**Animals as Property under the Law**

*Introduction*

Under the law in Australia and many other jurisdictions animals are afforded a status similar to that of inanimate objects, whereby they are the subject of absolute property.¹ This paper will explore the impact that the classification of animals as property has upon the promotion of animal welfare within Australia and the apparent inconsistencies between the protection and recognition afforded to household pets and animals with economic value, such as livestock. The effect of the status of animals under the law will then be examined with reference to the manner animals are dealt with in family law property settlement proceedings and the compensation available where companion animals are harmed.

*Proprietary Status*

The treatment of animals as being inferior to humans under the law has an extensive historical basis² which is thought to derive from the works of philosophers such as Aristotle, who envisaged a hierarchical structure in which humans were above animals,³ and religious teachings such as Judeo-Christian doctrine, which considered animals to be mere objects in existence solely for use by humans.⁴

Under the current law animals continue to be viewed as items of property. They are included within the definition of goods for the purpose of the *Australian Consumer Law* Consumer Guarantees Regime⁵ and have been

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⁴ Elizabeth Ellis, ‘Our relationship with animals’ (2010) 74 Hot Topics 1, 3.
⁵ *Competition and Consumer Law Act 2010* (Cth), Sch 2 s 2.
judicially interpreted to be goods for the purposes of the Sale of Goods Act. Even wild animals are considered to be property of the Crown, with this interest capable of being transferred to individuals through the procurement of appropriate licences.

As a result of this proprietary status, animals are not afforded legal rights and are simply regarded as objects, a human resource to be used at the whim of their owners. The law does, however, provide some protections and recognises the need for animals to be free from suffering.

The status of animals in Australia is comparable to that in most other countries, including the United States, and is a particularly prominent example of the laws failure to keep up with changing societal attitudes. In the last 25 years knowledge of animal functioning and level of sentience has increased substantially and companion animals are often considered to be members of the family rather than mere items of property. This is something which is clearly not reflected under the current law. The categorisation of animals as property has become rigid, antiquated and ill equipped, as it fails to meet and reflect the belief in modern society that pets are integral members of the family.

**Legislative Protection**

As a result of Constitutional limitations, regulation of animals is largely dealt with separately by each of the States and Territories.
The property status of animals is particularly evident in legislation such as the *Animal Care and Protection Act 2001* (Qld), under which animals receive a broad definition. The purposes of the Act are described to include the provision of standards for animal care and use which strike a reasonable balance between 'the welfare of animal and the interests of persons whose livelihood is dependent on animals', as well as protecting animals from pain which is considered to be 'unjustifiable, unnecessary or unreasonable'.

Throughout the legislation to use of limiting terms such as ‘unnecessary’ and ‘unjustifiable’ demonstrates that such conduct can apparently be justifiable in certain circumstances. Section 18(2) of the Act is a prime example of this, providing that a person will be considered to be cruel to an animal in violation of s 18(1) where they engage in conduct which ‘causes it pain that, in the circumstances, is unjustifiable, unnecessary or unreasonable’, ‘kills it in a way that causes it to die in unreasonable pain’ or ‘unjustifiably, unnecessarily or unreasonably injures or wounds it or overloads it’. A number of similar protections are also contained within the animal welfare legislation of other States and Territories.

These qualifications raise a number of issues, such as what should constitute ‘unreasonable’ or ‘unnecessary’ pain and how prosecutors can effectively demonstrate this to satisfy the relevant onus of proof. It is suggested that the vagueness of these provisions may simply result in interpretations that favour the interests of humans at the expense of those of animals.

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13 *Animal Care and Protection Act 2001* (Qld), s 11(1).
14 *Animal Care and Protection Act 2001* (Qld), s 3(b)(i).
15 *Animal Care and Protection Act 2001* (Qld), s 3(c).
16 *Animal Care and Protection Act 2001* (Qld), s 18(2)(a).
17 *Animal Care and Protection Act 2001* (Qld), s 18(2)(g)(iii).
18 *Animal Care and Protection Act 2001* (Qld), s 18(2)(h).
19 *Animal Welfare Act 2002* (WA), s 19; *Prevention of Cruelty to Animals Act 1986* (Vic), s 9(1) and 10(1); *Animal Welfare Act 1993* (Tas) s 7, 8 and 9; *Prevention of Cruelty to Animals Act 1985* (SA) s 13 and 15; *Animal Welfare Act (NT)*, s 6-9, 11-13 and 19; *Cruelty to Animals Act 1975* (NSW), s 4-10, 12 and 16; *Animal Welfare Act 1992* (ACT) s 7-9, 13 and 15-16.
21 Ibid.
**Animals used for Production**

Ellis notes that ‘our exploitation of [animals] sits uncomfortably with our professed concern’ for them.\(^2^2\) This is particularly evident in relation to livestock and other animals used for farming purposes. It is suggested that societal attitudes towards animals are dictated to an extent by their perceived usefulness,\(^2^3\) with an observable trend that the greater the economic value of an animal, the less its rights and welfare are considered. A distinction thus appears to be drawn between what constitutes acceptable treatment for household pets and what is acceptable for animals used in production.

The fact that animals with economic value, such as livestock, are provided with fewer protections in practice than animals kept as pets is a reflection of the pressure placed upon animal industries to increase production and efficiency.\(^2^4\) As noted above, one of the particular purposes of the Queensland *Animal Care and Protection Act 2001* (Qld) is to attain a ‘reasonable balance’ between animal welfare and the interests of persons who are financially dependent upon animals.\(^2^5\) It is thus suggested that, in relation to animals used for such purposes, the very laws which were implemented to protect against cruelty now ‘actively facilitate it’.\(^2^6\)

As has been observed by White, there really is ‘no rational ethical basis for differentiating our treatment of otherwise equally sentient creatures’.\(^2^7\) Whilst recently there has been a push in Australia for the greater protection of livestock through the banning of live exports, there is still no specific

\(^{22}\) Ellis, above n 4, 2.
\(^{23}\) Ibid.
\(^{25}\) *Animal Care and Protection Act 2001* (Qld), s 3(b)(i).
legislation in the States or Territories which adequately governs their treatment.28

**Benefit of Proprietary status**

Some commentators suggest that it is beneficial for animals to be classified as property, given the tendency of people to be protective of what they own.29 Epstein argues that:

‘A contemporary case for animal rights cannot be premised on the dubious assumption that our new understanding of animals justifies a revision of our old legal understandings.’ 30

He notes that suggestions of animals as holders of legal rights are ‘altruistic sentiments’ which ‘are the indulgence of the rich and secure’31 and he goes further to question the why ‘anyone assumes the human ownership of animals necessarily leads to their suffering, let alone their destruction’.32

Cao submits a number of arguments to counter this, noting that the classification of companion animals as commodities promotes an ‘easy come easy go culture’ and can lead to an oversupply in the market for them, as well as providing financial incentives for intensive breeding.33 Indeed it is this perception of animals as replaceable items of property that leads to circumstances where owners seek out the services of vets and organisations, such as the RSPCA to euthanize their pets, when they are perceived to have become too much trouble.34

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28 Note that Victoria has, however, enacted the Livestock Management Act 2010 (Vic) to address some of these issues.
29 Debora Cao, Animal Law in Australia and New Zealand (Lawbook Co. Australia: 2010 1st ed), [6.50].
31 Ibid, 10.
32 Ibid.
33 Cao above n 29, [6.50].
Whether you support the suggestion that animals should be given rights under the law or if you simply believe that greater protections should be afforded to ensure that the welfare of all animals is upheld, it is apparent that the law needs to change from the archaic and harmful perception of animals as items of property.

**Remedies for harm to pets**

Cao, in arguing the disadvantages of animals being treated as commodities, notes that this limits the remedies available where the wrong of another leads to the death of, or harm to, an animal.\(^{35}\) In this regard it is apparent that compensation is not recoverable under Australian law for loss or harm suffered by an animal, with only damages for economic loss recoverable by their owners in the form of the market value of the animal.\(^{36}\)

Whilst no Australian courts have awarded damages for the emotional value and significance of animals, there have been a number of cases in other common law jurisdictions which indicate a willingness to recognise animals as more than mere items of property.

*New Zealand*

There have been two relatively recent New Zealand criminal cases in which damages for ‘emotional harm’ have been awarded. In the Queenstown District Court the owner of a dog which had been brutally killed by being thrown against a tree stump was awarded reparation in the form of $2000 for emotional harm.\(^{37}\) A subjective test was used by Judge Dominic Flatley who stated that ‘you may not have had an intention to kill it Mr Spittle but you had no regard at all for whether or not you might do so’. His honour in the

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\(^{35}\) Cao above n 29, [6.50].

\(^{36}\) Ibid.

proceedings noted that he was hopeful that this would assist the owner in dealing with the pain he said they must have been experiencing.\textsuperscript{38}

Judge Jackie Moran in her decision in the District Court of Christchurch similarly required that $1,000 be paid for emotional harm to the owner of a pet which was beaten to death by the defendant as punishment for making a mess inside the house.\textsuperscript{39}

\textit{Canada}

The 2006 Canadian case of \textit{Ferguson v. Birchmount Boarding Kennels Ltd}\textsuperscript{40} was the first Canadian case to allow damages, in the amount of $1,417, for pain and suffering associated with the loss of a pet and recognised pets as being more than mere chattels. This decision was applied in the 2006 Ontario small claims court case of \textit{Nevelson v. Murgaski},\textsuperscript{41} which involved two dog attacks by the defendant’s dog on the elderly plaintiff and her dog. The plaintiff’s dog suffered a puncture wound from each attack, whilst the elderly plaintiff received hand injuries and had to be treated for anxiety and shock. The court awarded damages of $1,750 for pain, suffering and inconvenience.\textsuperscript{42}

\textit{United States}

The US case of \textit{Gluckman v. American Airlines}\textsuperscript{43} concerned a dog which had to be euthanized as a result to the heatstroke and brain damage it sustained from being transported in an unventilated baggage hold. The owner was unsuccessful in seeking to claim damages for the negligent infliction of

\textsuperscript{39} Robertson, above n 36, 11.
\textsuperscript{40} \textit{Ferguson v. Birchmount Boarding Kennels Ltd.} (2006) 79 O.R. (3d) 681 (Div. Ct.)
\textsuperscript{41} \textit{Nevelson v. Murgaski} [2006] O.J. No. 3132 (QL)
\textsuperscript{42} Anne F Walker, ‘Ontario courts award compensation for emotional distress associated with the loss of a pet’ (2007) 48(9) \textit{Canadian Veterinary Journal} 967.
\textsuperscript{43} 844 F. Supp. 151 (S.D.N.Y. 1994).
emotional distress, as the law did not allow recovery of this nature for the loss of property, and similarly could not claim for loss of companionship or for pain and suffering of the dog.\textsuperscript{44}

In \textit{Carbasho v. Musulin}\textsuperscript{45} Starcher J of the Supreme Court of Appeals of West Virginia made the following dissenting statement in relation to the view that only the market value of animals is recoverable:

‘This opinion is simply medieval. The majority blithely says that “our law categorizes dogs as personal property” — that “damages for sentimental value, mental suffering, and emotional distress are not recoverable” when one’s pet is injured or killed by the negligence of another person. In coming to this conclusion, the majority overlooks the fact that the “law” in question is common law, which is controlled by this Court. There was nothing stopping the majority from changing that common law other than their lack of concern for pet owners and the emotional bonds that exist between owners and their pets’.

In a number of cases, however, the ‘intrinsic value’ of animals has now been recognised as a category for damages. The intrinsic value evaluates both the animal as an individual as well as its relation to humans as property.\textsuperscript{46} Indeed there is some authority from courts in Florida where damages have been awarded for emotional distress or mental suffering occurring as a result of the death of a companion animal.\textsuperscript{47}

The Kentucky Court of Appeals in 2001 upheld a decision to grant $50,000 in compensatory damages and $75,000 in punitive damages where two horses were stolen from their owner and sold for slaughter.\textsuperscript{48} A Colorado judge has

\textsuperscript{47} Johnson v Wander 360 So 2d 37 (1978); Levine v Knowles 197 So 2d 329 (1967); Wetman v Tipping 166 So 2d 66 (1964); Levine v Knowles 197 So 2d 329 (1967).
also awarded $65,000 to a woman for the death of her 18-month old dog, which was struck by a car after a cleaning service employee accidentally let her out.49

Most recently in September 2012 a California court on appeal50 upheld an award of $50,000 in emotional damages. This case concerned an incidence of trespass to the plaintiff’s property and intentional injury inflicted upon their dog with a baseball bat.51 Justice Rylaarsdam in that case cited the 1889 decision of Johnson v. McConnell52 and noted, when discussing dogs as pets, that ‘there are no other domestic animals to which the owner or his family can become more strongly attached, or the loss of which will be more keenly felt’.53 Whether this statement could be said to limit the damages recoverable to dogs only, rather than other companion animals, will have to been seen in future cases.

The recognition of this type of damages, whilst not overly widespread, could be said to indicate that the significance of animals under the law as being more than mere items of property is slowly being recognised. However, it is suggested that Australian courts are unlikely to award such damages, without further reform, given the well-established proprietary status of animals.54

**Animals in Family law matters**

Recent statistics reveal that Australia has the highest incidence of pet ownership in the world, with 4 million dogs and 2.6 million cats being kept as pets.55 More than 83 per cent of Australians have had a pet at some time in

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52 Johnson v. McConnell 80 Cal 545 (1889).
54 Bruce, above n 3, 5.21.
their lives and have reflected on pet ownership in a very positive light.\textsuperscript{56} Despite this, the law is sharply at odds with societal perceptions of the status of pets, as the majority of families see their pets as members of their family rather than ‘mere property’.\textsuperscript{57} Favre proposes that this changed societal trend is due to the changing nature of modern family structure, through which human families are becoming smaller and pets are taking a more significant role.\textsuperscript{58}

In Australia pet custody cases are relatively new and undeveloped. American family courts, however, have a long history of dealing with these cases, and thus provide a valuable insight into the conflicting views which are arise when considering the legal status of pets.

Some judges in the United States have expressed reluctance in using court resources to determine the custody of pets, with Judge Charles E. Porcellino of the Cook County Court stating:

‘[T]hat is just not a judiciable issue in my opinion. Go out and buy another dog. Someone should compromise. But to take up a judge’s time when there are children to be cared for and support to be enforced, don’t ever bring a stupid issue like that before me.’\textsuperscript{59}

However, more recently a number of judges have begun to take a different approach by rejecting the strict legal status conferred on pets. Ohio Supreme Court Justice Barbara Howe, who has ruled on a number of pet custody cases, has noted that this is ‘a very important issue that needs to be dealt with in a serious manner’.\textsuperscript{60} It has been observed that ‘the courts are beginning to recognise the intrinsic emotional and physical value provided by these four

\begin{itemize}
  \item \textsuperscript{56} Ibid.
  \item \textsuperscript{57} Jerry Buchmeyer, ‘A slight Change of Pace’ (1998) 61 Texas B.J., 1089.
  \item \textsuperscript{59} Briggs Adams, ‘Judge Blends Street Smarts, Law and Compassion in Divorce Call’ (1997) 20 Chicago Lawyer 4 (Quoting Cook County Circuit Judge Charles E. Porcellino).
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legged characters. These are living creatures that you can’t put a price on … In most cases they’re the heart and soul of their owners’. ⁶¹

In the course of family law property settlement proceedings, it must often be determined whether an animal is marital or separate property. It is generally accepted that a partner who owned a pet prior to the marriage will retain the pet upon dissolution.⁶² Pets acquired during the relationship, however, will most likely be awarded to the individual who can prove the stronger ownership rights through receipts of expenses such as grooming bills and veterinary care.⁶³ Within these circumstances, there is no likelihood for shared ownership following the dissolution of relationship since ownership becomes vested in only one of the parties.⁶⁴ This becomes particularly heart breaking for the non-custodial party as the courts could overlook the non-financial contributions which that party may have made towards maintaining the pet.⁶⁵ This approach clearly demonstrates the tendency of the law to regard animals as mere objects.

Best interests of the pet

In the light of changed societal circumstances, courts are urged to depart from the prevailing common law position of treating animals as just personal property, by implementing a different approach in order to accommodate the deep, quasi-familiar relationship shared by people and their pets.⁶⁶

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⁶⁵ Ibid.
⁶⁶ Ibid.
In order to determine which party retains custody of pets following a divorce or separation, it has thus been advocated that courts should consider what is in the best interests of that pet. This recommended approach would be similar to the procedures used in child custody cases which consider the wishes of the child and parents, the interaction and relationship of the child with parents and the child’s adjustment to changing circumstances.\textsuperscript{67} The purpose behind such model is to protect the child from being exposed to any emotional harm and thus ensuring and prioritising child’s well-being.\textsuperscript{68}

Huss states that family pets are often negatively affected by change of family circumstances and in particular divorce and separation.\textsuperscript{69} She goes on to comment that divorce and separation can affect companion animals as much as it does children, if not more so.\textsuperscript{70} It has been suggested that with the proper adoption of best interests approach, this emotional effect can be minimised.

Within North American jurisprudence, some courts have followed this approach when deciding which party should be awarded custody. In \textit{Zovko v Gregory},\textsuperscript{71} the judge determined that the happiness of the cat took priority over the property rights asserted by both parties. The court thus, awarded that custody of the cat should go to the party who actually took care of it.\textsuperscript{72} Through this decision the judge departed from the strict personal property considerations typically taken by courts. Furthermore, in the case of \textit{Juelfs v Gough}\textsuperscript{73} the court held that the dog was put in danger by the wife’s other dogs, thus indicating that the dog was not safe while living at her residence. In \textit{Vargas v Vargas},\textsuperscript{74} the court awarded custody of the couple’s dog to the wife after considering testimony that the husband was not treating the dog nicely and the fact that the husband’s home included both a scrap metal yard and a

\textsuperscript{67} Mills, above n 61, 299.
\textsuperscript{68} Ibid.
\textsuperscript{70} Ibid.
\textsuperscript{71} CH 97-544 (Va.Circuit Ct. October 17, 1997).
\textsuperscript{72} Ibid.
\textsuperscript{73} 41 P.3d 593, 599 (Alaska 2002).
five-year old child. This was despite the fact that the dog was a gift to the husband.

Each of these cases proposes that, in deciding the best interests of the pet, the court needs to consider which party:

- has paid attention to the pet’s basic daily needs such as food, shelter, physical care, exercise, flea control and worm medication,
- takes the pet to the veterinarian
- demonstrates emotional involvement with pet; and
- offers better financial stability for the pet.75

In determining the best interests of pets in custody disputes, courts should consider awarding shared custody or visitation agreements, thus ensuring each party continues to be involved in their pet’s lives. This was particularly evident in *Arrington v Arrington*76 where Texas Appeals Court upheld a divorcing couple’s request that reasonable visitation rights be granted to the husband so he can continue to enjoy the companionship of their canine for years to come. In *Assal v Barwick*,77 the couple had agreed that the husband should be granted a thirty-day visitation period during each summer as that arrangement was suitable for each party. Similarly, the court in *Lanier v Lanier*78 granted joint custody of the dog, ordering a switch in custody every six months, as well as ensuring that the dog continued attending weekly ladies Bible classes with the wife and riding on the back of motorbike with the husband. The judge stressed out that it was necessary for dog’s wellbeing to continue with these activities.79

However, previously some courts have rejected requests for shared custody or visitation of pets, citing reasons such as a lack of statutory authority to support shared custody of personal property, hesitation to “open the

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76 613 S.W.2d 565, 569 (Texas Civil Appeals 1981).
77 No. 164421 (Md. Cir. Ct. December 3, 1999).
78 No. 3966 (The State of South Carolina The Court of Appeals 2005).
79 Ibid.
floodgates” and the problems that would be presented in attempting to enforce such a decree. In *Bennett v Bennett*, the trial court granted the wife visitation rights in relation to the dog, but the appellate court overturned the order based on the fact that the trial court lacked authority to order visitation with personal property and reminded that the dog should be allocated according to the state’s equitable distribution doctrine. The appellant court went on comment:

“Determinations as to the custody and visitation lead to continued enforcement and supervision problems. Our courts are overwhelmed with the supervision of custody, visitation and support matters related to the protection of our children. We cannot undertake the same responsibility as to the animals”.

This is clearly indicating that the courts are mostly concerned with preventing non-custodial parties from appealing such custody arrangements since it is highly probable that divorce couples would return to the court repeatedly when breach of agreement occurs. The case goes on to argue that it is much easier and less time consuming to award custody according to the property principles of ownership. On this basis the court’s reasoning has been criticised and thus it is important that Australian courts develop an approach as to how pets should be dealt with upon divorce or separation, which goes beyond treating them as insignificant assets.

**Recommendations**

It is evident that there is some inconsistency and conflict in North American cases when dealing with the custody of pets following divorce or separation, which occurs in the absence of legislative and judicial guidance. However it

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80 Bogdanovski, above n 63, 221.
81 655 So.2d 109, 110 (Florida District Court of Appeal 1995).
82 Ibid.
83 McLain, above n 74, 6.
84 *Bennett v Bennett*, 655 So.2d 109, 110 (Florida District Court of Appeal 1995).
does appear that the courts are generally reluctant to depart from the inadequate classification of pets as property.

Through considering these cases, it is apparent that Australian courts should not entirely rely on property law principles when deciding with which party the pet should remain after the relationship breakdown. Instead, it is proposed that family law courts adopt a new system which will consider the best interest of pets and their owners when deciding on custody of the pet in question.

Reform Suggestions

Overall, it is apparent that the current treatment of animals as property under Australian law is inadequate in number of aspects. The law has a fundamental role to play in the prevention of cruelty to animals and the greater protection and recognition of animal rights. As such it appears that reform needs to be undertaken to ensure that the interests of animals are adequately acknowledged under the law.

It has been suggested that the use of National Model Codes on a Federal level could operate to improve the inconsistencies in the legal status of animals throughout the country, although this alone would not be sufficient.

To improve the standards of welfare for animals, particularly those used in farming, it is suggested that the people involved in the management or use of production animals receive training and education in relation to the biological functioning of these animals and factors which may affect their welfare. It is recognised that greater resources and improved methods for the enforcement of the law and relevant codes of practice needs to be implemented to ensure the safety and welfare of animals used in industry.

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85 Voiceless, above n 26, 3.
86 Broom, above n 11, 344.
87 Ibid, 339.
There has been a call for larger scale reform in the form of changing the title of persons responsible for the care of animals from ‘owner’ to ‘guardian’. Several parts of California and towns in Ohio, Indiana, Missouri, New Jersey, New York, Massachusetts, Canada and several other US States have made the change to ‘guardian’ on animal tags, public park signs, veterinary forms, adoption forms, kennel forms, and on all animal companion-related publications. So far, however, Rhode Island has been the only State to completely adopt this terminology.\(^{88}\) Whilst this change may seem to be a slight and trivial, this may assist in further changing societal values and providing achieving of animals with recognition at law as beings with feelings, rather than mere property.\(^{89}\)

It is recommended that legislators give greater consideration to the interests of animals and take action to ensure that the out-dated legal principles regarding animals as items of property are reformed to better reflect the perceptions of modern Australian society.

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