult for regulators to satisfactorily resolve.

WHAT IS A COMPANION ANIMAL?

No consistent legal definition

[6.20] There is no widely used common legal definition of the term “companion animal”, and many jurisdictions eschew any explicit reference to “companion animal” in legislation. This may be because it is difficult:

to define the exact group of animals commonly referred to as companion animals. In essence the term refers to animals with which something is shared. This could just be time, in which case non-domesticated animals such as birds and fish would be included. However, if companion animals are providing friendship they would include mainly domesticated animals, especially cats, dogs and horses, although there [are] undoubtedly many individual examples of captive wild animals providing friendship in special circumstances.²

In practice, the term is one of convenience, used by policy-makers, animal welfare agencies and others to distinguish the particular domestic setting in

2. C Phillips, *The Welfare of Animals: The Silent Majority* (Springer, London, 2009), p 155.

which an animal is situated from other settings in which the same type of animal may be found such as in research laboratories, on farms and in the wild.

The High Court, in *Attorney-General v Bray*, has endorsed an understanding of “domestic” animals, which can perhaps be read as a synonym for companion animals, as “such animals as are commonly kept and cared for in and about human habitation”³ It’s clear from the judgments that the Court has in mind cats and dogs.

The general approach in animal protection legislation is to include a definition of the broad term “animal”. All jurisdictions include provision for the making of codes of practice for the treatment of animals, including companion animals.⁴ Most jurisdictions have, to a greater or lesser extent, adopted codes of practice addressing a range of areas relevant to companion animals, including keeping companion animals as pets, the operation of pet shops, animal breeding, pet grooming establishments, companion animal transport and boarding establishments.⁵

Similarly, animal control or management legislation⁶ generally does not define “companion animal”. New South Wales provides an exception. Section 5(1) of the *Companion Animals Act 1998* (NSW) defines a companion animal as a cat or dog or any other animal prescribed as such by a regulation (none have been prescribed to date). The legislation takes an expansive approach to “companion”, with a note to the definition in s 5(1) providing that “[t]he fact that an animal is not strictly a ‘companion’ does not prevent it being a companion animal for the purposes of this Act. All dogs are treated as companion animals, even working dogs on rural properties, guard dogs and police dogs”. Subordinate instruments may provide a definition. For example, the *South Australian Standards and Guidelines for Breeding and Trading Companion Animals 2017* define a companion animal as “any animal that is normally traded through wholesale or retail trade including (but not limited to) dogs, cats, rabbits, guinea pigs, rats, mice, birds, amphibians and reptiles”.⁷

3. *A-G v Bray* (1964) 111 CLR 402 at 425 per Windeyer J.

4. See Chapter 4 for a discussion of the way in which codes of practice apply in various jurisdictions.

5. For a list of subordinate legislation incorporating codes of practice for companion animals in the various jurisdictions, see R Morton and A L Whittaker, “Understanding Subordinate Animal Welfare Legislation in Australia: Assembling the Regulations and Codes of Practice” (2022) 12 *Animals* 2437 at 6.

6. For example, *Animal Management (Cats and Dogs) Act 2008* (Qld); *Dog and Cat Management Act 1995* (SA); *Dog Control Act 2000* (Tas); *Domestic Animals Act 1994* (Vic); *Dog Act 1976* (WA); *Domestic Animals Act 2000* (ACT).

7. Department of Environment, Water and Natural Resources, *South Australian Standards and Guidelines for Breeding and Trading Companion Animals* (January 2017), p 6, <<https://cdn.environment.sa.gov.au/environment/docs/standards-and-guidelines-for-breeding-and-trading-of-companion-animals-gen.pdf>>.

A legislative definition of “companion animal” such as that provided in the New South Wales legislation is both too narrow and too broad. In the absence of further prescriptive regulation expanding the type of animal falling within the definition, the restriction to cats and dogs is too narrow in the sense that the category of companion animal extends beyond cats and dogs, to include, at least, horses, as well as other “farm” animals that are primarily kept as animal companions (eg, pigs or sheep).

It is too broad because dogs or cats may be used in a variety of settings where they are clearly not companions. This includes, for example, the use of dogs or cats in scientific research. In the case of research, the use of animals is governed by legislation and research use codes.⁸ Of course, by the time a dog reaches the research laboratory, the use of the term “companion” is no longer justified.

Even in less clear-cut settings, such as those nominated by the New South Wales legislation, ethical issues surrounding the use of animals to enforce the law or to act as security guards, or even fulfilling the role of working dogs on farms, are very different to those concerning household pets. The harm to which animals are exposed as police or security animals is self-evident and, as with research animals, there is no sense in which the animals concerned are *primarily* companions (regardless of the relationship they may form with their handlers). For example, the Queensland Police Dog Squad uses dogs in a range of settings, including “to detect drugs, firearms, cash, explosives, blood, human remains and electronic storage devices, as well as general policing duties”.⁹ The risk to which police animals are exposed may result in comparatively minor harm to the animal, as in the case where a 19-year-old woman was found guilty of animal cruelty in Queensland by slapping a police horse on the rump.¹⁰ At the other end of the scale, in 2021 a Queensland man who stabbed a police dog in the throat while being apprehended, was charged with unlawfully wounding an animal, and was subsequently sentenced to seven months’ imprisonment.¹¹ While the

8. See Chapter 9. In Australia, the key code is *Australian Code for the Care and Use of Animals for Scientific Purposes* (8th ed, NHMRC, 2013, updated 2021), <<https://www.nhmrc.gov.au/about-us/publications/australian-code-care-and-use-animals-scientific-purposes#block-views-block-file-attachments-content-block-1>>.

9. Queensland Police Service, “Celebrating 50 Years of the Queensland Police Dog Squad”, <<https://mypolice.qld.gov.au/news/2022/07/22/celebrating-50-years-of-the-queensland-and-police-dog-squad/>>.

10. R Redmond, “Bond for Slapping Police Horse”, *The Gold Coast Bulletin* (14 August 2009), p 4.

11. R Wuth, “Man Jailed for Stabbing Police Dog”, *7News.com.au* (15 April 2021), <<https://7news.com.au/news/crime/man-jailed-for-stabbing-qld-police-dog-c-2598885>>. See *Criminal Code Act 1899* (Qld), s 468 (Injuring animals) for the relevant offence provision. Outside the scope of this chapter, there are, of course, serious ethical issues raised by the harm suffered by humans pursued by police animals and the circumstances in which this occurs, especially given “the use of police dogs has not been subjected to the same scrutiny as other uses of force by police”: Crime and Misconduct Commission, *The Queensland Police Dog Squad* (9 November 2007), p 1.

use of animals in these contexts may be consistent with a limited, orthodox understanding of animal welfare, alternative accounts of our obligations to animals, considered in Chapter 1 provide a basis for more closely scrutinising this use (eg, utilitarianism) or ceasing it altogether (eg, a rights approach).

Assistance animals

[6.30] Another type of animal that may, at first blush, fall within the category of “companion animal”, at least on a broad-based approach to the term such as that favoured by the NSW legislature, is the so-called “assistance animal”. Assistance animals are animals trained to provide support to persons with a disability. Examples include guide dogs, hearing dogs and seizure alert dogs. In Australia, protection for those reliant on assistance animals against discrimination and lawful access to public places is provided through Commonwealth and State/Territory anti-discrimination legislation and other general legislation.¹² Even though an assistance animal may provide companionship to a person suffering a disability (in the case of psychiatric disability this companionship may itself constitute the therapeutic support provided by the animal), the legislation and the case law emphasise the utilitarian nature of the relationship, with a focus on the requirement that the training of an animal be specifically directed to supporting a person with a disability.

The nature of the distinction between an assistance animal and a companion animal is well-illustrated in *Ondrich v Kookaburra Park Eco-Village*.¹³ In this case, the applicant purchased and took home a terrier, keeping the dog on her premises in contravention of a body corporate by-law preventing the keeping of cats and dogs. When the body corporate sought to enforce an adjudicator’s decision that the dog be removed, the applicant took action in the Federal Magistrates Court under the *Disability Discrimination Act 1992* (Cth), alleging that she was discriminated against by the body corporate. The grounds of complaint included a claim of direct discrimination, on the basis that the applicant suffered a disability and was treated less favourably by the body corporate because of her possessing an animal trained to assist her to alleviate the effects of her disability. While the Magistrate found the applicant did suffer from a disability for the purposes of the Act (including anxiety, depression and Asperger’s syndrome), and relied on the dog to cope with social situations, the basic obedience training provided to the dog

12. For a comprehensive overview of Australian legislation, jurisdiction by jurisdiction, see Victorian Law Reform Commission, *Community Law Reform: Assistance Animals* (Final Report 16, September 2008), Chapter 3 and Appendix 3. The Commonwealth legislation makes clear that discrimination based on a disabled person being accompanied by an assistance animal is disability discrimination per se, effectively overturning the Full Federal Court decision in *Queensland (Queensland Health) v Forest* (2008) 168 FCR 532: see *Disability Discrimination Act 1992* (Cth), ss 8 and 9.

13. *Ondrich v Kookaburra Park Eco-Village* (2009) 227 FLR 83.

did not qualify the dog as an “assistance animal”. Burnett FM drew a clear distinction between companionability and assistance:

It may well be the fact that the presence of the dog had and has the effect of alleviating the applicant’s social anxiety and stress but that matter alone does not demonstrate the dog was trained to assist the applicant achieve that outcome. It is plain the presence of the dog alleviates the effect of the disability but otherwise the evidence does not demonstrate any nexus between the training it received and that outcome as an intended outcome from that training. Other evidence was adduced by the applicant. It was not helpful. For instance her GP, Dr Scott Jenkins noted the benefits of companionship achieved by having the dog and of the dog’s significance to her psychological wellbeing. None of that is in doubt. However it does not address the issue. Indeed Dr Jenkins describes the association between the applicant and the dog as “a significant therapeutic relationship”. That is an apt description referring to the relationship between the applicant and the dog. However there is nothing remarkable about that fact. It is difficult to imagine how the circumstance of a natural canine/human relationship could be classified as training; not to mention training intended to assist an aggrieved person to alleviate the effect of a disability.¹⁴

The Federal Court of Australia took a less formalistic view in *Reurich v Club Jervis Bay Ltd*¹⁵ when considering the pre-requisite for formal assistance dog training. In this case the Court found in favour of the applicant, who suffered from a series of mental health disorders including social communication disorder, paranoid personality disorder and attention deficit/hyperactivity disorder. The discrimination related to the applicant being denied entry to the Club on numerous occasions, in part due to his being accompanied by his assistance dog, Boofhead, and an unsubstantiated claim that the dog smelt and was unhygienic. In this case Boofhead had been trained by his owner, but importantly the dog was also licensed as a “trainee” assistance dog pending the completion of an accredited public access test. Markovic J acknowledged that “[t]he old saying goes, that a dog is a man’s best friend but, as this case demonstrates, sometimes a dog can be more than that”.¹⁶ Importantly, the Court held that relevant training is not limited to training for positive acts to address a person’s disability; it can also extend to an animal’s training which provides assistance as a “mere calm presence”.¹⁷

The Queensland Government is more prescriptive, stating in a commentary on the *Guide, Assistance and Hearing Dog Act 2009* (Qld) that “[a] guide, hearing or assistance dog is *not* a pet or a ‘companion’ dog”.¹⁸ This emphatic boundary drawing perhaps reflects not just a conception of the role to be performed by a dog as a companion or as an assistance animal, but also an

14. *Ondrich v Kookaburra Park Eco-Village* (2009) 227 FLR 83 at 106.

15. *Reurich v Club Jervis Bay Ltd* (2018) 360 ALR 296.

16. *Reurich v Club Jervis Bay Ltd* (2018) 360 ALR 296 at 299.

17. *Reurich v Club Jervis Bay Ltd* (2018) 1220 FCA 296 at 362.

18. Queensland Government, *Guide, Hearing and Assistance Dogs Legislation: Information for Businesses*, <https://www.qld.gov.au/_data/assets/pdf_file/0030/216687/ghadogs-businesses-booklet.pdf> (emphasis in original).

ethical understanding or justification for the treatment of animals in these different settings. As Serpell, Coppinger and Fine suggest:

The concept of using trained and sociali[s]ed animals to assist people with disabilities, or as therapeutic adjuncts, has great intrinsic appeal, exemplifying as it does for many people the ultimate in mutually beneficial animal-human partnerships. Nevertheless, while the advantages to the humans in these relationships may be obvious, the benefits to the animals are by no means self-evident. Indeed, the use of animals for animal-assisted activities and therapy imposes a unique set of stresses and strains on them that the “industry” is only just beginning to acknowledge.¹⁹

Domesticated wild animals

[6.40] Finally, the category of companion animal may be stretched to include wild animals taken into captivity. Keeping wild animals as pets is permissible in some jurisdictions in Australia, usually only where an appropriate licence or permit has been granted. A common justification for the keeping of native wild animals as pets is species conservation. There has been public advocacy in Australia for allowing native animals such as quolls and swamp wallabies to be owned as pets, on the premise that “[o]pportunities to have them as pets is another conservation strategy that will add to the overall likelihood of success”.²⁰

Individual ownership of wild animals as pets is highly questionable on ethical grounds. In response to arguments for keeping native animals as pets, RSPCA Australia has pointed out that “native animals taken from the wild and kept as companions animals face significant risk as their behavioural, physiological and social needs will not be met”.²¹ This is often “due to widespread ignorance of the husbandry requirements of these animals” who often suffer from neglect”.²² Licensing of carers may not always address this ignorance. In 2022, RSPCA Queensland, Queensland Police and

19. J A Serpell, R Coppinger and A H Fine, “The Welfare of Assistance and Therapy Animals: An Ethical Comment” in A H Fine (ed), *Handbook on Animal Assisted Therapy* (Academic, San Diego, 2000) extracted in S J Armstrong and R G Botzler (eds), *The Animal Ethics Reader* (2nd ed, Routledge, London, 2008), p 568.

20. Palaeontologist Professor M Archer, “Could Keeping Native Animals as Pets Help Conservation of Threatened Species”, *ABC News* (11 August 2021). Archer promotes the keeping of native wildlife as pets given that people are more likely to engage with, and care about animals they can establish a relationship, and consequently, care about. Archer goes as far to suggest that not promoting the keeping of native wildlife as pets is a potential “passport to extinction”, and supports the establishment of native wildlife breeding colonies, and replacing pet cat and dogs with native wildlife, <<https://www.abc.net.au/news/2021-08-11/keeping-australian-native-animals-as-pets/100362834>>.

21. RSPCA Australia, “What Is RSPCA’s View on Keeping Native Animals as Pets?” (updated 2 March 2022), <<https://kb.rspca.org.au/knowledge-base/what-is-the-rspcas-view-on-keeping-native-animals-as-pets/>>.

22. RSPCA Victoria, “Native and Introduced Species”, <<https://rspcavic.org/learn/native-and-introduced-species/>>.

Queensland Parks and Wildlife Service officers seized more than 100 native animals from a licensed wildlife carer in response to breaches of the *Animal Care and Protection Act 2001 (Qld)*.²³ Of the 100 animals seized, including ringtail and brushtail possums, a phascogale, reptiles and birds including magpies, butcher birds, currawongs, a barn owl and tawny frogmouth, 25 were located deceased and 67 of them were euthanised as they were unable to be rehabilitated or returned to their natural environment.²⁴

To conclude this section, the term “companion animal” is not a precise, legally determined denomination. It is employed to describe animals in a range of settings, most commonly the household pet, but is also applied to captive wild animals and sometimes, less persuasively, to animals used to provide assistance to humans beyond companionability, including in law enforcement activities and for the disabled. The remainder of this chapter adopts an understanding of a companion animal as primarily a household cat or dog not kept for a “working” purpose, since the ability to form an emotional relationship with these animals has made them the most popular and the most companionable of all animals.²⁵

SIGNIFICANCE OF COMPANION ANIMALS

Instrumental value

Companion animals as personal property

[6.50] The instrumental value of companion animals is expressed through their legal classification as personal property.²⁶ Although some jurisdictions

23. Queensland Department of Environment and Science, “More Than 100 Native Animals Seized in Brisbane Operation”, Media Releases (10 November 2022), <<https://www.des.qld.gov.au/our-department/news-media/mediareleases/more-than-100-native-animals-seized-in-brisbane-operation>>; A Courtney, “Queensland Officers Seize More Than 100 Native Animals from Wildlife Carer’s Brisbane Home”, *ABC News* (10 November 2022), <<https://www.abc.net.au/news/2022-11-10/qld-wildlife-native-animals-seized-brisbane-home-police-warrant/101637754>>.

24. Queensland Department of Environment and Science, “More Than 100 Native Animals Seized in Brisbane Operation”, Media Releases (10 November 2022), <<https://www.des.qld.gov.au/our-department/news-media/mediareleases/more-than-100-native-animals-seized-in-brisbane-operation>>.

25. It is acknowledged this is a culturally determined understanding of companion animals. For example, in some cultures it may be acceptable to kill companion animals, especially dogs, for human consumption; in Western liberal jurisdictions this would be a culturally and, in some jurisdictions legally, transgressive act: see J A Serpell, “Having Our Dogs and Eating Them Too: Why Animals Are a Social Issue” (2009) 65 *Journal of Social Issues* 633 at 640-641. Australian jurisdictions which criminalise the killing of dogs and cats for the purpose of human consumption include South Australia and Victoria: see *Summary Offences Act 1953 (SA)*, s 10; *Meat Industry Act 1993 (Vic)*, ss 3(1), 35(1). Of course, the farming of dogs and cats for food would, by definition, take them outside the realm of companionability, into the category of “production” animals (alongside the farming of animals such as chickens, pigs, cows and sheep).

26. See Chapter 3 for a detailed consideration of the legal classification of animals as property.

are expressly recognising animal sentience,²⁷ this does not change their property status. Companion animals are the possessions of their owners, and are market commodities, bought and sold accordingly. Trade practices and sale of goods legislation define animals as “goods”, along with other chattels.²⁸ There is a thriving “pet industry” in Australia, built around the sale and keeping of animals as pets. In 2021 total expenditure on pet care products and services (dogs and cats) in Australia is estimated to have been \$30.7 billion.²⁹ The major beneficiaries include pet shops, supermarkets and veterinarians.

Implications of commodification

[6.60] The commodification of companion animals has important implications for the way in which society uses and treats companion animals, and the way in which the law responds to harm to them. It has been argued that the legal classification of animals as property may serve to better protect animals, on the premise that “people tend to protect what they own”. Epstein asks the rhetorical question: “Why is it that anyone assumes the human ownership of animals necessarily leads to their suffering ... often quite the opposite is true ... there is no necessary conflict between owners and their animals”.³⁰ Similarly, Sunstein is sceptical about any adverse consequences flowing from the buying and selling of animals in the marketplace per se, suggesting that “[p]eople who have bought their dog do not think that they own a ‘thing’. Payment does not make people believe that the animal with whom they live is a mere commodity. The real problem here is the mistreatment of animals, not the mere fact of sale”.³¹ However, sound arguments exist for taking a less benign, more realistic view of the consequences of a market in companion animals.

First, the commodification of companion animals leads to a culture of “easy come, easy go”, with empirical evidence suggesting that companion animals are surrendered and euthanased in part because they are comparatively cheap, a new animal can easily be purchased and there are no consequences, legal or otherwise, for the surrender of animals.³² While animal protection

27. See, for example, *Animal Welfare Act 1992* (ACT), s 4A.

28. See, for example, *Competition and Consumer Act 2010* (Cth), s 4(1) (“goods includes ... (b) animals, including fish”). Similarly, succession legislation defines companion animals as “personal” or “household” chattels: see [6.100], n 66.

29. Animal Medicines Australia, “Survey Reveals the Spending and Care Habits of Aussie Pet Owners”, Media Release (30 August 2021), <<https://animalmedicinesaustralia.org.au/media-release/survey-reveals-the-spending-and-care-habits-of-aussie-pet-owners/>>.

30. R A Epstein, “Animals as Objects, or Subjects, of Rights” in C R Sunstein and M C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, New York, 2004), pp 148-149.

31. C R Sunstein, “Slaughterhouse Jive” (2001) 224(5) *New Republic* 44.

32. B E Rollin and M D H Rollin, “Dogmatism and Catechisms – Ethics and Companion Animals” (2001) 14 *Anthrozoös* 4 at 9.

legislation in all jurisdictions includes an offence of abandonment,³³ this needs to be distinguished from surrender to an animal shelter or to a vet.

Secondly, the existence of a market in companion animals may lead to an “oversupply” of the commodity. A major animal welfare problem in Australia is the oversupply of cats and dogs, with a high number of unwanted animals surrendered, abandoned and/or killed every year in animal shelters and in veterinary practices.³⁴ Despite the ready availability of unwanted animals in animal shelters, enterprises such as pet shops, markets and breeders continue to supply animals for sale. Where this sale occurs without animals first being desexed, one certain outcome is the continuation of a large pool of unwanted cats and dogs. Those selling animals internalise the profits from sales and externalise any negative consequences which may follow (including the adverse welfare and life outcomes for surrendered animals, and the associated costs of operating animal welfare shelters and maintaining government services with responsibility for animal management). The COVID-19 pandemic led to a significant surge in companion animal acquisition, especially for dogs, as noted in the Introduction. This led to a temporary reduction in supply of companion animals, including high levels of adoption from shelters. However, with pandemic restrictions eased (especially work-from-home restrictions) and a return to post-pandemic normality, there is evidence of an increase in surrenders.³⁵

Thirdly, in the case of breeders, financial incentives and consumer preference combine to create pressure for ever more “ideal”, ever more “refined” breed standards. As Sandøe and Christiansen suggest:

Through screening and responsible breeding [some] illnesses can be bred out. Other conditions are, however, clearly related to breed standards, where the demand for certain features, such as short noses, flat faces and deep skin folds, predispose the offspring to develop certain health problems. Furthermore, breed standards may prescribe certain mutilations, such as docking of tails These problems would probably not exist were it not for the features that some people consider desirable.³⁶

Fourthly, financial incentives may lead to the intensification of breeding of companion animals. In particular, “puppy mills” or “puppy farms”, are an

33. *Prevention of Cruelty to Animals Act 1979* (NSW), s 11; *Animal Care and Protection Act 2001* (Qld), s 19; *Animal Welfare Act 1985* (SA), s 13(3)(b)(iii); *Animal Welfare Act 1993* (Tas), s 8(2)(f); *Prevention of Cruelty to Animals Act 1986* (Vic), s 9(1)(h); *Animal Welfare Act 2002* (WA), s 19(3)(f); *Animal Welfare Act 1992* (ACT), s 6G; *Animal Protection Act 2018* (NT), ss 6(1)(h), 22(1).

34. See [6.220] and [6.230].

35. See, for example, R Cornish, “New Pet Owners Urged to Ask for Help Before Surrendering Animals Post-Lockdown”, *ABC News* (11 August 2021), <<https://www.abc.net.au/news/2021-08-11/covid-dog-adoptions-returns/100365042>>.

36. P Sandøe and S B Christiansen, *Ethics of Animal Use* (Blackwell Publishing, Oxford, 2008), p 121.

“intensive breeding facility that is operated under inadequate conditions”, with result that they “fail to meet dogs’ physical and mental needs”.³⁷ Large numbers of animals may be kept in highly confined spaces, with drastic animal welfare consequences, arising from overcrowding, cage confinement, indiscriminate breeding, poor facilities and lack of basic or veterinary care. Puppy farmers sell their animals in ways that disguise the origins of the animals, including online, through newspapers, through pet shops, car boot sales and false houses.³⁸ Puppy farming cases may be difficult to prosecute, and the costs of prosecution may be very high.³⁹ State governments have become increasingly involved in the addressing puppy farming, including regulating breeders and the ways in which animals may be sold.⁴⁰ However, puppy farms *per se* remain legal.

Fifthly, an instrumental understanding of companion animals as commodities limits the remedies available where a companion animal is harmed or killed due to the wrong of another. To start with an obvious point, compensation is not available where it is measured by the pain or suffering experienced by an animal due to the wrong of another. Apart from difficult issues which might arise about how to place a value on the suffering of an animal as experienced by the animal,⁴¹ compensation of this nature is not possible as long as companion animals are personal property, and not “legal persons”.⁴² The measure of compensation is based on the loss suffered by the owner as a result of the wrongful harm or death of their companion animal.

37. RSPCA Australia, “What Is a Puppy Farm?” (updated 8 March 2023), <<https://kb.rspca.org.au/knowledge-base/what-is-a-puppy-farm/>>.

38. Australian Veterinary Association, “Puppy Farming – Policy” (29 July 2016), <<https://www.ava.com.au/policy-advocacy/policies/companion-animals-commercial-activities/puppy-farming/>>.

39. RSPCA Australia, “Discussion Paper: Puppy Farms” (January 2010), pp 11-14, <<https://kb.rspca.org.au/downloads/discussion-papers/>>.

40. See, for example, *Animal Care and Protection Regulation 2012* (Qld), Sch 3A *Code of Practice for Breeding of Dogs; Domestic Animals Act 1994* (Vic), Pt 4; *Dog Amendment (Stop Puppy Farming) Act 2021* (WA) amending the *Dog Act 1976* (WA).

41. While the rapidly growing field of animal welfare science provides a source of scientific evidence and analysis of animal welfare (including the nature of animal suffering), the issue remains as to how to quantify such suffering, even where it can be described. For an account of the rise of animal welfare science, see C Phillips, *The Welfare of Animals: The Silent Majority* (Springer, London, 2009), Ch 8 (“Animal Welfare Science”).

42. As Handford remarks, “[n]or does an animal have any right to sue on it’s own behalf: in Ohio, a court rejected an attempt to file a claim on behalf of ‘Poopi’, a miniature poodle, for pain and suffering and emotional distress consequent on a veterinarian making a botched attempt to spay her when she had already been spayed, resulting in a large incision scar on her abdomen – after she had only gone to the animal hospital to have her teeth cleaned. The court commented: ‘A dog cannot recover for emotional distress – or indeed for any other direct claim of which we are aware’”: P Handford, *Mullany and Handford’s Tort Liability for Psychiatric Damage* (2nd ed, Lawbook Co, Sydney, 2006), p 625 (referring to *Oberschlake v Veterinary Association Animal Hospital* 785 NE 2d 811 (Ohio 2003)).

There is very little case law or legislation in Australia governing damages claims for harm to companion animals. The limited case law which does exist endorses a “market value” approach to assessment of damages for economic loss.⁴³ On this approach, the compensation available is limited to the market value of the animal, which in some cases may include any consequential loss (eg, where a companion animal that is used for breeding is harmed or killed).⁴⁴ In most circumstances this will be a comparatively modest amount. Consistent with general principles governing damages for economic loss, it may also be possible for an owner to be awarded an amount recognising “investment” in an animal (eg, an amount reflecting outlays on immunisation, training and desexing), and an amount spent on mitigating any harm suffered by an animal (eg, veterinary bills incurred after harm caused to the animal by a pet grooming or boarding establishment).⁴⁵

To date, there is no reported case law in Australia suggesting a preparedness on the part of the courts to award damages for non-economic loss caused by the loss or harm to a companion animal, and in particular for loss giving rise to psychiatric illness. There are two key hurdles here for any would-be claimant to traverse.

First, there is the need, in all cases involving a claim for damages for psychiatric illness for damage to property, to establish a recognisable psychiatric illness (rather than an emotional response falling short of this standard).⁴⁶

Secondly, there is a need for the courts to make a policy decision to extend the circumstances in which damages may awarded for psychiatric illness caused by damage to property, where the property is a companion animal.⁴⁷ As long ago as 1939, MacKinnon LJ suggested that “recovery may be allowed for shock and related apprehension for the safety of pets”.⁴⁸ Two leading Australian

43. See *Davies v Bennison* (1927) 22 Tas LR 52. For a discussion of the general principles concerning damages for damage to property, see K Denton et al, *The Law of Torts in Australia* (5th ed, Oxford University Press, Melbourne, 2012), pp 742-774.

44. K Denton et al, *The Law of Torts in Australia* (5th ed, Oxford University Press, Melbourne, 2012), pp 724-743.

45. See *Beaumont v Cahir* [2004] ACTSC 97, where the owner of a horse was entitled to damages for “restoring” the horse and other consequential loss, and was not required to obtain a “replacement” horse. This was consistent with the general principle that damages are for restoration of a chattel rather than that replacement must be “reasonable”: see *Kinsbury-Carr v Kiliman* [2007] ACTSC 36.

46. For a detailed discussion of the general law in this area, see P Handford, *Mullany and Handford's Tort Liability for Psychiatric Damage* (2nd ed, Lawbook Co, Sydney, 2006), Ch 2 (especially at [2.40]).

47. For a discussion of claims for damages for psychiatric illness for damage to property, see P Handford, *Mullany and Handford's Tort Liability for Psychiatric Damage* (2nd ed, Lawbook Co, Sydney, 2006), Ch 25.

48. P Handford, *Mullany and Handford's Tort Liability for Psychiatric Damage* (2nd ed, Lawbook Co, Sydney, 2006), p 621 (citing *Owens v Liverpool Corporation* [1939] 1 KB 394 at 399). See also fn 3 in Handford.

torts scholars suggest that “[i]t seems likely that courts will allow recovery for psychiatric illness caused by injury to pets”.⁴⁹ While this has yet to come to pass in Australia, there are some lower level courts in the United States which have awarded damages, where the harm to a companion animal was intentional and caused “emotional distress”.⁵⁰ However, the problem with the US case law in this area is that “the courts have drawn the line at various places. As a result there is a spectrum of holdings that make generalis[ations] difficult and suggest that the development of this legal issue is not yet complete”.⁵¹

What could justify the extension of damages to those who suffer psychiatric illness as a result of loss or harm to their companion animals? Waisman, Wagman and Frasch, summarising the main arguments for change, highlight the recognition that:

because companion animals are “family”, recovery of damages resulting from their deaths should be allowed in the same manner as for the death of children and spouses ... scientific studies support the notion that the emotional distress suffered by one who loses a companion animal is similar to that suffered when a human family member dies ... the human/companion animal bond already has been recogni[s]ed in numerous other aspects of society, such that the time has come for the legal system to progress accordingly.⁵²

The emphasis on the significance of the human/companion animal bond implies a shift away from an instrumental understanding of companion animals as mere commodities. Non-instrumental conceptions of companion animals are considered in the next part of this chapter.

Non-instrumental value

[6.70] In a broad sense,⁵³ it might be argued that the keeping of companion animals is always instrumental, since they are always kept to serve some

49. N J Mullany and P Handford, “Moving the Boundary Stone by Statute: The Law Commission on Psychiatric Illness” (1999) 22 *UNSW Law Journal* 350 at 414 (fn 445). Mullany and Handford suggest that *Davies v Bennison* (1927) 22 Tas LR 52 (“where the plaintiff was shocked on seeing the defendant shoot her pet cat but failed to recover”), would be decided differently were it heard today: at 414 (fn 444).

50. For a comprehensive introduction to relevant US cases, see B A Wagman, S S Waisman and P D Frasch, *Animal Law: Cases and Materials* (4th ed, Carolina Academic Press, North Carolina, 2010), pp 191-263.

51. D Favre, *Animal Law: Welfare, Interests, and Rights* (2nd ed, Wolters Kluwer, New York, 2011), p 140. Handford notes that “jurisdictions [in the United States] permitting recovery for emotional distress and trauma caused by property damage remain in the minority ... notably in cases involving injuries, fatal or otherwise, to pet cats and dogs”: P Handford, *Mullany and Handford’s Tort Liability for Psychiatric Damage* (2nd ed, Lawbook Co, Sydney, 2006), pp 624-625 (footnotes omitted).

52. S S Waisman, B A Wagman and P D Frasch, *Animal Law: Cases and Materials* (2nd ed, Carolina Academic Press, North Carolina, 2002), p 124.

53. Significant portions of this section are drawn directly from S White, “Companion Animals: Members of the Family or Legally Discarded Objects?” (2009) 32 *UNSW Law Journal* 852.

purpose for humans, even if that that purpose is non-economic. As Sandøe and Christiansen argue:

The basis of the relationship is that humans decide to keep companion animals ... When someone decides to keep a companion animal, the animal's life (eg, its food, housing and reproduction) will typically be controlled to suit human preferences. The status of companion animals as different from that of friends and family is also paramount in the relevant legal framework, since in law animals are generally seen as possessions – a status no longer legally accorded to human individuals. Acknowledging this asymmetry between humans and animals in respect of power and legal status makes it clear that companion animal ownership is indeed a form of animal use.⁵⁴

There is a growing body of literature which emphasises the “health” benefits for humans – physiological and psychological – associated with the keeping of companion animals. Rowan and Beck suggest that “there is solid evidence that animal contact has significant health benefits and that it positively influences transient physiological states, morale, and feelings of self worth ... Long term effects of animal companionship and interaction include an influence on the attitudes and behaviours of young children”.⁵⁵ More recently, pet ownership has been shown to be important for vulnerable persons during the COVID-19 pandemic – including the elderly, children and those suffering from chronic health conditions – due to the wellbeing benefits of touch which was reported to lead to comfort, relaxation and reciprocity.⁵⁶ Others have taken a more critical approach to some of the early research on which such claims are based.⁵⁷ To acquire a companion animal solely for an anticipated health benefit, even if the benefit is more perceived than real, would still be a highly instrumental use of that animal. However, the reasons for acquiring companion animals, the status they come to assume in a family setting and the care extended to them suggest a more complex

54. P Sandøe and S B Christiansen, *Ethics of Animal Use* (Blackwell Publishing, Oxford, 2008), pp 119-120.

55. A N Rowan and A M Beck, “The Health Benefits of Human-Animal Interactions” in C P Flynn (ed), *Social Creatures: A Human and Animal Studies Reader* (Lantern Books, New York, 2008), p 279.

56. J Young, R Pritchard, C Nottle and H Banwell, “Pets, Touch, and COVID-19: Health Benefits from Non-human Touch Through Times of Stress” (2022) 4 *Journal of Behavioural Economics for Policy* 25.

57. For a wide-ranging critique, see J A Serpell, *In the Company of Animals: A Study of Human Animal Relationships* (Cambridge University Press, Cambridge, 1996), Ch 6 (“Pets as Panacea”). For an example of recent research undermining a specific long-standing claim – that keeping a companion animal can help to reduce loneliness – see A Gilbey, J McNicholas and G M Collis, “A Longitudinal Test of the Belief that Companion Animal Ownership Can Help Reduce Loneliness” (2007) 20 *Anthrozoös* 345. The best position may be that while some studies have been beset by methodological shortcomings, and there is still no conclusive evidence for a direct causal connection between human wellbeing and keeping companion animals, it remains reasonable to cautiously conclude that “pets are good for us”: D L Wells, “The Effects of Animals on Human Health and Well-Being” (2009) 65 *Journal of Social Issues* 523 at 536.

picture. As Sandøe and Christiansen acknowledge “for many owners of companion animals animal welfare is a key issue: owners value their animals highly and do their best to provide them with good lives. Sometimes the animal will even enjoy privileges and be given a special status even at a cost to the owner’s own comfort or to the comfort of the owner’s human companions”.⁵⁸ The special significance assumed by companion animals is borne out in recent Australian opinion surveys and sociological research.

Companion animals as “family members”

[6.80] In a 2019 survey for Animal Medicines Australia, over 60% of respondents referred to their cat or dog as members of their families, with an additional 23% referring to their cat or dog as a companion.⁵⁹ This confirms a trend which has been established for some time. A 2006 survey report by the Melbourne Institute of Applied Economic and Social Research found that a “very large majority (92% in both 1994 and 2006) felt very close to their pet”.⁶⁰

What does it mean, though, to say that a companion animal is a “member of the family” or to “feel very close to them”? Is this just a sentimental response on the part of companion animal owners, or does it reflect something more significant? Franklin explored these questions in an Australian context, as part of a wide-ranging research project, a “national study of human–animal relations”.⁶¹

Franklin’s national survey included exploration of the idea of animals as family members because:

this ascription came up spontaneously and frequently in a series of focus groups conducted in advance of the national survey. This translation is commonly referred to as anthropomorphism, or the attribution of human-like qualities to animals that are merely whimsical fantasies of the human imagination. This may be so, but it is not necessarily so. If people are merely extending to animals as animals, the notion of belonging and recogni[s]ing close bonds with them as equivalent to those within human families, then this is not a case of anthropomorphism; it is a case of hybridi[s]ation, hybridi[s]ation of the family.⁶²

58. P Sandøe and S B Christiansen, *Ethics of Animal Use* (Blackwell Publishing, Oxford, 2008), p 120.

59. Animal Medicines Australia, “Pets in Australia: A National Survey of Pets and People” (2019), p 20, <https://animalmedicinesaustralia.org.au/wp-content/uploads/2019/10/ANIM001-Pet-Survey-Report19_v1.7_WEB_low-res.pdf>.

60. B Headey, *National Pets and People Survey 2006 – Socially Responsible Pet Ownership in Australia: A Decade of Progress* (2006), p 20.

61. For an article-length account of the research, see A Franklin, “Human-Nonhuman Animal Relationships: An Overview of Results from the First National Survey and Follow-Up Case Studies 2000-2004” (2007) 15 *Journal of Human-Animal Studies* 7. For a longer account, see A Franklin, *Animal Nation: The True Story of Animals and Australia* (UNSW Press, Sydney, 2006), especially pp 199-238.

62. A Franklin, “Human-Nonhuman Animal Relationships: An Overview of Results from the First National Survey and Follow-Up Case Studies 2000-2004” (2007) 15 *Journal of Human-Animal Studies* 7 at 14.

In response to the question “Do you think of any animals you keep as members of your family?” on average 88% of respondents said yes. The percentages varied according to location, but were all overwhelmingly high (eg, the percentage figure for ACT respondents was 72%, for Sydney respondents was 84%, for Brisbane respondents was 90% and for Melbourne respondents was 92%).⁶³

Importantly, the study explored whether ascribing family status to companion animals meant anything more than just applying “sentimental labels”, by asking respondents about access to household space, given that “anecdotal evidence suggests that in the 1950s and before, animals were largely kept out of the house, sleeping in kennels or on verandahs”.⁶⁴

The results suggest that by contrast with years gone by, and consignment to the backyard, companion animals increasingly have access to lounge and family rooms (76% of respondents), kitchens (66% of respondents) and even private spaces such as bedrooms (52% of respondents allowing animals into their bedroom, and 35% into their children’s bedrooms). Around half of the respondents allowed their companion animal to lie on furniture.⁶⁵

This access to household space is tangible evidence that companion animals are more than just family members in name:

The symbolism of household space needs to be emphasised here. Bedrooms are largely highly private spaces, the inner sanctum of privatised societies ... in this sense when people in our survey stated that an animal was *both* a member of the family *and* allowed into their bedroom, it was a refined answer indicating that they were not just a member of the family but a very close intimate member ... in the past when dogs were kept outside, or when they were allowed inside but not on furniture, their separate, inferior status was being marked. To discover that half of those interviewed allowed their animals on furniture is to uncover a major shift in their status and position relative to humans and human society.⁶⁶

If companion animals are ascribed “family” status by most owners, how is this manifested legally? One important way is through protection under animal protection legislation, discussed in more detail in the next section. Two further ways which considered in the next section, consistent with a non-instrumental legal conception of companion animals, are pet custody disputes and the creation of pet trusts.

63. A Franklin, *Animal Nation: The True Story of Animals and Australia* (UNSW Press, Sydney, 2006), p 208.

64. A Franklin, *Animal Nation: The True Story of Animals and Australia* (UNSW Press, Sydney, 2006), p 210.

65. A Franklin, *Animal Nation: The True Story of Animals and Australia* (UNSW Press, Sydney, 2006), pp 210-211.

66. A Franklin, *Animal Nation: The True Story of Animals and Australia* (UNSW Press, Sydney, 2006), pp 211-212 (emphasis in original).

Companion animal custody disputes

[6.90] Companion animal custody disputes, admittedly much more common in North America than in Australia,⁶⁷ involve parties to a relationship breakdown going to court seeking orders for custody or access rights to the family pet, in the same way that such orders are sought in relation to children:

While the law considers companion animals to be personal property, many individuals consider their companion animals to be members of the family. Upon divorce or dissolution of the marriage, when judicial intervention is sought to determine the distribution of marital property, courts are left to grapple with the unique position of companion animals – marital “property” which may be considered as a child to either or both spouses.⁶⁸

So far there is little consistency in court decisions, “sometimes courts have treated pets like children, other times they have specifically refused to do so, saying that the law gives them no flexibility in this matter”.⁶⁹ To the extent that courts have been prepared to treat the custody of companion animals as analogous to that of children, such action is radically inconsistent with a strict property analysis, which would suggest that companion animals should simply be distributed as chattels, as part of the overall distribution of the parties’ property.⁷⁰ Courts in Australia have so far not been prepared to countenance the possibility of custody arrangements for pets. In *Davenport v Davenport (No 2)*, the Federal Court of Australia acknowledged that while for many Australians pets may be akin to members of the family, the Courts have always dealt with pets as personal property and it was not possible to grant a shared custody request, citing the lack of any provision under the *Family Law Act 1975* (Cth) or other legislation allowing for this.⁷¹ *Jarvis & Weston* [2007] FamCA 1339, which was not cited in *Davenport v Davenport (No 2)*, took a different approach. The Court ordered that the “dog go with

67. See E Mills and K Akers, “‘Who Gets the Cat ... You or Me?’ Analyzing Contact and Residence Issues Regarding Pets upon Divorce or Separation” (2002) 36 *Family Law Quarterly* 283; T Bogdanoski, “Towards an Animal Friendly Family Law” (2010) 19 *Griffith Law Review* 197. For an overview of the US case law in this area, see B A Wagman, S S Waisman and P D Frasch, *Animal Law: Cases and Materials* (4th ed, Carolina Academic Press, North Carolina, 2010), pp 575-585. See also D Rook, “Who Gets Charlie? The Emergence of Pet Custody Disputes in Family Law Adapting Theoretical Tools from Child Law” (2014) 28 *International Journal of Law, Policy and the Family* 177; R J Huss, “Separation, Custody, and Estate Planning Issues Relating to Companion Animals” (2003) 74 *University of Colorado Law Review* 181; cf J D Gregory, “Pet Custody: Distorting Language and the Law” (2010) 44 *Family Law Quarterly* 35.

68. B A Wagman, S S Waisman and P D Frasch, *Animal Law: Cases and Materials* (4th ed, Carolina Academic Press, North Carolina, 2010), p 575.

69. D Favre, *Animal Law: Welfare, Interests, and Rights* (2nd ed, Wolters Kluwer, New York, 2011), pp 59-60.

70. B Newell, “Animal Custody Disputes: A Growing Crack in the ‘Legal Thinghood’ of Nonhuman Animals” (2000) 6 *Animal Law* 179.

71. *Davenport v Davenport (No 2)* (2020) 62 Fam LR 222 at 227, 229.

the boy” of a separating couple, in circumstances where the father was resisting this outcome on the basis of a lack of jurisdiction for such an order. Without specifically identifying the relevant jurisdiction, the Court held that it could be found should the need arise.⁷²

Finally, the status of animals within a family can be significant in a context of domestic and family violence. Kotzmann et al argue for the recognition of animals “as sentient victims of domestic violence”, so enabling “courts to make orders protecting these animals, which would safeguard their welfare” and reduce the concern of those escaping domestic violence that their pets might be harmed.⁷³ The RSPCA has attempted to address the safety and wellbeing of animals involved in domestic violence, and the emotional burden placed on victims of domestic and family violence, by partnering with not-for-profit DV Connect by offered safe emergency accommodation for animals until they can safely be returned to their owners or rehomed.⁷⁴

Estate planning and companion animals

[6.100] Consistent with the “family” status commonly ascribed to companion animals, estate planning for companion animals is an increasingly important issue for owners. If an owner dies and does not address the future of their companion animal in a will, then their companion animal will be distributed, according to the rules of intestacy, as a “personal effect”⁷⁵ or a “household” or “personal” chattel.⁷⁶ While it is not possible for a testator to bestow a legacy directly on their companion animal,⁷⁷ they do have several options to address the fate of their companion animal in their estate planning arrangements.

One option is for a testator to stipulate that in the event of their death, their companion animal should be killed. While such a provision may

72. *Jarvis & Weston* [2007] FamCA 1339 at [22].

73. J Kotzmann et al, “Addressing the Impact of Animal Abuse: The Need for Legal Recognition of Abused Pets as Sentient Victims of Domestic Violence in Australia” (2022) 45 *UNSW Law Journal* 184.

74. See *RSPCA QLD Annual Report 2021-2022*, p 29, <<https://www.rspca.org.au/resources/annual-reports>>.

75. *Succession Act 2006* (NSW), Ch 4; *Intestacy Act 2010* (Tas).

76. See *Succession Act 1981* (Qld), Pt 3 (“household chattel”, s 34A); *Administration and Probate Act 1919* (SA), Pt 3A (domestic animals are not specifically mentioned, but would be an “article of household use” and therefore a “personal chattel”, s 72B); *Administration and Probate Act 1958* (Vic), Pt I, Div 6 (“personal chattels”, s 5(1)); *Administration Act 1903* (WA), Pt II (domestic animals are not specifically mentioned but would be an “article of household use” and therefore a “personal chattel”, s 14(2)); *Administration and Probate Act 1929* (ACT), Pt 3A (“personal chattel”, s 44); *Administration and Probate Act* (NT), Pt III, Div 4 (“personal chattel”, s 61).

77. This is because a companion animal, as personal property, has no capacity to hold property (including money): see, for example, F Hannah, “Leaving a Legacy for Pets” (2008) 28(10) *Proctor* 17 at 17.

be motivated by concern about how the animal will cope with the loss of their owner or by concern about suitable rehoming of the animal, this is a legally and ethically flawed approach. Testamentary provisions of this kind have not been tested in Australian courts. Courts in the United States have refused to enforce such provisions on the ground that they are contrary to public policy. National media coverage and public outcry arising from such cases has prompted state legislatures in the United States to pass legislation rendering provisions of this kind unenforceable.⁷⁸ Most often, a testator will be concerned to ensure, after their death, the ongoing care of their companion animal. An option here is to establish a “pet trust”. This would involve the appointment of a trustee, the identification of a person prepared to take responsibility for the ongoing care of the animal, and instructions for how trust funds should be used in the care of the animal. A shortcoming of this option is that such a trust would not be enforceable in Australia, given the lack of a beneficiary capable of enforcing the trust and the fact that such a trust would be for a private, non-charitable purpose.⁷⁹ By contrast, all states in the United States have passed legislation validating pet trusts.⁸⁰ It has been argued that similar legislation “might seem unlikely in the Australian context”.⁸¹ An alternative to a pet trust is the Pet Legacy Program operated in most Australian jurisdictions by the RSPCA. Under this program, a testator can leave their companion animal in the care of the RSPCA, in return for making a bequest. Under the terms of the program, the RSPCA undertakes to find a suitable new home for the animal.⁸²

PROTECTING COMPANION ANIMAL WELLBEING THROUGH ANIMAL WELFARE REGULATION

[6.110] If companion animals are widely regarded as members of the family, how is this status reflected in the protection of their welfare? After first clarifying the role of the Commonwealth and the State/Territory jurisdictions in Australia, this section explores the application of Australian animal welfare law in a companion animal context. The imposition of a prohibition against cruelty and an obligation to meet the basic welfare needs

78. B A Wagman, S S Waisman and P D Frasch, *Animal Law: Cases and Materials* (4th ed, Carolina Academic Press, North Carolina, 2010), pp 593-604.

79. For a detailed discussion of the relevant law, see F Hannah, “Leaving a Legacy for Pets” (2008) 28(10) *Proctor* 17; P Jamieson, “Trusts for the Maintenance of Particular Animals” (1985-1987) 14 *University of Queensland Law Journal* 175 (although dated, the latter provides a succinct historical overview. The uncertainties and shortcomings identified in the law remain relevant).

80. B A Wagman, S S Waisman and P D Frasch, *Animal Law: Cases and Materials* (4th ed, Carolina Academic Press, North Carolina, 2010), pp 627-637; ASPCA, “Pet Trust Laws”, <<https://www.aspc.org/pet-care/pet-planning/pet-trust-laws>>.

81. F Hannah, “Leaving a Legacy for Pets” (2008) 28(10) *Proctor* 17 at 20.

82. F Hannah, “Leaving a Legacy for Pets” (2008) 28(10) *Proctor* 17 at 17.

of an animal operate as important constraints on the personal property status of companion animals. By comparison with the regulation of the protection of farm animals, considered in Chapter 7, the position of companion animals is enviable. However, there remain important limitations in the regulation of the protection of companion animals.

Commonwealth and State/Territory roles in Australia

[6.120] In Australia, the States and Territories have assumed responsibility for animal protection regulation. While there is no constitutional head of power directly addressing animal protection, it may be that other heads of power would provide a basis for Commonwealth regulation.⁸³ To date, the Commonwealth has addressed only two aspects of the regulation of the protection of companion animals, prohibiting the importation of five breeds of dog,⁸⁴ and the import or export of fur from domestic cat and dog species.⁸⁵

Animal welfare regulatory standards for companion animals

[6.130] Animal welfare is a complex concept and may mean different things to different audiences. As Phillips suggests “[l]awyers may need a more precise definition than the general public, who need a definition in terms that can easily be understood. Scientists require a definition in terms that can be measured, and animal managers or keepers require one that is practically relevant and can be easily applied to their animals”.⁸⁶ Perhaps reflecting this complexity, in practice the term “welfare” is defined in only three Australian jurisdictions, and in very broad terms, as the “health, safety or wellbeing” of an animal.⁸⁷ Even in those jurisdictions where the term is defined, it is not then used in any operative way in the legislation.

Radford has argued for a need to distinguish between “cruelty” and “welfare”, even if they do have some affinity, on the basis that while cruel treatment of

83. Such as the trade and commerce power (s 51(i)), the corporations power (s 51(xx)), and the external affairs power (s 51(xxix)): *Australian Constitution*. In 2007, the then Federal Minister for Agriculture Fisheries and Forestry, responding to representations on the need for nationally consistent animal welfare legislation, asserted that “[u]nder the Constitution it is possible for the Commonwealth to legislate unilaterally however 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).

84. *Customs (Prohibited Imports) Regulations 1956* (Cth), reg 3, Sch 1. The prohibited breeds are dogo Argentino (Argentinian mastiff); fila Brasileiro (Brazilian mastiff); Japanese Tosa (Japanese fighting dog); American pit bull terrier or pit bull terrier; and Perro de Presa Canario or Presa Canario (Canary mastiff).

85. *Customs (Prohibited Exports) Regulations 1958* (Cth), reg 9AB; *Customs (Prohibited Imports) Regulations 1956* (Cth), reg 4W.

86. C Phillips, *The Welfare of Animals: The Silent Majority* (Springer, London, 2009), p 1.

87. *Animal Care and Protection Act 2001* (Qld), s 10 and Sch (Dictionary); *Animal Welfare Act 1992* (ACT), s 2 Dictionary; *Animal Protection Act 2018* (NT), ss 24, 25 (aggravated cruelty).

an animal must by necessity compromise an animal's welfare, it is possible to fail to meet the welfare needs of an animal without necessarily being cruel.⁸⁸ The distinction turns on an understanding that "animal welfare is principally a *scientific* notion, which has emerged as a discrete area of study only comparatively recently; cruelty, in contrast, is a long-established *legal* test. To that extent, there is a degree of affinity between cruelty and welfare, but the two are far from being synonymous: prejudicing an animal's welfare does not of itself amount in law to cruelty".⁸⁹ Radford further states that:

This distinction is reflected in the thrust of public policy. On the one hand, the intention is to *prevent* cruel treatment by proscribing particular forms of behaviour. On the other, the aim is to *promote* improved standards of welfare by identifying those matters which are important to animals, and translating these into rules, guidance, and advice, to which those responsible for their care are required to have due regard.⁹⁰

Consistent with this distinction, Australian legislation addresses the protection of animal welfare through the imposition of two key, related standards: a cruelty prohibition, enforceable against the world at large (including the animal's owner or a person in charge of the animal), and "duty of care" obligations (enforceable only against the animal's owner or a person in charge of the animal).

Cruelty prohibition

[6.140] Although there is variation in the precise legal drafting, all jurisdictions in Australia have adopted an anti-cruelty prohibition (generally stating that a person must not be cruel to or ill-treat an animal), with some also including a specific provision for aggravated cruelty or ill-treatment.⁹¹ For each jurisdiction, this prohibition applies to animals generally, and therefore includes companion animals such as cats and dogs in a domestic setting. Most jurisdictions include non-exhaustive definitions of "cruelty", comprising acts such as beating, abusing, terrifying, tormenting or worrying animals, or generally causing an animal pain that is unnecessary, unreasonable or unjustifiable.⁹² Of all the categories of animal, prosecutions

88. M Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (Oxford University Press, Oxford, 2001), p 260.

89. M Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (Oxford University Press, Oxford, 2001), pp 260-261 (emphasis in original, footnotes omitted).

90. M Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (Oxford University Press, Oxford, 2001), p 260 (emphasis in original).

91. *Prevention of Cruelty to Animals Act 1979* (NSW), ss 5(1), 6(1) (aggravated cruelty); *Crimes Act 1900* (NSW), s 530 (serious animal cruelty); *Animal Care and Protection Act 2001* (Qld), s 18(1); *Criminal Code Act 1899* (Qld), s 242 (serious animal cruelty); *Animal Welfare Act 1985* (SA), s 13(2), 13(1) (aggravated ill-treatment); *Animal Welfare Act 1993* (Tas), ss 8(1), 9 (aggravated cruelty); *Prevention of Cruelty to Animals Act 1986* (Vic), ss 9, 10 (aggravated cruelty); *Animal Welfare Act 2002* (WA), s 19; *Animal Welfare Act 1992* (ACT), ss 7, 7A (aggravated cruelty); *Animal Protection Act 2018* (NT), ss 24, 25 (aggravated cruelty).

92. For the variety of approaches, see *Prevention of Cruelty to Animals Act 1979* (NSW), ss 5(1), 6(1) (aggravated cruelty); *Animal Care and Protection Act 2001* (Qld), s 18(1); *Criminal Code*

for cruelty to companion animals are the most numerous, with a large number of these resulting in guilty pleas. This means that issues contested in court will centre on the facts of a given case (rather than the content of the cruelty prohibition) and the appropriate sentence.

Some jurisdictions have adopted codes of practice which may qualify the application of the cruelty prohibition.⁹³ Codes of practice generally address the treatment of companion animals in a range of specific settings, such as in pet shops, boarding establishments, pet grooming establishments and shelters. There is no consistency across jurisdictions in the range of codes adopted or in the content of codes. One jurisdiction, the Australian Capital Territory, has adopted codes addressing the treatment of companion animals generally (ie, outside a specific context such as a boarding establishment). These codes are concerned with setting minimum standards for the welfare obligations of animal owners or those in charge of cats and dogs and are not specifically concerned with the cruelty prohibition.⁹⁴

In addition to the cruelty prohibition, each jurisdiction variously prohibits a range of other practices, many specific to companion animals, unless they are performed by a veterinary surgeon for a therapeutic purpose (practices such as tail docking, ear cropping, declawing and devocalisation). Again, there is no consistency across jurisdictions in the incorporation of these additional offences.⁹⁵ It might be thought that the self-evidently painful nature of practices such as tail docking and ear cropping would in any event fall within the definition of “cruelty”. However, the way in which cruelty offences are qualified (so that, for example, justified, necessary or reasonable pain may be permissible) means that the position may not be clear cut.⁹⁶

Act 1899 (Qld), s 242 (serious animal cruelty); Animal Welfare Act 1985 (SA), s 13(2), 13(1) (aggravated ill-treatment); Animal Welfare Act 1993 (Tas), s 8(1); Prevention of Cruelty to Animals Act 1986 (Vic), ss 9, 10 (aggravated cruelty); Animal Welfare Act 2002 (WA), s 19; Animal Welfare Act 1992 (ACT), ss 7, 7A (aggravated cruelty); Animal Protection Act 2018 (NT), ss 24, 25 (aggravated cruelty).

93. Depending on the jurisdiction, compliance with a code of practice may provide an offence exemption, a defence, or be admissible evidence in any prosecution proceeding. For a consideration of the way in which codes of practice operate, see Chapter 4.

94. See, for example, *Animal Welfare (Welfare of Dogs in the ACT) Code of Practice 2010 (ACT)*.

95. See, for example, *Prevention of Cruelty to Animals Act 1979 (NSW), s 12 (tail docking, ear cropping, debarking, declawing, clitoridectomy); Animal Care and Protection Act 2001 (Qld), ss 23 (ear cropping), 24 (tail docking), 25 (debarking), 26 (declawing); Animal Welfare Regulations 2012 (SA), reg 6 (devocalisation, tail docking, ear cropping); Animal Welfare (General) Regulations 2013 (Tas), reg 6 (tail docking); Prevention of Cruelty to Animals Act 1986 (Vic), ss 3, 11A (ear cropping, debarking, tail docking, declawing); Animal Welfare (General) Regulations 2003 (WA), reg 14 (tail docking); Animal Welfare Act 1992 (ACT), s 19A (tail docking, ear cropping, ear removal, clitoridectomy, declawing, cosmetic); Animal Protection Act 2018 (NT), s 7 (tail docking, ear cropping, declawing and debarking).*

96. See Chapter 5 for a discussion of such qualifications.

Other manifestly cruel practices which may involve companion animals are prohibited across all jurisdictions. A typical example here is dog fighting. Given the difficulty in catching offenders actually conducting practices such as dog fights, the provisions generally extend to promoting or attending such events, keeping premises with the intention of conducting such events or possessing tools used for training animals for such events.⁹⁷

Duty of care obligations

[6.150] Cruelty offences have been a feature of animal protection regulation since legislation first emerged in the early to mid-19th century. Over time jurisdictions have increasingly incorporated the imposition of welfare obligations. As previously observed, these are concerned with promoting standards of welfare and, by contrast with cruelty prohibitions, are essentially positive in nature. Their emergence reflects the rise of large-scale industrial farming and, inspired by the “Five Freedoms”, recognise that much animal suffering is not the result of intentionally inflicted harm of the sort governed by cruelty prohibitions, but rather is the result of inadequate care.⁹⁸ Even in a companion animal context, where cruelty offences remain significant, the preponderance of prosecutions are for breach of welfare obligations.⁹⁹

In translating welfare obligations into legislation, Queensland and Tasmania have created specifically labelled “duty of care” provisions, while the Northern Territory has a “minimum level of care”.¹⁰⁰ The Queensland and Northern Territory legislation ~~is~~ ^{is} more robust than that in Tasmania, with failure to comply with the duty operating as a standalone offence. Additionally, Queensland has introduced, in effect, an aggravated duty of care breach, where the breach “causes death, serious deformity, serious disability or prolonged suffering of an animal”.¹⁰¹ The Queensland provision defines

97. See *Prevention of Cruelty to Animals Act 1979* (NSW), s 17; *Animal Care and Protection Act 2001* (Qld), ss 20-22; *Animal Welfare Act 1985* (SA), s 14; *Animal Welfare Act 1993* (Tas), s 10; *Prevention of Cruelty to Animals Act 1986* (Vic), s 13; *Animal Welfare Act 2002* (WA), s 32; *Animal Welfare Act 1992* (ACT), s 17; *Animal Protection Act 2018* (NT), s 37.

98. For an extended discussion of this point, see B E Rollin, “Annual Meeting Keynote Address: Animal Agriculture and Emerging Social Ethics for Animals” (2004) 82 *Journal of Animal Science* 955.

99. For example, in 2021-2022, 87% of cases attended by RSPCA officers in Queensland were identified as breaches concerning duty of care with educational advice the preferred response, along with the issuing of formal Animal Welfare Directions in more serious cases: see RSPCA QLD, *Annual Report 2021-2022*, p 19, <<https://www.rspcaqld.org.au/who-we-are/annual-report>>.

100. *Animal Care and Protection Act 2001* (Qld), s 17(1) (“[a] person in charge of an animal owes a duty of care to it”); *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”); *Animal Protection Act 2018* (NT) (s 6 minimum level of care; s 22 offence for not providing a minimum level of care).

101. *Animal Care and Protection Act 2001* (Qld), s 17(2)(a).

the content of the “duty of care” as including taking 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”.¹⁰² Perhaps consistent with the overlap between the concepts of cruelty and welfare, other jurisdictions have all or some welfare obligations incorporated directly into their cruelty offences, with other welfare obligations included as standalone offence provisions.¹⁰³ As with cruelty offences, the duty of care obligations are variously qualified, most commonly by reference to what is “reasonable”, “appropriate” or “sufficient”.¹⁰⁴

Enforcement of cruelty and duty of care offences

Investigation

[6.160] In practice, the investigation of cruelty and duty of care offences for companion animals is most commonly undertaken by RSPCA inspectors in each jurisdiction, statutorily appointed under animal welfare legislation, although police officers and other authorised persons (typically government departmental employees) may also do so.¹⁰⁵ The enforcement role played by the RSPCA in each jurisdiction is, in part, a colonial legacy. As Caulfield suggests “[w]hen during the 19th century English laws and customs were imported into Australia, one of the imports was the role of the RSPCA in enforcing anti-cruelty laws”.¹⁰⁶ In some jurisdictions there is an informal understanding or convention (and, in at least one jurisdiction, discussed below, a formal written arrangement) as to enforcement arrangements between the RSPCA and other organisations with appointed inspectors. Again, as should now be familiar, there is no consistency across jurisdictions. For example, apart from a limited role played by police officers:

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102. *Animal Care and Protection Act 2001* (Qld), s 17(2); *Animal Protection Act 2018* (NT), s 6.
103. *Prevention of Cruelty to Animals Act 1979* (NSW), ss 5(3), 8; *Animal Welfare Act 1985* (SA), s 13(3); *Prevention of Cruelty to Animals Act 1986* (Vic), s 9(1)(f), (i); *Animal Welfare Act 2002* (WA), s 19(3)(d), (e), (h); *Animal Welfare Act 1992* (ACT), ss 6B-6F.
104. See *Animal Care and Protection Act 2001* (Qld), s 17(2), (3), (4); *Prevention of Cruelty to Animals Act 1979* (NSW), ss 5(3), 8; *Animal Welfare Act 1985* (SA), s 13(3); *Prevention of Cruelty to Animals Act 1986* (Vic), s 9(1)(f), (i); *Animal Welfare Act 2002* (WA), s 19(3)(d), (e), (h); *Animal Welfare Act 1992* (ACT), ss 6B-6F; *Animal Protection Act 2018* (NT), s 6; *Animal Welfare Act 1993* (Tas), ss 6, 7, 8(2)(g).
105. *Prevention of Cruelty to Animals Act 1979* (NSW), ss 4, 24D; *Animal Care and Protection Act 2001* (Qld), s 114; *Animal Care and Protection Regulation 2012* (Qld), reg 9; *Animal Welfare Act 1985* (SA), s 28; *Animal Welfare Regulations 2012* (SA), reg 4; *Animal Welfare Act 1993* (Tas), s 13; *Prevention of Cruelty to Animals Act 1986* (Vic), ss 18, 18A; *Animal Welfare Act 2002* (WA), s 33; *Animal Welfare Act 1992* (ACT), ss 76, 77; *Animal Protection Act 2018* (NT), s 9.
106. M Caulfield, *Handbook of Australian Animal Cruelty Law* (Animals Australia, Melbourne, 2009), p 173.

- in New South Wales, inspectors are from RSPCA NSW and the Animal Welfare League.¹⁰⁷
- in Western Australia, inspectors are from RSPCA WA (non-commercial livestock and companion animals).¹⁰⁸
- in the Australian Capital Territory and Tasmania, inspectors are from RSPCA ACT¹⁰⁹ and RSPCA Tas,¹¹⁰ respectively.

Provisions included in a formal, written arrangement between RSPCA Qld and the Department of Agriculture and Fisheries defines the responsibilities and obligations of RSPCA in the area of enforcement of the ACPA.¹¹¹ RSPCA Qld has been primarily responsible for companion animal enforcement in areas where it has inspectorate staff.¹¹²

It is important to note that an arrangement such as this, and any others of a similar nature which exist in other jurisdictions but which have not been publicly disclosed, is not a requirement of any legislative mandate; they exist only for the operational convenience of the parties involved.

Inspectors enjoy wide-ranging powers in each jurisdiction, including powers to enter and search premises; seize “animals or other things”; require assistance; and alleviate animal suffering.¹¹³ An important regulatory tool available to inspectors in all jurisdictions is the ability to issue “animal welfare directions” or “notices” to those in charge of a companion animal.¹¹⁴

107. NSW Department of Primary Industries, “Inspections and Enforcement”, <<https://www.dpi.nsw.gov.au/animals-and-livestock/animal-welfare/reporting-animal-welfare-concerns/animal-welfare-enforcement/inspections-and-enforcement>>.

108. Department of Agriculture and Food, “Reporting Animal Cruelty”, <<https://www.agric.wa.gov.au/animalwelfare/reporting-animal-cruelty>>.

109. Department of Territory and Municipal Services, “Animal Welfare – Government Responsibilities”, <<https://www.cityservices.act.gov.au/pets-and-wildlife/domestic-animals/animal-welfare>>.

110. Department of Natural Resources and Environment Tasmania, “Animal Welfare”, <<https://nre.tas.gov.au/biosecurity-tasmania/animal-biosecurity/animal-welfare>>.

111. Queensland Government, *Review of the Animal Care and Protection Act 2001 Discussion Paper* (2021), p 17, <<https://www.publications.qld.gov.au/dataset/review-of-the-animal-care-and-protection-act-2001/resource/0d3cd859-2f6b-4721-a054-b24671f29285>>.

112. *Evidence to Senate Rural and Regional Affairs and Transport Committee, Parliament of Australia* (Canberra, 15 February 2006), p 4 (Jim Varghese, Director-General, Queensland Department of Primary Industries and Fisheries).

113. *Prevention of Cruelty to Animals Act 1979* (NSW), Pt 2A; *Animal Care and Protection Act 2001* (Qld), Ch 6, Pt 2; *Animal Welfare Act 1985* (SA), Pt 5, Div 2; *Animal Welfare Act 1993* (Tas), Pt 3; *Prevention of Cruelty to Animals Act 1986* (Vic), Pt 2A; *Animal Welfare Act 2002* (WA), Pt 4, Div 2; *Animal Welfare Act 1992* (ACT), Pt 7, Div 7.3; *Animal Protection Act 2018* (NT), Pt 5, Div 3.

114. *Prevention of Cruelty to Animals Act 1979* (NSW), s 24N; *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 24ZP; *Animal Welfare Act 2002* (WA), s 47(1)(j); *Animal Welfare Act 1992* (ACT), s 85(5); *Animal Protection Act 2018* (NT), s 92.

Directions may be used, essentially in the form of a warning, to provide guidance or require that action be taken to better address the welfare needs of an animal. Directions are a less punitive form of regulatory action than bringing a prosecution, and can be issued in circumstances where the welfare of an animal is or, importantly, *might* be compromised. They can be issued where a prosecution may not be appropriate or sustainable. A failure to observe the requirements of a direction constitutes an offence, providing a powerful incentive for compliance. Directions can, therefore, be used both as an educative tool and as a spur, under threat of prosecution, to compliance.

Bestowing inspectors with wide-ranging investigatory powers does not mean that those powers will necessarily be used. Although more relevant in the context of investigation of alleged offences concerning farm animals, an important question is who may enforce animal welfare legislation where the RSPCA or government agencies fail to do so. This question raises complex issues of criminal law (including the duty of police officers to uphold the law and the conduct of private prosecutions) and administrative law (including issues of standing and mandamus). The position in Australia is by no means clear.¹¹⁵ As Caulfield suggests:

It may well be that the time has come for the proposition to be tested in an Australian court that the RSPCA and responsible government departments are, by analogy with the police, likewise expected by the public to enforce the law relating to animal cruelty, that they are therefore under a duty so to do and are thereby susceptible to compulsion by the court to perform that duty in the event they do not perform it appropriately.¹¹⁶

Prosecution

[6.170] Prosecution figures are regularly reported by the RSPCA in Australia. Although not a comprehensive measure of the extent of prosecutorial activity, given the role played by the police and some government departments in enforcement, the RSPCA Australia figures provide the best guide available about the extent of prosecution of cruelty and duty of care offences for companion animals.

115. For an extended discussion of these issues, see M Caulfield, *Handbook of Australian Animal Cruelty Law* (Animals Australia, Melbourne, 2009), pp 194-202.

116. M Caulfield, *Handbook of Australian Animal Cruelty Law* (Animals Australia, Melbourne, 2009), p 202.

Table 6.1 Cruelty complaints, prosecutions by state/territory RSPCA for the 2021–2022 financial year¹¹⁷

	State/Territory RSPCA							Total
	ACT	NSW	QLD	SA	TAS	VIC	WA	
Cruelty complaints								
Investigated	660	14,088	15,538	4,265	2,108	10,577	6,444	53,680
Cruelty prosecutions								
Prosecutions finalised	0	111	73	24	8	76	26	318
Successful prosecutions (facts proved in relation to principal charges)	1	103	73	24	8	68	26	303
Charges laid	9	418	1308	90	23	286	88	2222
People charged	1	107	148	36	10	73	38	413
Cases pending	1	58	49	44	5	68	0	280
Routine inspections	6	468	0	14	15	19	7	529

The figures in Table 6.1 show that a small proportion of the total complaints investigated by the RSPCA proceed to prosecution. This may reflect other regulatory responses to complaints by inspectors (such as the issue of an animal welfare direction or notice or an informal warning/advice provided). However, as Table 6.1 shows, once a matter is prosecuted, there is a high “success rate”, probably indicative of a very high proportion of guilty pleas.

Sentencing

[6.180] Sentencing of offenders for cruelty and duty of care offences is a controversial area. As Chapter 7 shows, there are very few prosecutions in a farm animal context. This means that, in practice, when considering animal cruelty sentencing, the issue is really one of sentencing in cases involving

117. RSPCA Australia, “RSPCA Australia National Statistics 2021-2022”, Table 5, <<https://www.rspca.org.au/what-we-do/our-role-caring-animals/annual-statistics>>.

companion animals. Although not grounded in any rational or ethically defensible distinction which ought to be drawn between the protection of companion animals and other animals, there can be little doubt that cruelty cases involving companion animals invoke an emotional resonance which is lacking for maltreatment of other animals (especially farm animals). This differential response is perhaps consistent with the “family” status widely ascribed to companion animals by members of the community.

Debate in this area has centred around whether the sentences imposed by courts are giving effect to legislative intent, especially given most jurisdictions have substantially increased the maximum penalties which may be imposed for cruelty offences, as part of a wider modernisation of animal welfare legislation.¹¹⁸ While it may be the case that sentencing is a complex process, and analysing “current penalty levels in animal cruelty cases is no easy task”,¹¹⁹ there is some evidence that the intent of the legislation is not being realised. In a detailed analysis of animal cruelty sentencing in Australia published in 2013, Markham identified some distinctive sentencing patterns:

- it was rare for custodial sentences to be imposed.
- a custodial sentence was more likely in cases where there had been extreme animal cruelty, but even here sentences were low, dampening down upper-level sentences for less extreme, but still very serious offending.
- the most common sentence was a fine, the least severe sentencing option.

118. Significant variations in penalty apply. Maximum penalties in each jurisdiction for cruelty/ill-treatment are (for individuals): *Prevention of Cruelty to Animals Act 1979* (NSW), ss 5 (\$44,000 and/or one-year imprisonment), 6 (aggravated cruelty) (\$110,000 and/or two years’ imprisonment); *Animal Care and Protection Act 2001* (Qld), s 18 (\$275,000 or three years’ imprisonment); *Criminal Code Act 1899* (Qld), s 242 (serious animal cruelty) (seven years’ imprisonment); *Animal Welfare Act 1985* (SA), s 13(2) (\$20,000 and/or two years’ imprisonment), 13(1) (aggravated ill-treatment) (\$50,000 or four years’ imprisonment); *Animal Welfare Act 1993* (Tas), ss 8 (\$14,000 and/or 12 months’ imprisonment), 9 (aggravated cruelty) (\$28,000 or 18 months’ imprisonment); *Prevention of Cruelty to Animals Act 1986* (Vic), ss 9 (\$46,230 or 12 months’ imprisonment), 10 (aggravated cruelty) (\$92,460 or two years’ imprisonment); *Animal Welfare Act 2002* (WA), s 19 (\$50,000 and/or five years’ imprisonment) (note that WA sets a minimum fine of \$2,000); *Animal Welfare Act 1992* (ACT), ss 7 (\$32,000 and/or two years’ imprisonment), 7A (\$48,000 and/or five years’ imprisonment); *Animal Protection Act 2018* (NT), ss 24 (\$31,000 and/or two years’ imprisonment), 25 (\$78,500 and/or five years’ imprisonment).

119. A Markham, “Animal Cruelty Sentencing” in P Sankoff, S White and C Black (eds), *Animal Law in Australasia: Continuing the Dialogue* (2nd ed, Federation Press, Sydney, 2013), p 213. Making the task difficult are the fact that prosecutions generally take place in magistrates courts, with few appellate decisions; sentencing notes are not available; there is no evidence of any national co-ordination in Australia; and prosecution records are not detailed enough to make meaningful comparisons (p 213). Where sentencing decisions are appealed, the normal constraints on higher court review of first instance decisions apply (ie, the need to establish an error in approach or a sentence absolutely outside the range, making it manifestly inadequate). In an animal cruelty/duty of care context, see, for example, *Hall v Gundelach* (unreported, District Court of Queensland, Judge Griffen SC, 14 February 2005).

- there had been very little creativity in the types of sentence imposed, such as the use of community service or work orders, or rehabilitative non-custodial sentences.¹²⁰

A very powerful sentencing tool available to courts is the ability to order that an offender be prohibited from keeping animals, either for a particular period or permanently. Prohibition orders can be especially appropriate in cases of animal hoarding or puppy mills, where there may be a high likelihood of repeat behaviour on the part of an offender. Research is required on the extent to which such orders are being made in practice, and how effectively they are implemented (given problems of a lack of national co-ordination).

More recent data from a Queensland Sentencing Advisory Council (QSAC) report on animal welfare offence sentencing in Queensland is broadly consistent with Markham's findings.¹²¹ However, the QSAC data suggest that custodial sentences are becoming slightly less rare, and there is evidence of an increase in other types of orders, such as prohibition and community service orders, even if the imposition of a fine remains the most common option.

Inappropriate first-instance sentencing outcomes, if they are occurring, are significant for at least three reasons. First, from an animal-centred perspective, the failure to impose fair sentences in the cases which are prosecuted "reinforces the notion that animals are property and not living, sentient beings".¹²² Secondly, from a human-centred perspective, such outcomes "disregard the increasing body of anecdotal evidence and research that links repeated, intentional abuse of animals to a variety of anti-social behaviours ... animal cruelty is part of a broader scheme of community-based violence".¹²³ Third, as noted above, most first instance sentencing outcomes occur at the Magistrates Court level or equivalent, and appeal courts are reluctant to interfere with those decisions even where they may be at the very bottom end of expectations.

120. A Markham, "Animal Cruelty Sentencing" in P Sankoff, S White and C Black (eds), *Animal Law in Australasia: Continuing the Dialogue* (2nd ed, Federation Press, Sydney, 2013), pp 213-216.

121. Queensland Sentencing Advisory Council, *Sentencing Spotlight on Animal Welfare Offences* (2019), <https://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0010/623098/sentencing-spotlight-on-animal-welfare-offences.pdf>. For a similar analysis for Victoria, see *Sentencing Advisory Council, Animal Cruelty Offences in Victoria* (February 2029), <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Animal_Cruelty_Offences_in_Victoria.pdf>.

122. K Sharman, "Sentencing under Our Anti-Cruelty Statutes: Why Our Leniency Will Come Back to Bite Us" (2002) 13 *Current Issues in Criminal Justice* 333 at 334 (footnotes omitted).

123. K Sharman, "Sentencing under Our Anti-Cruelty Statutes: Why Our Leniency Will Come Back to Bite Us" (2002) 13 *Current Issues in Criminal Justice* 333 at 334 (footnotes omitted).

MANAGEMENT OF COMPANION ANIMALS – ANIMAL WELFARE ASPECTS

[6.190] In the final section of this chapter an important aspect of the treatment of companion animals will be considered, commonly referred to as “animal management” (or “animal control”). Traditionally the province of local government, animal management can have important implications for companion animal welfare, encompassing the regulation of matters such as companion animal overpopulation (including registration, desexing and microchipping), and animal control (including regulation of “dangerous” animals and animal numbers per residence).

Given the wide variation in the regulation of these issues at a local government level, there has been a tendency for increased State and Territory intervention in Australia. This section briefly considers some of the key issues which have emerged in this area of regulation, with a particular focus on welfare aspects of animal management.

Keeping companion animals

[6.200] Increased urbanisation has important implications for the wellbeing of companion animals. Phillips has pointed out that “the trend towards high density living is forcing dog and cat owners to leave their animals indoors for longer, and in some cases permanently”.¹²⁴ Consistent with this trend, local governments have for some time prescribed the maximum number of cats and dogs that may be kept on residential premises. This regulation is motivated by concerns about the wellbeing of animals confined in small urban lots, as well as the effects on surrounding community members of the intensification of animal keeping.

Like much of the regulation in the area of animal welfare generally, and compounded by local government regulatory responsibility, there is no consistency across local government areas. Regulatory control of the number of pets is now common in Australia, but the specified constraints, such as animal numbers per household, will depend on the locality. For example, in Brisbane the maximum number of cats or dogs allowed without a permit is two per household,¹²⁵ while in regional Toowoomba (west of Brisbane) the number varies with the size of the property, if 450 m² or less only one dog is allowed, between 451 m² and 4,000 m² two dogs are allowed, three dogs are allowed on a property between 4,001 m² and 40,000 m² and a property greater than 40,000 m² allows four dogs.¹²⁶

124. C Phillips, *The Welfare of Animals: The Silent Majority* (Springer, London, 2009), p 170.

125. Brisbane City Council, “Keeping a Dog”, <<https://www.brisbane.qld.gov.au/community-and-safety/pets-and-livestock/keeping-a-pet-in-brisbane/keeping-a-dog>>.

126. Toowoomba Region, “Number of Allowed Dogs”, <<https://www.tr.qld.gov.au/our-region/living-here/animals/2932-number-of-allowed-dogs>>.

Dangerous dogs

[6.210] In the past couple of decades there has been a pronounced increase in regulation concerning “dangerous” dogs. Legislative change has often been prompted by highly publicised and deeply distressing cases of dog attacks in which humans have been seriously mauled or even killed, especially young children.¹²⁷ Legislation in Australia has adopted a generic approach governing all breeds of dog (dangerous dog regulation) together with regulation targeting particular breeds of dog (restricted dog regulation or “breed specific” regulation). The clearest legislative statement of the objects of dangerous dog regulation is found in s 59(1) of the *Animal Management (Cats and Dogs) Act 2008* (Qld):

The purposes are to ... (a) protect the community from damage or injury, or risk of damage or injury, from particular types of dogs ... and (b) ensure the dogs are (i) not a risk to community health or safety; and (ii) controlled and kept in a way consistent with community expectations and the rights of individuals.

The precise terms of the legislation in each jurisdiction vary widely, but generally empower local government authorities (or in some jurisdictions a court) to declare a dog to be “dangerous”, where the dog has seriously attacked or harassed a person or another animal, or where, because of the way the dog has behaved, or may do so.¹²⁸ Some jurisdictions have adopted a separate category of “menacing dog”, where an attack has occurred or the potential for attack exists, but is not serious.¹²⁹

The consequences of a dangerous dog declaration may include compulsory desexing of the dog, identification as a dangerous dog (eg, in central

127. A study of the incidence of public sector hospitalisations due to dog bites in Australia between 2001 and 2013 found that the public health implications for dog bite injuries are significant. The research suggests that family dogs are mostly responsible for attacks, with 84% of attacks accounted for by dogs owned by the immediate family, relative or close friend of the person bitten. While adults are most commonly attacked, children comprise most hospitalisations: see M Rajshekar et al, “The Incidence of Public Sector Hospitalisations Due to Dog Bites in Australia 2001-2013” (2017) 4 *Australian and New Zealand Journal of Public Health* 377.

128. *Companion Animals Act 1998* (NSW), Pt 5, Div 1; *Animal Management (Cats and Dogs) Act 2008* (Qld), Ch 4, Pt 4; *Dog and Cat Management Act 1995* (SA), Pt 5, Div 3 (allows for the making of control and destruction orders for dangerous dogs); *Dog Control Act 2000* (Tas), Pt 3, Div 3; *Domestic Animals Act 1994* (Vic), Pt 3, Div 3; *Dog Act 1976* (WA), Pt 6, Div 2; *Domestic Animals Act 2000* (ACT), Pt 2, Div 2.3. There are no specific provisions in Northern Territory legislation allowing for dangerous dog declarations, although there is a power for local councils to make regulatory orders which may address a range of animal issues, including dangerous animals: *Local Government Act 2019* (NT), s 195. As well, the *Summary Offences Act 1923* (NT) creates an offence where a dog attacks or menaces a person or animal: s 75A.

129. *Animal Management (Cats and Dogs) Act 2008* (Qld), Ch 4, Pt 4; *Dog and Cat Management Act 1995* (SA), Pt 5, Div 3 (allows for the making of control and destruction orders for menacing dogs, although no definition of a “menacing dog” is provided); *Domestic Animals Act 1994* (Vic), Pt 3, Div 3A.

databases), restrictions on the control and keeping of the dog (such as muzzling in public places, and secure fencing and a dangerous dog notice on the premises where the dog is kept),¹³⁰ and seizure or destruction of the dog in certain circumstances (eg, a failure to comply with restrictions, an unprovoked attack by the dog).¹³¹ Particular breeds of dog may be defined as “restricted dogs”, and are subject to the same or similar regulatory restrictions as dangerous dogs (ie, in effect the particular breeds are presumptively declared to be dangerous dogs).¹³²

Given the potential welfare consequences for dogs that are declared to be dangerous, including being held for long periods in kennels (eg, where a destruction order for a seized dog is contested), and potentially death where a destruction order is upheld, issues of procedure become very important. Although more empirical research in Australia is required, the experience of broadly similar legislation in the United States may be instructive:

In the practice of dog law at the local level, events can flow fast and dog owners often find themselves in legal quagmires even before talking to lawyers. Also, because dogs are not usually the highest priority of local government, procedure/ due process is often less than robust, and therefore the [lawyer] for the dog owner often has a procedural battle to fight ...¹³³

Aspects of the legislation which are breed-specific raise particular concerns given it “is not the breed that is inherently good or evil, but rather people who determine whether dogs will be useful inhabitants of society”.¹³⁴ After a review of the relevant literature on breed as a risk factor in dog bite cases, Cassell and Ashby conclude that:

Overall, the researchers involved in these studies tended to support the position that public policy and prevention efforts to reduce dog bite injury should not

130. *Companion Animals Act 1998* (NSW), Pt 5, Div 4; *Animal Management (Cats and Dogs) Act 2008* (Qld), s 97, Sch 1; *Dog and Cat Management Act 1995* (SA), s 50; *Dog Control Act 2000* (Tas), s 32; *Domestic Animals Act 1994* (Vic), Pt 3, Div 3; *Dog Act 1976* (WA), s 33GA; *Domestic Animals Act 2000* (ACT), Pt 2, Div 2.3.

131. *Companion Animals Act 1998* (NSW), Pt 5, Divs 3, 4; *Animal Management (Cats and Dogs) Act 2008* (Qld), Ch 5, Pt 4; *Dog and Cat Management Act 1995* (SA), s 51; *Dog Control Act 2000* (Tas), Pt 3, Divs 4, 5; *Domestic Animals Act 1994* (Vic), Pt 7A, Divs 2, 6, s 84P; *Dog Act 1976* (WA), Pt 7; *Domestic Animals Act 2000* (ACT), Pt 2, Div 2.7.

132. *Companion Animals Act 1998* (NSW), Pt 5, Div 5; *Animal Management (Cats and Dogs) Act 2008* (Qld), s 63 and Ch 4, Pt 4; *Dog and Cat Management Act 1995* (SA), s 4 and Pt 5, Div 1A; *Dog Control Act 2000* (Tas), Pt 3, Div 3; *Domestic Animals Act 1994* (Vic), s 3(1) and Pt 3, Div 3B; *Dog Regulations 2013* (WA). The restricted breeds in these jurisdictions are some or all of those whose import is prohibited under national legislation: see *Customs (Prohibited Imports) Regulations 1956* (Cth), reg 3, Sch 1.

133. D Favre, *Animal Law: Welfare, Interests, and Rights* (2nd ed, Wolters Kluwer, New York, 2011), p 173.

134. D Burstein, “Breed Specific Legislation: Unfair Prejudice and Ineffective Policy” (2004) 10 *Animal Law* 313 at 323.

focus on breed restriction or bans but be based on the tenet that every breed poses a threat of dog bite and it is safest to conclude that any dog may bite.¹³⁵

The Australian Veterinary Association¹³⁶ and RSPCA Australia¹³⁷ reject breed-specific regulation. Other preferable measures include promotion of responsible dog ownership, education of the public about how to behave around dogs (especially for children), multifaceted animal control efforts (including low-cost desexing, licensing and a focus on irresponsible dog owners) and appropriate targeting of regulation (with breed neutrality and a focus on owners as being primarily responsible for a dog's behaviour).¹³⁸

Surrender/abandonment of companion animals

[6.220] Despite an overwhelming majority of Australians regarding companion animals as “members of the family” a significant number of animals are surrendered to animal shelters every year or abandoned.¹³⁹

Over the past five financial years there has been a substantial decrease in the number of companion animals received by the RSPCA.¹⁴⁰ As Table 6.2 shows, in the 2021–2022 year around 95,000 companion animals were received in RSPCA shelters around Australia, with the overwhelming majority of these animals being cats and dogs (approximately 64,792 in total, comprised 35,571 cats and 19,221 dogs). In the same year, 6,506 cats and 2,484 dogs were euthanased in RSPCA shelters.

135. E Cassell and K Ashby, “Unintentional Dog Bite Injury in Victoria: 2005-07”, *Hazard* (Edition No 69, Summer 2009, Victorian Injury Surveillance Unit, Monash University Accident Research Centre), p 18.

136. Australian Veterinary Association (AVA), “Policies (Breed Specific Legislation)”, <<http://www.ava.com.au/policy/614-breed-specific-legislation>>. The AVA states that there is “little evidence to support banning particular dog breeds as a way of addressing canine aggression in the community. Instead, education of the public and legislative tools that equip animal management authorities to identify potentially dangerous individual dogs offer the best results in reducing incidents with aggressive dogs”.

137. RSPCA Australia, “What Is the RSPCA’s Position on Breed-Specific Legislation?”, <<https://kb.rspca.org.au/knowledge-base/what-is-the-rspcas-view-on-breed-specific-legislation/>>.

138. E Cassell and K Ashby, “Unintentional Dog Bite Injury in Victoria: 2005-07”, *Hazard* (Edition No 69, Summer 2009, Victorian Injury Surveillance Unit, Monash University Accident Research Centre), p 19.

139. For an extended discussion of the issues briefly raised here, see S White, “Companion Animals: Members of the Family or Legally Discarded Objects?” (2009) 32 *UNSW Law Journal* 852.

140. A range of other private organisations operate animal shelters, from the very small to some which are quite large (eg, the Animal Welfare League), as well as local governments (operating “pounds”). This means the total number of companion animals received by animal shelters around Australia is likely to be very much greater than represented in the RSPCA statistics. The RSPCA provides the most comprehensive and accessible data on animal shelter admissions and for this reason its data is used here.

Table 6.2 Comparison of animals received nationally by the RSPCA over the past five years¹⁴¹

	2017-2018	2018-2019	2019-2020	2020-2021	2021-2022	% Change from previous year
Dogs						
Reclaimed/ returned/ rehomed/ other	34,709	29,555	24,606	19,809	16,737	-15.51
Euthanased	5,577	4,308	3,466	2,502	2,484	-0.72
Total dogs received	40,286	33,863	28,072	22,311	19,221	-13.85
Cats						
Reclaimed/ returned/ rehomed/ other	40,401	39,430	35,650	33,968	29,065	-14.43
Euthanased	12,610	11,740	9,714	8,604	6,506	-24.38
Total cats received	53,011	51,170	45,364	42,572	35,571	-16.45
Other Animals						
Reclaimed/ returned/ rehomed/ other	20,709	19,572	19,010	17,597	18,983	7.88
Euthanased	18,651	19,541	20,084	20,577	21,053	2.31
Total other animals received	39,360	39,113	39,094	38,174	40,036	4.88
Total animals	132,657	124,146	112,530	103,057	94,828	-7.98

The reasons given by owners for surrendering their animals are mostly human-centric (eg, unwanted litter, accommodation issues, owner health issues and incompatibility), and raise important ethical questions about the treatment of animals given the fate of many relinquished animals (especially cats). In particular, in those cases where relinquishment occurs for relatively trivial

141. RSPCA Australia, "RSPCA Australia National Statistics 2021-2022", Table 2, <<https://www.rspca.org.au/what-we-do/our-role-caring-animals/annual-statistics>>.

reasons, it is clear that the animal concerned is not a member of the family, in the sense of an acquired, ongoing obligation to care for the animal. Such action may be more consistent with an understanding of animals as property, to be disposed of when necessary.

By contrast with relinquishment, abandonment of an animal is an offence under animal welfare legislation in all jurisdictions, either as part of the broader cruelty offence, or as a separate offence, and in all cases is punishable by a fine and/or imprisonment.¹⁴² There are, however, very few prosecutions for abandonment offences.

Addressing cat and dog overpopulation

[6.230] Given the adverse welfare outcomes for some surrendered and abandoned companion animals, and the killing of a large number of animals by animal shelters when they cannot be rehomed, addressing companion animal overpopulation is not just an “animal management” issue, but very much an animal welfare issue as well. Regulatory responsibility for animal management involves a mixture of local government and State/Territory responsibility. There is a clear trend towards greater consistency, at least at a State/Territory level:

The past decade has witnessed a period of gradual reform in the way that Australian States and Territories manage companion animals, reflecting increased sensitivity within the community not only to the welfare of these animals but also to the public nuisance created by poorly managed cats and dogs. Several Australian States and Territories have enacted new laws or amended existing ones.¹⁴³

Key measures adopted to address problems of overpopulation are concentrated on identification and reunification with owners (through registration and microchipping)¹⁴⁴ and reproductive control (through desexing).¹⁴⁵ Other remedial measures, such as compulsory companion animal education programs and licensing of pet owners have so far not been adopted.

142. See *Prevention of Cruelty to Animals Act 1979* (NSW), s 11; *Animal Care and Protection Act 2001* (Qld), s 19; *Animal Welfare Act 1985* (SA), s 13(3)(b)(iii); *Animal Welfare Act 1993* (Tas), s 8(2)(f); *Prevention of Cruelty to Animals Act 1986* (Vic), s 9(1)(h); *Animal Welfare Act 2002* (WA), s 19(3)(f); *Animal Welfare Act 1992* (ACT), s 6G; *Animal Protection Act 2012* (NT), s 6(1)(h).

143. Dr Linda Marston et al, *Review of Strategies for Effectively Managing Unwanted Cats and Dogs in Queensland* (Animal Welfare Science Centre, Monash University, 2008), p 106.

144. “Microchipping” involves a veterinarian implanting an electronic chip under the skin of an animal. The microchip can be scanned and matched with centrally recorded information about the animal and his or her owner.

145. For a detailed account of the regulatory environment in Australia, including key statutes in each jurisdiction (except Queensland), see Dr Linda Marston et al, *Review of Strategies for Effectively Managing Unwanted Cats and Dogs in Queensland* (Animal Welfare Science Centre, Monash University, 2008), pp 26-27. The key Queensland legislation is the *Animal Management (Cats and Dogs) Act 2008* (Qld).

SUMMARY

[6.240] By contrast with the regulation of the welfare of other categories of animal, the interests of companion animals are well-protected. This protection is arguably consistent with the “family” status that many Australians ascribe to their companion cats and dogs. The welfare interests of companion animals are addressed primarily through animal welfare legislation, with protection against cruelty and an obligation to adequately meet an animal’s welfare needs. Animal management regulation also affects the welfare interests of companion animals in important ways and has been progressively reformed in all jurisdictions. Despite the existence of these regulatory protections, the realisation of their full potential remains constrained, given the personal property status of companion animals, and issues such as a lack of consistency across jurisdictions in a range of areas (eg, in penalties for breach of duty and cruelty offences, and in animal management measures such as desexing, microchipping and registration), lack of adequate enforcement of existing regulatory protections, uneven sentencing outcomes in cruelty and duty of care cases, and a significant number of unwanted companion animals taken in by animals shelters each year. Rather than being complacent about the prevailing treatment of companion animals, issues of this nature demand a commitment to continued reform.

Further reading

- S J Armstrong and R G Botzler (eds), *The Animal Ethics Reader* (3rd ed, Routledge, London, 2017).
- A Franklin, *Animal Nation: The True Story of Animals and Australia* (UNSW Press, Sydney, 2006).
- G Wolf, M Bagaric and J Kotzmann, “Towards a Coherent Sentencing Jurisprudence for Animal Cruelty Offences” (2021) 95 *Australian Law Journal* 368.