

COMPANION ANIMALS: MEMBERS OF THE FAMILY OR LEGALLY DISCARDED OBJECTS?

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I INTRODUCTION

Companion animals, or pets, play a very significant role in the lives of many humans – variously inspiring pleasure, invoking an ethic of care and responsibility, advancing psychological and physical well-being, promoting social engagement, and providing economic benefit, including for the veterinary profession, pet shops, and pet food and other industries.

In Australia, as well as in comparable Western jurisdictions such as the United States, Canada, the United Kingdom and New Zealand, there is a very high level of pet ownership.¹ In reflecting on the interaction between humans and animals more broadly, and in particular on the ways in which that interaction is

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1 Drawing on commissioned survey and statistics from the Australian Bureau of Statistics, the Australian Companion Animal Council Inc ('ACAC') states that 'the incidence of pet ownership in Australia is one of the highest in the world, with an estimated 63% of Australia's 6.6 million households owning some kind of pet (53% owning a cat or dog)': ACAC, *Pet Ownership Statistics* <http://www.acac.org.au/pet_care.html> at 6 October 2009. The 2009–10 National Pet Owners Survey, conducted by the American Pet Products Association ('APPA'), found that 62 per cent of United States households own a pet (the overwhelming majority owning a cat and/or dog): APPA, *Industry Statistics and Trends* <http://americanpetproducts.org/press_industrytrends.asp> at 6 October 2009. The Pet Food Association of Canada ('PFAC') states that '[m]ore than one quarter of Canadian households own at least one dog and one third of Canadian households own at least one cat. One in ten households has at least one cat and one dog – that's over 12.5 million pets nationwide': PFAC, *Pet Food Industry in Canada* <<http://www.pfac.com/about/industry/index.html>> at 6 October 2009. The Pet Food Manufacturers' Association ('PFMA') states that there are 27 million pets in the United Kingdom, with 43 per cent of the population sharing their homes with a pet: PFMA, *How Many People Live With a Pet?* <http://www.pfma.org.uk/index.php?option=com_easyfaq&task=view&id=18&itemid=999999999> at 6 October 2009. The New Zealand Pet Food Manufacturers' Association ('NZPFM') states that 'New Zealand's pet ownership statistics are one of the highest in the world', with around 53 per cent of households owning at least one cat, and around 35 per cent of households owning a dog: see NZPFM, *The Pet Food Market* <<http://www.petfoodnz.co.nz/market.htm>> at 6 October 2009.

legally constituted, the pervasiveness of pet ownership makes the human-companion animal relationship a natural starting point.

Legal aspects of the human-companion animal relationship have been explored in some depth in international jurisdictions, especially the United States.² Animal law is still an emerging discipline in Australasia,³ so that there is a more limited literature on companion animals and the law in an Australasian context. Research in Australasia has focused on three key areas: sentencing in animal cruelty cases;⁴ damages claims and the 'value' of companion animals where they have been injured or killed;⁵ and guardianship as an alternative to the current legal construction of domestic animals as objects of absolute ownership.⁶ While acknowledging the importance of these concerns, this article will explore the relinquishment of companion animals to animal shelters, an issue that has received comparatively little attention in the legal academy, both within Australia and internationally.

This article will draw out the duality that lies at the heart of our relationship with companion animals, and analyse the role played by the law in sanctioning this duality. On the one hand, opinion surveys and an emerging body of sociological literature suggest that our relationship with companion animals is vested with such meaning and significance that they have come to be regarded by many as 'members of the family'. Consistent with this significance, animal welfare law is more stringent in protecting the interests of companion animals than it is for any other category of animal. On the other hand, significant numbers of companion animals are relinquished to animal shelters every year, where the fate of many, especially kittens and cats, is death. Although animal welfare law criminalises the abandonment of companion animals, it provides no sanction for the relinquishment of companion animals to animal shelters.

It will be argued that this duality in our relationship with companion animals is underpinned by the legal characterisation of companion animals as personal property. Underlying most of the reasons given for relinquishment of companion animals is an understanding that, when circumstances demand, a companion animal is a dispensable item – an object of property that can be disposed of when it is no longer convenient to continue owning it.

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- 2 See, eg, the leading United States textbook Sonia S Waisman, Pamela D Frasch and Bruce A Wagman, *Animal Law: Cases and Materials* (3rd ed, 2006), and journals including *Animal Law* from Northwestern School of Law of Lewis and Clark College, *Journal of Animal Law & Ethics* from the University of Pennsylvania Law School and *Journal of Animal Law* from Michigan State University, College of Law.
 - 3 See Steven White, 'The Emergence of Animal Law in Australian Universities' (2008) 91 *Reform* 51; Peter Sankoff, 'Animal Law: A Subject in Search of Scholarship' in Peter Sankoff and Steven White (eds), *Animal Law in Australasia: A New Dialogue* (2009) 389.
 - 4 See, eg, Katrina Sharman, 'Sentencing Under Our Anti-Cruelty Statutes: Why Our Leniency Will Come Back to Bite Us' (2002) 13 *Current Issues in Criminal Justice* 333; Annabel Markham, 'Animal Cruelty Sentencing in Australia and New Zealand' in Sankoff and White, above n 3, 289.
 - 5 See, eg, Lesley-Anne Petrie, 'Companion Animals: Valuation and Treatment in Human Society' in Sankoff and White, above n 3, 57.
 - 6 See, eg, Ruth Pollard, 'Animals, Guardianship and the Local Courts: Towards a Practical Model for Advocacy' (2008) 91 *Reform* 48.

Part II of this article provides background on the extent to which companion animals form a part of the lives of most Australians. As suggested above, opinion surveys and sociological research indicate that a very high proportion of households regard their companion animals as members of their family. This is expressed in a range of ways, including through allowing companion animals access to intimate household space such as living rooms, kitchens and bedrooms, and through their involvement in a range of family rituals, such as birthday and Christmas celebrations.

The next part places these sociological insights in a regulatory context. It is argued that companion animals are the subject of a level of welfare protection consistent with their status as 'members of the family'. Companion animals enjoy the fullest regulatory protection of all animals, even if there are some important limitations in the regulatory regime which governs their interests.

Part IV shifts the focus from the idea of companion animals as family members to the idea of companion animals as disposable property. Animal welfare shelters in Australia take in enormous numbers of unwanted animals every year, including those surrendered or relinquished by their owners. The reasons commonly provided for relinquishment raise important ethical issues, addressed in Part V, including the unnecessary killing of a large number of otherwise healthy animals, and the fact that this killing goes on virtually unnoticed by society, with animal shelter staff bearing the physical and psychological burdens of this task.

The final part of this article considers possible legal responses to the ethical issues raised by the relinquishment of companion animals, including some measures which have been adopted in some jurisdictions in Australia. It is argued that while some of these legal responses are undoubtedly important, all suffer from a key weakness – they fail to destabilise the legal construction of companion animals as personal property. The article concludes with a consideration of plausible ways in which the property status of companion animals might be legally modified, even if not removed.

It is important to acknowledge at the outset that the significance of the treatment of companion animals, in numerical terms alone, is vastly outweighed by concerns about the welfare of farmed animals. As Wolfson and Sullivan point out, farmed animals in the United States account for 98 per cent of all animals killed annually.⁷ That leaves just two per cent for all other categories of animal, including companion animals. It is likely that the percentage figures in Australia would be substantially the same.⁸ Importantly, given the imbalance in numbers

7 See David Wolfson and Mariann Sullivan, 'Foxes in the Hen House' in Cass Sunstein and Martha Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (2004) 205, 206. Wolfson and Sullivan state that around 9.5 billion animals are killed annually in the United States for food production.

8 Around 500 million animals are raised annually in Australia for food and food production. See Katrina Sharman, 'Farm Animals and Welfare Law: An Unhappy Union' in Sankoff and White, above n 3, 35. This compares with an estimated total pet population of around 37 million in 2007: see ACAC, above n 1. These figures suggest a higher percentage of companion animals in Australia than the United States; however, the United States data refers to animals killed, rather than raised, annually.

between farmed and companion animals, 'Australia's State and [T]erritory animal welfare laws currently do little to address the widespread suffering endured by millions of animals daily as a result of most common farming practices.'⁹ Despite this, there are three reasons for my focus on companion animals. First, legal analysis of the plight of farmed animals in Australia has been explored in some depth already.¹⁰ That analysis suggests a dysfunctional regulatory regime, assessed against the broad goal of protecting farmed animals from cruelty. Secondly, while the regulation of the treatment of companion animals may be enviable by comparison with the regulation of the treatment of farmed animals, we should not be lulled into taking for granted the protection of the interests of companion animals. Finally, as the next part shows, companion animals play a deeply significant role in the lives of many Australians, in ways that farmed animals do not.

II CONTEMPORARY NATURE OF HUMAN-COMPANION ANIMAL RELATIONSHIPS: COMPANION ANIMALS AS 'MEMBERS OF THE FAMILY'

A burgeoning literature in human-animal relations (or 'anthrozoology') has developed over the past two decades, addressing a diverse range of issues and drawing on a range of disciplines, including history, philosophy, political science, law, zoology, anthropology, medicine, veterinary science and environmental studies.¹¹ However, it is only comparatively recently that the familial significance of companion animals has been the subject of sociological interest. As Franklin suggests:

The social significance of pets has been acknowledged by journalists, but only so far through a continuous flow of stories concerning the eccentric and bizarre side of pet anthropomorphism. Pets have never made it into texts on the sociology of the family, despite the trickle of studies that emphasizes the extent of their involvement, their functions and growing importance ... and despite studies that found pets to be defined as family members by their owners.¹²

9 Sharman, 'Farm Animals and Welfare Law', above n 8, 56. See also Malcolm Caulfield, *Handbook of Australian Animal Cruelty Law* (2008).

10 See, eg, Sharman, 'Farm Animals and Welfare Law', above n 8; Caulfield, above n 9; Steven White, 'Regulation of Animal Welfare and the Emergent Commonwealth: Entrenching the Traditional Approach of the States and Territories or Laying the Ground for Reform?' (2007) 35 *Federal Law Review* 347, 354–63.

11 For a summary of the development of this interdisciplinary field see: Adrian Franklin, *Animals and Modern Cultures: A Sociology of Human-Animal Relations in Modernity* (1999) 1–2. Two prominent interdisciplinary journals addressing human-animal relationships are *Anthrozoös*, first published in 1987, and the *Journal of Human-Animal Studies*, first published in 1993.

12 Franklin, *Animals and Modern Cultures*, above n 11, 98. In one of these studies, Albert and Bulcroft, writing in an United States context, point out that '[g]iven the high rates of pet ownership in this country, the lack of sociological data on pet–human bonds indicates that family social scientists have little insight into an aspect of family life that is shared by millions of Americans': Alexa Albert and Kris Bulcroft, 'Pets, Families and the Life Course' (1988) 50 *Journal of Marriage and Family* 543, 544.

The ‘trickle of studies’ since the early 1980s, referred to by Franklin, suggests that a high proportion of households regard their companion animals as family members, with the percentage of respondents describing pets as family members ranging from 70 per cent to 99 per cent.¹³ Bonas, McNicholas and Collis suggest that these studies need to be treated with some caution, since ‘[t]hese very high levels of inclusion of pets as family members may have been inflated by the way in which the questions were framed to participants’.¹⁴ Despite this, they accept that ‘large numbers of pet owners are willing to include pets in a category of close human relationships’.¹⁵

More recent Australian surveys are consistent with the general tenor of these studies. For example, a major 2006 report by BIS Shrapnel prepared for the Australian Companion Animal Council Inc asserted that ‘[p]ets today are being treated more like one of the family than in any previous generation’.¹⁶ The report summarises an Australian study by Newspoll, which ‘explored the concept of being a “parent” as opposed to a pet “owner”’.¹⁷ The results included that ‘85% of pet owners’ agreed their pet is part of the family, like a child’, ‘21% of pet owners often/sometimes celebrate their pet’s birthday’ and ‘44% of pet owners give their pet[s] presents for Christmas or other special occasions’.¹⁸ Similarly, 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’.¹⁹

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 has recently explored these questions in an Australian context, as part of a wide-ranging research project, a ‘national study of human-animal relations’.²⁰ This study, the first of its kind in Australia, was designed to find out

13 Sheila Bonas, June McNicholas and Glynn Collis, ‘Pets in the Network of Family Relationships’ in Anthony Podberscek, Elizabeth Paul and James Serpell (eds), *Companion Animals and Us: Exploring the Relationships Between People and Pets* (2005) 209, 212. These studies, and the figures derived from them, are from the United States and the United Kingdom.

14 Ibid.

15 Ibid.

16 BIS Shrapnel Global Marketing and Intelligence Forecasting, *Contribution of the Pet Care Industry to the Australian Economy, 2006* (6th ed, 2006) 33 <http://www.acac.org.au/pdf/pet_industry_report.pdf> at 6 October 2009.

17 Ibid.

18 Ibid. It is claimed, though without sources, that ‘[s]imilar studies have been conducted in other countries with similar results, indicating that this is a worldwide trend’.

19 Bruce Headey, *National Pets and People Survey 2006 – Socially Responsible Pet Ownership in Australia: A Decade of Progress* (2006) 20 <http://www.petnet.com.au/sites/default/files/National_People_and_Pets_2006.pdf> at 6 October 2009.

20 For an article-length account of the research see Adrian 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 Adrian Franklin, *Animal Nation: The True Story of Animals and Australia* (2006) 199–238.

what ordinary Australians think, feel and do with the complex categories of animals in their country ... how closely their lives are surrounded by animals and how much they mean to them and how this meaning has changed in relation to changes in society and culture generally.²¹

The study is significant because the rigour of the research methods adopted ensured a comprehensive, representative picture of human-animal relations in Australia for the first time.²² The study gathered information on the keeping of companion animals and attitudes towards them, engagement with and attitudes to wildlife, involvement in animal-related activities (eg, feeding wildlife, hunting, pet shows and visits to zoos), attitudes to the way animals are treated in Australia (eg, factory farming, the killing of native animals as food, views about hunting and fishing, animal rights and the use of animals in research), and attitudes to animal-related organisations (members, supporters or opponents).²³

A key argument made by Franklin in *Animal Nation* is that the way in which Australians understand and relate to animals is inextricably bound up with the process of colonisation and issues of national identity. Initially, native Australian animals were viewed as undesirable, with colonial professional shooters, as Franklin puts it, working 'their way through country shooting out the wildlife much as the forests were clear-felled'.²⁴ Non-native animals were imported, both wild (eg, birds, foxes, rabbits and trout) and domesticated (eg, pigs, goats, horses, rabbits and cattle).²⁵ Colonisation privileged the introduced domestic and wild animals to counteract the 'strangeness' of native fauna, since '[s]ettler society was unsettled by nature generally, but especially by the fauna'.²⁶ British colonialists

executed one of the most extraordinary and audacious acts of environmental intervention. They sought, at first informally and then quite systematically and institutionally, to introduce British wildlife into Australia, to transform Australia into the likeness of Britain. At the same time, farmers, hunters and bounty-hunters were systematically clearing away the native animals ...²⁷

However, the formation of Australia as an independent, federal nation led to a reversal of this position:

Henceforth nativeness was to be associated positively with the emergent nation and privileged over the introduced species, who could now be associated with their rejected colonial status. More than that, the acclimatised 'foreigner' animals could be cast as endangering true Australian wildlife. In the same stroke, native

21 Franklin, *Animal Nation*, above n 20, 25.

22 Franklin states that '[t]he survey [of 2000 respondents] was conducted by phone with Australians over the age of 16, and we randomized the choice of respondent in each household by asking to speak with the person whose birthday was next. This guaranteed that all ages and genders are represented. We also created statistically representative interview targets for all capital cities and state rural areas': Franklin, 'Human-Nonhuman Animal Relationships', above n 20, 8.

23 Franklin, *Animal Nation*, above n 20, 200.

24 Ibid 15.

25 While some of these animals were deliberately released into the wild (eg, for hunting), others escaped, reproducing in large numbers (eg, pigs). For a detailed account of the 'Britainisation' of the Australian landscape and animal world see: ibid 79–109.

26 Ibid 14.

27 Ibid 79.

animals seemed to demand policies of protection while the introduced animals seemed to deserve eradication.²⁸

The British colonialists also brought with them household species. Unlike introduced wild animals, however, affection for these animals has survived the emergence of Australia as an independent nation. Franklin's study provides compelling evidence of the significance of companion animals in our contemporary lives. The results of the study identify the most commonly kept companion animals, the types of people who keep companion animals, and the reasons for keeping companion animals.

As to the types of companion animal, dogs, cats, birds and fish form the key group, with 47 per cent of surveyed households having at least one dog, 30 per cent having a cat, 17 per cent having a bird, and 13 per cent having fish. A wide range of other types of animal were kept as companion animals, although their overall incidence was low (including native species of animals).²⁹

As to who keeps companion animals, Franklin's study finds that the keeping of animals is similar across all income groups, except for those on very low incomes, who are less likely to keep animals.³⁰ Households where there are married or de facto partners are more likely to keep animals, and especially so if they have children under the age of 18.³¹ The study identifies an inverse association between education and keeping of companion animals: generally, the higher the level of educational attainment, the lower the proportion of households keeping animals. While 79 per cent of persons with limited educational attainment kept animals, only 38 per cent of people with PhDs did so.³² Those with higher educational attainment tend to be more concerned with wildlife and environmental issues, and relatively less concerned with animals as companions, with a very high proportion of those with doctorates identifying as supporters of the Wilderness Society.³³

The reason for keeping companion animals is overwhelmingly for company (rather than amusement) for both adults and children. Dogs are also kept, usually in addition, for security reasons.³⁴ The study found that the need for companion animals can be motivated by loneliness, in the context of an increasing number of single person households; as substitutes for children, in the context of couples

28 Ibid 15.

29 Franklin, 'Human-Nonhuman Animal Relationships', above n 20, 9.

30 Ibid.

31 Ibid 10.

32 Ibid.

33 Ibid. Franklin argues that '[c]learly there is something important about formal education that disturbs attitudes and practices with animals. It is highly likely that those processed through the tertiary and higher educational mills are most exposed to enlightenment biopolitics and formal scientific positions on the essential (and proper) difference between humanity and animality. Such views are mirrored in many contemporary debates: in social and cultural studies of the environment and political movements, in the sciences of ecology and land management and in Australian eco-nationalistic history. One suspects that the less educated are less influenced by such taxonomies and ontologies and tend to take animals as they find them': Adrian Franklin, "'Be[a]ware of the Dog": A Post-Humanist Approach to Housing' (2006) 23 *Housing, Theory and Society* 137, 144.

34 Franklin, *Animal Nation*, above n 20, 204.

putting off having children or not having children at all; and as surrogate siblings for children, in the context of an increasing number of couples having only one child.³⁵

These motivations link to the last key area explored by the study in relation to companion animals: their place in the family structure. As pointed out already, there is scant sociological literature addressing the significance of animals as family members. 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 recognizing close bonds with them as equivalent to those within human families, then this is not a case of anthropomorphism; it is a case of hybridization, hybridization of the family.³⁶

In response to the question 'Do you think of any animals you keep as members of your family?', on average 88 per cent of respondents said yes. The percentages varied according to location, but were all overwhelmingly high (eg, the percentage figure for ACT respondents was 72 per cent, for Sydney respondents was 84 per cent, for Brisbane respondents was 90 per cent and for Melbourne respondents was 92 per cent).³⁷ These figures are consistent with the pet surveys considered earlier, and arguably reflect a growing lack of inhibition in expressing an understanding of companion animals as family members. In follow-up interviews with 10 veterinarians as part of Franklin's study, a Sydney veterinarian reflected on the notion of companion animals being substitute children:

Well funny enough people are actually willing to admit that it's a substitute child. They're not embarrassed to actually say that. A lot of them actually say it is a substitute child. I notice that – I don't recall that so much in the past, but in recent years I have noticed that people actually refer to it as their child in many ways...³⁸

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'.³⁹

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 per cent of respondents), kitchens (66 per cent of respondents), and even private spaces such as bedrooms (52 per cent of respondents allowing animals into their bedroom, and 35 per cent into their children's bedrooms).

35 Ibid 205–7.

36 Franklin, 'Human-Nonhuman Animal Relationships', above n 20, 14.

37 Franklin, *Animal Nation*, above n 20, 208.

38 Franklin, 'Human-Nonhuman Animal Relationships', above n 20, 15.

39 Franklin, *Animal Nation*, above n 20, 210.

Around half of the respondents allowed their companion animal to lie on furniture.⁴⁰

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.⁴¹

In summary, opinion surveys and recent sociological research show that a very high proportion of Australian households have a companion animal, and an overwhelming number of those who do keep a companion animal consider that animal to be a part of their family. Companion animals are increasingly intimate members of the family, symbolised by their access to private household space and their inclusion in social rituals.

III REGULATION OF THE WELFARE OF COMPANION ANIMALS IN AUSTRALIA

Given the expressed status of companion animals as ‘members of the family’, how is the welfare of companion animals regulated? It would be expected, commensurate with their family status, that companion animals would enjoy a high degree of welfare protection expressed through law. By and large this is true, but the position is not as clear-cut as might be expected.

Due to constitutional limitations, the regulation of the welfare of animals in Australia, including companion animals, is primarily addressed by the States (and Territories).⁴² Each of the States and Territories has enacted legislation regulating the welfare of companion animals.⁴³ Although the details of each jurisdiction’s

40 Ibid 210–11.

41 Ibid 211–12 (emphasis in original).

42 For a brief discussion of these constitutional limitations, and an analysis of the limited regulatory role in animal welfare played by the Commonwealth, see: White, ‘Regulation of Animal Welfare and the Emergent Commonwealth’, above n 10, 363–9. 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).

43 *Prevention of Cruelty to Animals Act 1979* (NSW) (‘POCTAA (NSW)’); *Animal Care and Protection Act 2001* (Qld) (‘ACPA (Qld)’); *Animal Welfare Act 1985* (SA) (‘AWA (SA)’); *Animal Welfare Act 1993* (Tas) (‘AWA (Tas)’); *Prevention of Cruelty to Animals Act 1986* (Vic) (‘POCTAA (Vic)’); *Animal Welfare Act 2002* (WA) (‘AWA (WA)’); *Animal Welfare Act 1992* (ACT) (‘AWA (ACT)’); *Animal Welfare Act* (NT) (‘AWA (NT)’).

regime differ,⁴⁴ at a broader level a standard regulatory approach to welfare regulation can be identified. Each jurisdiction has a prohibition against cruelty, which may be defined to include acts that are not 'unnecessary' or 'unreasonable'. For example, in Victoria, the offence of cruelty is defined by listed practices, including acts or omissions leading to 'unreasonable pain or suffering'.⁴⁵ In Queensland, cruelty is defined as including acts causing 'pain that, in the circumstances, is unjustifiable, unnecessary or unreasonable'.⁴⁶ In New South Wales, 'a reference to an act of cruelty committed upon an animal includes a reference to any act or omission as a consequence of which the animal is unreasonably, unnecessarily or unjustifiably' harmed.⁴⁷

As well as a prohibition against cruelty, essentially a negative duty, most jurisdictions have enacted provisions which impose positive obligations on animal owners or those in charge of an animal. In Queensland and Tasmania, these obligations are explicitly identified as a 'duty of care'.⁴⁸ The provision in Queensland is the most comprehensive, since it explicitly states what is expected of a person in charge of an animal if they are to discharge their duty of care obligations.⁴⁹

While other jurisdictions do not explicitly incorporate the language of 'duty of care' into their statutes, they have provisions consistent with such a duty. For example, in New South Wales, a 'person in charge of an animal shall not fail to provide the animal with food, drink or shelter, or any of them, which, in each case, is proper and sufficient and which it is reasonably practicable in the circumstances for the person to provide'.⁵⁰ As well, a person in charge of an animal is required to provide an animal with veterinary treatment where required.⁵¹

The cruelty prohibition and 'duty of care' obligations included in animal welfare legislation together provide, at face value, a high degree of protection for the welfare of companion animals. This impression is reinforced by reflecting on the quite different position of farmed animals. The treatment of farmed animals is subject to a more complex regulatory system, with reliance placed on 'codes of practice' rather than directly applied cruelty or duty of care legislative provisions. Model Codes of Practice are developed by the Commonwealth Primary Industries Ministerial Council, with State and Territory jurisdictions either directly adopting these Codes, or developing and adopting their own codes based

44 For a detailed discussion see Caulfield, above n 9, ch 2.

45 *POCTAA* (Vic) s 9(1)(c).

46 *ACPA* (Qld) s 18(1).

47 *POCTAA* (NSW) ss 4(2), 5(1).

48 *ACPA* (Qld) s 17(1); *AWA* (Tas) s 6.

49 *ACPA* (Qld) s 17(3) states that:

a person breaches the duty only if the person does not take reasonable steps to (a) provide the animal's needs for the following in a way that is appropriate: (i) food and water; (ii) accommodation or living conditions for the animal; (iii) to display normal patterns of behaviour; (iv) the treatment of disease or injury; or (b) ensure any handling of the animal by the person, or caused by the person, is appropriate.

50 *POCTAA* (NSW) s 8.

51 *POCTAA* (NSW) s 5(3)(c).

on the Model Codes.⁵² Codes of practice set out standards for a range of farmed animals (eg, sheep, cattle, pigs) in a range of settings (eg, on farm, for transportation). The codes of practice set out minimum standards for the welfare of farmed animals. Importantly, these standards may not meet the legislative cruelty or duty of care requirements.⁵³ The codes of practice are significant because most jurisdictions provide a defence to, or exemption from, prosecution for a cruelty or duty of care offence where there is compliance with a code. For example, in Victoria, section 6(1)(c) of the *Prevention of Cruelty to Animals Act 1986* (Vic) ('*POCTAA* (Vic)') provides that the Act does not apply to 'any act or practice with respect to the farming, transport, sale or killing of any farm animal which is carried out in accordance with a Code of Practice'. In Queensland, compliance with a code of practice provides an 'offence exemption'.⁵⁴

The application of the legislative exemptions or defences where there is compliance with codes of practice permits a range of acts to be committed against farmed animals which would, if committed against companion animals, be criminal acts. For example, while it would certainly breach the legislative cruelty prohibition to confine a pet dog or cat in a cage little bigger than the animal itself for most of its life,⁵⁵ preventing it from turning around, this is permitted in the case of female pigs (confined in so-called sow stalls and farrowing crates).⁵⁶ This suggests that the legislature, and by extension society more broadly, recognises something special about companion animals, consistent with their close 'familial' relations with humans, while farmed animals are regarded much more pragmatically. This is despite no rational ethical basis for differentiating our treatment of otherwise equally sentient creatures.⁵⁷

Despite the apparent robustness of the legal protection of companion animals, there are a number of criticisms that could be made of the operation of the cruelty prohibition and duty of care standards.⁵⁸ First, the standards are broadly expressed, 'principle-based' standards, which do not specify clear performance outcomes.⁵⁹ This does bring some advantages, including potential application to a

52 For a detailed account of the code development and adoption process: see White, 'Regulation of Animal Welfare and the Emergent Commonwealth', above n 10, 354–7; Arnja Dale, 'Animal Welfare Codes and Regulations – The Devil in Disguise?' in Sankoff and White, above n 3, 174.

53 White, 'Regulation of Animal Welfare and the Emergent Commonwealth', above n 10, 356.

54 *ACPA* (Qld) s 40. For an account of other jurisdictions: see *ibid*.

55 Confinement of companion dogs in this way would also breach specific provisions in some jurisdictions requiring adequate exercise: see, eg, *POCTAA* (NSW) s 9 which applies to all animals in s 9(1), but then includes a specific exemption for stock animals in s 9(2A); *ACPA* (Qld) s 33.

56 See Sharman, 'Farm Animals and Welfare Law', above n 8, 40–2; Primary Industries Standing Committee, *Model Code of Practice for the Welfare of Animals – Pigs* (2008) 5–6, app 3.

57 Of course, a differential approach is also taken to other contexts in which animals are used. For example, a similar system of code exemption to cruelty and duty of care provisions exists for the treatment of animals in research, and the treatment of so-called 'feral' or 'pest' animals. For a wide-ranging, balanced account of various ethical approaches to our treatment of animals in these different contexts: see Robert Garner, *Animal Ethics* (2005).

58 The account of these criticisms is a summary of a fuller analysis provided by White: White, 'Regulation of Animal Welfare and the Emergent Commonwealth', above n 10, 351–4, 357–63.

59 *Ibid* 357. This is so even for duty of care provisions, such as a requirement to provide adequate food and water, given the use of qualifiers such as 'reasonable' and 'appropriate'.

wide range of harms and the fact that such standards do not date quickly. However, the lack of clarity in the scope of the standards creates potential uncertainty for duty holders, as well as for enforcement officials. In a context of limited prosecutorial resources,⁶⁰ and lack of higher court consideration of the standards,⁶¹ this uncertainty may have an inhibiting effect on the extent of enforcement activities.

Secondly, breach of the standards is a criminal offence in all jurisdictions, consistent with the classical definition of a command and control regime as involving 'the exercise of influence by imposing standards backed by criminal sanctions'.⁶² This has some downsides as Bloom suggests:

because criminality is the peak of the pyramid of possible sanctions, it immediately escalates breach of animal welfare standards to that peak ... [B]y placing animal welfare in a criminal framework, the remedies for a breach ... such as a fine or imprisonment are intrinsically negative and backwards looking. They are concerned with the harm caused, rather than future harms to be prevented (or even promotion of future welfare) and their orientation is punishment, rather than reform and help with improvement in conduct. It may well be that, in certain cases, criminal remedies are appropriate but without a parallel administrative framework, the criminal framework must remain a blunt instrument for the improvement of animal welfare.⁶³

Sankoff has raised similar concerns about the application of a criminal standard in an animal welfare context, especially in circumstances of low prosecution rates and the imposition of relatively low fines and custodial sentences for even the most serious of breaches. He gives qualified support to

60 Ibid 353–4. Under-enforcement is arguably exacerbated by the fragmentation in prosecutorial responsibility, with the RSPCA, government departments and the police bestowed with enforcement authority in most jurisdictions, but no clearly legislatively defined role for each. In some jurisdictions, some agencies have taken it on themselves to enter into 'administrative' agreements to define their respective roles: at 351–2.

61 Animal cruelty prosecutions are conducted in local courts, with higher court consideration almost exclusively limited to sentencing appeals (and even these are very small in number): Markham, above n 4, 299.

62 Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) 35.

63 Geoff Bloom, 'Regulating Animal Welfare to Promote and Protect Improved Animal Welfare Outcomes under the Australian Animal Welfare Strategy' (Paper presented at the Australian Animal Welfare Strategy International Animal Welfare Conference, Gold Coast, 1 September 2008) 32 <http://www.daff.gov.au/animal-plant-health/welfare/reports/regulating_animal_welfare> at 6 October 2009. It should be acknowledged that while Bloom makes this argument as part of a broad-based evaluation of animal welfare regulation generally, he does seem to be primarily concerned with code breaches, and therefore farmed animals, rather than companion animals.

shifting, at least in part, to a regulatory or administrative regime in which prosecutions would be summary proceedings ... Under such a scheme, most crimes against animals could be treated like highway traffic violations for speeding, with a fine and, in the case of repeat offending, imprisonment.⁶⁴

The arguments made by Bloom and Sankoff are themselves liable to challenge. For one thing, some jurisdictions already have in place a 'parallel administrative framework', with prosecution agencies able to issue enforceable directions falling short of criminal sanctions.⁶⁵ As well, a shift to a regulatory regime more consistent with Ayres and Braithwaite's model of responsive regulation, with its claims to transcend deterrence versus compliance models of enforcement through tiered enforcement sanctions,⁶⁶ may not accord proper recognition to the role of criminal law. Such an approach views criminal sanctions as just one of a number of mechanisms available for preventing harm, which can be substituted for other sanctions when they are not efficient or cost effective. An alternative view, with particular resonance in a setting in which the interests of sentient creatures are at stake, is provided by Ashworth:

My conception of the criminal law gives primary place to its censuring function, a public function with possibly severe consequences for citizens, which should be exercised in as fair and non-discriminatory a manner as possible ... There is no justification for differential enforcement systems that detract grossly from the principle of equal treatment and the sense of fairness about proportionate responses to wrongdoing.⁶⁷

A third criticism of the regulatory regime governing the treatment of companion animals is the lack of adequate sanctions for breach of cruelty and duty of care standards, reflecting apparent judicial indifference to community attitudes to animal cruelty.⁶⁸ Despite increases in maximum penalties across almost all jurisdictions in recent years, these reforms are not being reflected in sentence outcomes.⁶⁹

Importantly, the view that there are serious shortcomings in the sentencing of animal welfare offences is not dependent on reactionary claims about the need to be 'tough on crime'. After a comprehensive analysis of sentencing in Australian and New Zealand animal welfare cases, Markham concluded:

Animal cruelty offending is emotive and often particularly repugnant, and expressions of outrage and unreasoned demands for 'tougher' penalties are

64 Peter Sankoff, 'Five years of the "New" Animal Welfare Regime: Lessons Learned from New Zealand's Decision to Modernize its Animal Welfare Legislation' (2005) 11 *Animal Law* 7, 36.

65 See White, 'Regulation of Animal Welfare and the Emergent Commonwealth', above n 10, 353.

66 Ian Ayres and John Braithwaite, *Responsive Regulation* (1992).

67 Andrew Ashworth, 'Is the Criminal law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225 extracted in Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (2007) 200–1.

68 In his study of human-animal relations, Franklin found that 84 per cent of respondents agreed or strongly agreed with statement that '[p]eople who mistreat their animals should be punished in the same way as people who mistreat human beings': Franklin, 'Human-Nonhuman Animal Relationships', above n 20, 23.

69 As Markham has argued, '[w]hile a comprehensive analysis of sentencing outcomes is not possible, a review of the available materials does tend to confirm perceptions that the penalty provisions are not currently being realised, and that sentence levels are unduly low': Markham, above n 4, 293.

unlikely to be productive. Equally however, it would be wrong to dismiss legitimate criticisms of sentencing outcomes as the reactions of a punitive and ill-informed interest group ... [A]t a basic level the issue is one of giving effect to legislative intent. In general, that intent has not been realised to date.⁷⁰

Finally, despite the comparatively high standard of welfare protection for companion animals, that protection remains a qualification of the otherwise absolute property interest that an owner of a companion animal enjoys in the animal. In law, an animal is a 'thing', not a 'person'. The consequences of this legal classification will be explored in Part VI. For now, it needs to be borne in mind that

the purchase of an animal ... transfers ownership of the animal from one person to another. The companion animal can then be controlled *and disposed of* as the owner sees fit, subject only to certain limitations regarding their treatment imposed by animal welfare statutes.⁷¹

In summary, there is a widely-held societal expectation that companion animals should be protected by a vigorously enforced cruelty standard. While the animal welfare regulatory system may be imperfect in giving effect to the expectation that companion animals should be protected from harm in the way that other 'family' members should be, and transgressions similarly punished, the protection accorded to companion animals in law is significantly greater than for any other category of animal, especially farmed animals. At the very least, cruelty to companion animals is not to be taken for granted, even if the law 'on the books' is not always realised in practice.

In the next part, I focus on an aspect of our treatment of companion animals that is arguably taken for granted, unlike cruelty. While Franklin's research may suggest that companion animals are regarded by the overwhelming majority of Australians as members of the family, and the regulatory regime for protecting the interests of animals is broadly consistent with this status, the work of animal welfare shelters in dealing with unwanted companion animals draws the universality of this sort of claim into question.

IV THE WORK OF ANIMAL SHELTERS: COMPANION ANIMALS AS LEGALLY DISCARDED OBJECTS

A large number of animal shelters operate throughout Australia, ranging from independently run stand-alone shelters, often small in size, to individual council shelters (or 'pounds'), to the network of shelters operated around the country by

70 Ibid 303.

71 Petrie, above n 5, 58 (emphasis added).

the Royal Society for the Prevention of Cruelty to Animals ('RSPCA').⁷² RSPCA shelters have the highest public profile of all shelters. Collectively, RSPCA shelters deal with more companion animals than any other shelter organisation. The RSPCA is unique in providing detailed annual statistics on the animals admitted to its shelters and the fate of those animals. For these reasons, this article will explore the role of animal shelters largely through the work of the RSPCA. In doing so, however, it needs to be borne in mind that the number of animals finding their way into shelters around Australia is likely to be significantly greater than represented in the statistics of the RSPCA, given the diversity and range of non-RSPCA shelters.⁷³

Over the past five financial years, there has been a steady, although uneven, increase in the number of companion animals received by the RSPCA. As Table 1 shows, in the 2007–08 financial year, around 162 000 companion animals were received in RSPCA shelters around the country, with the overwhelming majority of these animals being cats and dogs (approximately 140 000 in total, comprised of 69 000 cats and 70 500 dogs). In the same financial year, 42 371 cats and 23 372 dogs were euthanased in RSPCA shelters.⁷⁴ In order to place these numbers in context, the Australian Companion Animal Council estimates that in 2007 in Australia there was a population of 3.7 million dogs and 2.2 million cats.⁷⁵ While these figures do not necessarily reflect accurate measures of euthanased animals as a proportion of the total companion animal population, they do provide a

72 The RSPCA is structured as a federation, with a national policy body and eight independent State/Territory bodies. RSPCA Australia 'is responsible for facilitating national campaigns and events and representing the interests of animal welfare with Government and industry across all areas', while each of the State/Territory bodies (eg, RSPCA New South Wales, RSPCA Queensland, and RSPCA Victoria) 'do much of the hands on work traditionally associated with the RSPCA such as the operation of shelters and the Inspectorate plus community education and fundraising': RSPCA Australia, *What We Do* (2009) <<http://www.rspca.org.au/what-we-do.html>> at 6 October 2009. For a nation-wide sample of animal shelters: see Pet Rescue, *Shelter Directory* (2009) <http://www.petrescue.com.au/shelter_directory/> at 6 October 2009.

73 For example, in Victoria the Melbourne-based Lost Dogs' Home 'cares for over 20,000 dogs and cats every year and is Australia's largest animal shelter': The Lost Dogs' Home, *Overview of the Lost Dogs' Home* (2009) <<http://www.dogshome.com/content/overview-lost-dogs-home>> at 6 October 2009. In Queensland, the Animal Welfare League ('AWL') 'takes care of approximately 12 000 strayed and abandoned animals annually from the Gold Coast and surrounding areas': AWL Queensland, *About Us* (2009) <<http://www.awlqld.com.au/About-us.html>> at 6 October 2009.

74 RSPCA Australia, *RSPCA Australia National Statistics 2007–2008* (2009) <<http://www.rspca.org.au/assets/files/Resources/RSPCAAnnualStats2007-2008.pdf>> at 6 October 2009.

75 ACAC, above n 1. These are estimates only, based on a survey conducted by BIS Shrapnel Global Marketing and Intelligence Forecasting, above n 16. Caution needs to be exercised in assessing both the number of animals admitted to shelters, and the number euthanased, as a proportion of the total companion animal population. This is because 'sound population estimates are unavailable' and the fact that 'states vary with respect to the number of shelters and pounds, other than those included in ... RSPCA figures ... There is also enormous variability in admission procedures and policies': Linda Marston et al, *Review of Strategies for Effectively Managing Unwanted Cats and Dogs in Queensland*, Animal Welfare Science Centre, Monash University (2008) 26–7 <http://www.dpi.qld.gov.au/documents/Biosecurity_AnimalWelfareAndEthics/L-Marsden-MUCD-Report.pdf> at 6 October 2009.

rough, conservative indication of the scope.⁷⁶ At the very least, the raw numbers show that a significant number of companion animals are killed every year in shelters around Australia.

Three important questions suggest themselves based on this national picture. First, why are companion animals, in particular cats and dogs, euthanased? Secondly, why do these animals finish up in shelters? And thirdly, of most relevance for present purposes, when animals are relinquished, what reasons do owners provide for doing so?

As to the first question, Table 2 shows the reasons given by the RSPCA for killing animals in 2007–08. For dogs, the major reason was described as ‘behavioural problems’, with ‘medical reasons’ the next most significant category. For cats, ‘medical reasons’ was overwhelmingly the major explanation, followed by the cat being ‘feral’, ‘no room for adoption’ and ‘behavioural problems’. The reasons identified by the RSPCA suggest that dogs and cats needed to be considered separately when assessing why they are killed by shelter staff.

In a 2004 study of dogs admitted to three metropolitan Victorian shelters, it was found that ‘[o]ne third of all euthanasias (34.5%) conducted in this study were performed for canine health reasons, 24.1% for aggression, and 9.6% for other behaviour issues’.⁷⁷ Extrapolating from this study, Marston et al tentatively conclude that ‘[v]ery few dogs are killed in Australia because there are more dogs available than homes. Dogs and puppies are euthanased in shelters most frequently because they are not suited to available homes, rather than because no homes are available’.⁷⁸ In a separate complementary study of cats admitted to three metropolitan Victorian shelters, ‘the most common reason given for euthanasia was that the cat was wild or feral ... [o]ther common reasons for euthanasia were that the cat was too young to be fostered or rehomed, or was not suitable because of health or temperament issues’.⁷⁹ Marston et al suggest, by contrast with the position for dogs, that ‘[o]versupply is a significant contributor to euthanasia rates for cats in shelters. Thousands more kittens are born each year than are able to be absorbed by available homes.’⁸⁰

As to why these animals finish up in shelters, some Australian research suggests that a very high proportion of animals admitted to shelters are strays

76 Marston et al suggest that ‘[d]ifficulties in the collection of accurate and comprehensive statistics should be addressed at a state and national level’: Marston et al, above n 75, 27. Apart from excluding animals killed in the large number of other shelters operating in Australia, the RSPCA figures also exclude companion animals killed by veterinarians in private practice, for which no figures are available. This may be a significant number of animals, since ‘it is generally accepted in Australia that euthanasia is best performed by one’s normal veterinarian, someone familiar to the animal’: Linda Marston, Pauleen Bennett and Grahame Coleman, ‘What Happens to Shelter Dogs? An Analysis of Data for 1 Year from Three Australian Shelters’ (2004) 7 *Journal of Applied Animal Welfare Science* 27, 44.

77 Marston, Bennett and Coleman, above n 76, 43.

78 Marston et al, above n 75, 29. This conclusion is consistent with the RSPCA statistics analysed above.

79 Linda Marston, Pauleen Bennett and Samia Toukhsati, *Cat Admissions to Melbourne Shelters*, (Report to the Bureau of Animal Welfare, 2006) 39.

80 Marston et al, above n 75, 31.

(public strays and strays admitted from Animal Management Officers), both dogs (84 per cent strays)⁸¹ and cats (80 per cent strays).⁸² By contrast, figures provided for Queensland by the RSPCA suggests 'owner-relinquished animals consistently comprise approximately 40% of admissions each year'.⁸³ United States studies suggest similarly high levels of owner relinquishments, with around 52 per cent of dogs admitted to shelters being strays, and 44 per cent relinquishments.⁸⁴ On balance, and despite the absence of comprehensive Australian data, it is reasonable to conclude that a significant proportion of companion animals in shelters, especially cats, are relinquished by owners.

In exploring the reasons for why owners relinquish their animals, similar problems of a lack of comprehensive data exist, at least in Australia. The data which is available suggests that the reasons for relinquishment are overwhelmingly 'owner-centric', including an unwanted litter, accommodation issues, owner health issues (including allergies), incompatibility with an adopting family, a new child, incompatibility with existing pets, and lack of time.⁸⁵ 'Animal-centric' reasons, such as behavioural problems, accounted for a much lower proportion of relinquishments.⁸⁶ This data is broadly consistent with a major group of studies exploring the reasons for shelter relinquishments in the United States, reported from 1998–2000.⁸⁷ In one of those studies, Salman et al found that:

Among the top 10 reasons for relinquishment common to both species were: moving, landlord not allowing pet, too many animals in household, cost of pet maintenance, owner having personal problems, inadequate facilities, and no homes available for litter mates. For cats, allergies in family, house soiling, and incompatibility with other pets were among the top 10 reasons stated. For dogs, owners having no time for pet, pet illness(es), and biting were among the top 10.⁸⁸

It will be argued below that these reasons for relinquishment raise important ethical questions about our treatment of companion animals. The legal position is more straight-forward. Underpinning the relinquishment of a companion animal to a shelter is a legal process that recognises companion animals as personal property. The process of relinquishment is a consensual transfer of ownership of the animal, from the relinquishing party to the animal shelter. In strict legal

81 Marston, Bennett and Coleman, above n 76, 40–1.

82 Marston, Bennett and Toukhsati, above n 79, 18.

83 Marston et al, above n 75, 141. Figures for the Animal Welfare League, a major Queensland shelter organisation, suggest relinquishments in the order of 54–8 per cent for cats, and 38 per cent for dogs: Marston et al, above n 75, 135–6.

84 Marston, Bennett and Coleman, above n 76, 41.

85 See Marston et al, above n 76, 137–8, 142; Marston, Bennett and Coleman, above n 76, 35–7; Marston, Bennett and Toukhsati, above n 79, 20.

86 Ibid.

87 Mo Salman et al, 'Human and Animal Factors Related to the Relinquishment of Dogs and Cats in 12 Selected Animal Shelters in the USA' (1998) 1(3) *Journal of Applied Animal Welfare Science* 207; Janet Scarlett et al, 'Reasons for Relinquishment of Companion Animals in US Animal Shelters: Selected Health and Personal Issues' (1999) 2(1) *Journal of Applied Animal Welfare Science* 41; John New et al, 'Characteristics of Shelter-Relinquished Animals and their Owners Compared with Animals and their Owners in US Pet-Owning Households' (2000) 3 *Journal of Applied Animal Welfare Science* 179.

88 Salman et al, above n 87, 212.

terms, relinquishment of an animal to a shelter involves the transfer of an object of property from one party to another, consistent with an understanding of companion animals as the absolute property of their owner. Other than loss of ownership of the companion animal concerned, there is no other legal sanction borne by the relinquishing party.

The legal underpinning of relinquishment needs to be distinguished from abandonment of an animal. In all jurisdictions in Australia, abandonment of an animal is an offence under animal welfare legislation, 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.⁸⁹ There are, however, very few prosecutions for abandonment offences. For example, in NSW in 2006–07, there were a total of 704 offences prosecuted, with only four of these being abandonment offences.⁹⁰ In Queensland, in 2007–08, three of 51 prosecutions included abandonment offences.⁹¹

In summary, a significant number of companion animals are freely surrendered to animal shelters each year in Australia, largely for ‘owner-centric’ reasons. The fate of many of these animals – including young, healthy animals – is death. These companion animals are legally discarded, with no regulatory sanction falling upon those who relinquish their animals. There is, therefore, a striking tension in the way society regards companion animals. On the one hand, they are affectionately regarded as members of the family. On the other hand, the role of animal shelters shows that they are also regarded as dispensable, being freely discarded in significant numbers each year. The next part of this article explores the ethical concerns raised by the wide-scale relinquishment of companion animals to shelters, and in particular by the typical reasons given for relinquishment.

V THE ETHICAL IMPLICATIONS OF RELINQUISHMENT OF COMPANION ANIMALS

In reflecting on evidence of the vast number of companion animals relinquished into shelters every year in the United States, on the ultimate fate of many of those animals (death), and on the reasons for relinquishment identified by Salman et al, Rollin and Rollin argue that there is

Solid empirical grounding for what most shelter workers have known anecdotally – people relinquish animals to be trashed because they are cheap; they have no

89 *POCTAA* (NSW) s 11; *ACPA* (Qld) s 19; *AWA* (SA) s 13(3)(b)(iii); *AWA* (Tas) s 8(2)(f); *POCTAA* (Vic) s 9(1)(h); *AWA* (WA) s 19(3)(f); *AWA* (ACT) s 8(2)(c); *AWA* (NT) s 7. Queensland is the only jurisdiction to provide a definition of ‘abandon’, the legislation stating that it ‘includes leaving [an animal] for an unreasonable period’: *ACPA* (Qld) s 19(3).

90 RSPCA New South Wales, *RSPCA Annual Report 2007*, 10
<http://www.rspcansw.org.au/_data/assets/pdf_file/0012/1803/rspca-annual_report_2006-2007.pdf> at 6 October 2009.

91 RSPCA Queensland, *RSPCA Queensland Annual Report 2007/2008*, 10–13
<<http://www.rspcaqld.org.au/aboutus/RSPCA-Qld-Annual-Report-2007-2008.pdf>> at 6 October 2009.

major investment in them (and they can always get another one). People relinquish animals because they have “personal problems”, because they are allergic to them, because they cannot deal with their behaviour, because they have no knowledge or false knowledge of what it takes to have and care for an animal and, above all, as Salman does not tell us but common sense does, because there are no consequences resulting from being irresponsible – not even social opprobrium or censure. Companion animals – easy come, easy go.⁹²

The lack of responsibility highlighted by Rollin and Rollin has two aspects – for the companion animals concerned, and for the shelter staff who must deal with the relinquished animals.

Even if it might be accepted that infliction of harm on animals can be justified in some contexts because of the benefits which accrue to humans or other animals as a result,⁹³ this position is difficult to sustain in a companion animal context:

If ever any social use of animals does not warrant abuse, suffering, or death, it is animals as companions. After all, almost all of the pet-owning public will resoundingly declare that they see their animals as “members of the family” ... we have a contractual relationship with all domestic animals, but most clearly so with those who are totally dependent on us, and for whom we have left no room to subsist, let alone thrive, on their own.⁹⁴

As has been shown above, short of abandonment, no legal sanction accompanies relinquishment of an animal to a shelter in Australia. Given the number of animals euthanased every year in animal shelters, and given the sorts of reasons typically proffered by owners for relinquishing their companion animals, it is clear that large numbers of animals are killed unnecessarily.

A lack of responsibility for companion animals also has ethical repercussions for the well-being of animal shelter staff. Marston et al point out that:

current euthanasia rates in shelters and pounds are clearly unacceptable to shelter staff required to kill animals as part of their occupation. A growing literature confirms that shelter staff are subject to high levels of work-related stress and compassion fatigue and that these disorders are directly related to the requirement to kill animals.⁹⁵

Rollin and Rollin also highlight the harm experienced by shelter staff in dealing with unwanted animals, but they take this empirical observation a step further. While in recent years a great deal of ethical attention has been focused on the plight of farmed animals and animals used in research, the ethical standing of companion animals has largely been taken for granted. This is because the work

92 Bernard Rollin and Michael Rollin, ‘Dogmatism and Catechisms – Ethics and Companion Animals’ (2001) 14 *Anthrozoös* 4, 9.

93 For example, in the context of farmed animals and animals used in research, the orthodox ethical position is that the infliction of harm on the animals involved, while still treating the animals as humanely as possible in the relevant context, is justified by the economic and social outcomes for humans. For a detailed account and critique of this position see Steven White, ‘Exploring Different Philosophical Approaches to Animal Protection in Law’ in Sankoff and White, above n 3, 79.

94 Rollin and Rollin, above n 92, 6–7. The reference to ‘contractual’ by Rollin and Rollin needs to be understood in a philosophical rather than strictly legal sense.

95 Marston et al, above n 75, 28 (citations omitted).

of animal shelters, largely publicly unacknowledged, has made the important ethical questions about our treatment of companion animals virtually invisible:

A secondary tragedy, virtually unnoticed by society, is thereby perpetuated on those who care most about animals – they do society's dirty work at the expense of their physical, mental, and spiritual health. Be these people humane society volunteers, animal control personnel, or veterinarians, they suffer for our sins, as victims of ... moral stress, resulting from the constant tension between what they believe they *should* be doing, in contrast to what they are doing ... Unwittingly, our shelters and humane societies have contributed to the problem – they have swept our dirt under the carpet, and sheltered us from the truth more than they have sheltered the animals.⁹⁶

The claim that animal shelters have served to disguise our ethical complicity in the treatment of many companion animals more than they have sheltered animals may be an unjustified rhetorical flourish. As shown in Part VI, all jurisdictions in Australia have introduced measures to address the sorts of concerns raised by Rollin and Rollin. Even if, as argued below, they have not been completely effective, they do provide evidence of some political and public awareness of the ethical problems inherent in relinquishment of animals to shelters. Of course, to the extent that the problems persist despite reform measures, and the unnecessary death of relinquished animals continues, then the argument of Rollin and Rollin may be more persuasive. Their position is perhaps consistent with, though not necessarily as radical as, a strict animal rights approach to the issue of the keeping of companion animals. Political theorist Robert Garner has pointed out that a strict animal rights perspective, recognising a right to life on the part of some animals, including cats and dogs, would regard the destruction of otherwise healthy animals as ethically unacceptable. If the keeping of pets cannot be separated from destruction of large numbers of healthy animals, a rights perspective draws the whole institution into question.⁹⁷ As Garner points out, however, the imposition of suffering is not an inherent feature of the keeping of animals as companions. On the contrary, the vast majority of companion animals are likely well cared for. Although more empirical research is required, it is reasonable to assume that most companion animals are fed well, exercised properly and given some opportunity to socialise with other members of their species.

96 Rollin and Rollin, above n 92, 7–8 (citation omitted, emphasis in original).

97 Garner, above n 57, 138. Francione, adopting a rights perspective, argues that that the institution of keeping animals as pets should be brought to an end, on the basis that it violates the right of a companion animal not to be treated as a 'thing': Gary Francione, *Introduction to Animal Rights: Your Child or the Dog?* (2000), 169–70. Francione suggests that we should 'care for all those domestic animals that are presently alive, but we should not continue to bring more animals into existence so that we may own them as pets': at 170. For an argument that the keeping of companion animals almost always serves the instrumental purposes of humans, and should be rejected for that reasons: see Stuart Spencer et al, 'History and Ethics of Keeping Pets: Comparison with Farm Animals' (2006) 19 *Journal of Agricultural and Environmental Ethics* 17.

VI LEGAL RESPONSES TO RELINQUISHMENT OF COMPANION ANIMALS

If it is accepted that the institution of keeping companion animals is justified, what are the possible legal responses to the sorts of ethical concerns raised by Rollin and Rollin?

In responding to the broad issue of unwanted companion animals, which extends beyond the narrower focus of this article on owner relinquished animals to include strays, jurisdictions in Australia have put in place a range of measures, although taken as a whole these measures are fragmented, both in administration and content.

Traditionally, issues of animal management have been the province of local government, with issues of animal welfare addressed by the States. More recently, States have extended their regulatory footprint into animal management issues as well:

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.⁹⁸

This process of reform has been justified on the basis that ‘there is a disparate approach to animal control by local councils’.⁹⁹ This has been reflected in the different management strategies adopted by different local authorities, across the key areas of companion animal registration, identification and desexing. For example, prior to recent reform in Queensland (and typical of problems found in other jurisdictions), most local authorities had a registration scheme for dogs, but very few for cats; most local authorities required identification of registered animals, but with microchipping voluntary, except in limited circumstances;¹⁰⁰ and some local authorities, but not others, offered financial incentives for desexing companion animals.¹⁰¹ Where reform has occurred, including most recently in Queensland, the trend has been towards mandatory registration of dogs and cats, mandatory microchipping of dogs and cats, and marking of animals which have been desexed (eg, through a tattoo).¹⁰²

Despite the importance of these reforms, they may do little to address the specific issues raised by relinquishment of animals to shelters for ‘owner-centric’ reasons. First, mandatory registration and identification are more relevant in addressing the management of strays, rather than the relinquishment of owned

⁹⁸ Marston et al, above n 75, 106.

⁹⁹ Queensland Government, *Managing Unwanted Cats and Dogs*, Discussion Paper (2007) 5.

¹⁰⁰ ‘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.

¹⁰¹ Queensland Government, above n 99, 3–4.

¹⁰² *Animal Management (Cats and Dogs) Act 2008* (Qld). For a comprehensive summary of the approach taken in other States and Territory jurisdictions see: Marston et al, above n 75, 107–27.

animals. Second, the key management strategies of registration, identification (including through microchipping) and desexing have their own inherent limitations.¹⁰³ Finally, there remains a need for a consistent national approach, despite the reform of local government management, with widely varying approaches to the key management strategies across the States and Territories.¹⁰⁴

Beyond traditional animal management reforms, three further possible legal responses to the relinquishment of companion animals have been raised: education, restriction on relinquishment, and restriction on acquisition of animals. As with the traditional animal management strategies, each of these proposed reforms has the objective of reducing the number of relinquished animals (as well as the number of stray and abandoned animals).

The first proposed reform is to focus on education about the demands of companion animal ownership, including the introduction of a licensing regime. If education were compulsory rather than voluntary,

[t]his may require the introduction of a licensing system, with acquisition of a licence being contingent on demonstrated knowledge and, in turn, being sufficient to demonstrate the preparedness of a person for animal ownership, much as a driver's license is acquired in preparation for driving behaviour.¹⁰⁵

While a promising proposal, there are some significant reasons for caution in embracing such an approach. First, there is no evidence available of whether such an approach would be effective, since there are as yet no reports on the implementation of such a system, even in pilot form.¹⁰⁶ Secondly, in legal terms, the proposal would be quite complex to implement, especially in a federal system like Australia, and certainly quite costly to administer. Thirdly, such a scheme may be very difficult to police, especially for animals acquired by owners from family or friends.¹⁰⁷ The relative lack of resources available for enforcing the cruelty prohibition and duty of care requirements already in place suggest that effective enforcement would be a very significant problem.

A second possible response to the problem of owner relinquishment of companion animals to shelters would be to place strict, legislated conditions around the circumstances of relinquishment. This might entail, as Rollin and Rollin suggest, allowing shelters to reject animals brought in for what they term 'convenience euthanasia', unless a significant fee were paid by the relinquishing owner.¹⁰⁸ Again, there are sound reasons to be cautious about such a proposal. First, to be effective, the fee would need to be set at a level high enough to ensure most people think twice before taking the step of relinquishment. This raises equity issues, falling hardest on the less well off, while preserving convenience disposal for the well off. It also tends to reinforce commodification of companion animals, effectively allowing the relinquishing owner of an animal to 'buy' the

103 For a discussion of these limitations: see *ibid.*, 41–50.

104 *Ibid.* 107–27.

105 *Ibid.* 57.

106 *Ibid.*

107 *Ibid.*

108 Rollin and Rollin, above n 92, 10.

death of their animal. Secondly, it is a reactive measure, addressing problems with companion animal ownership after the event. Thirdly, it risks being counter-productive. It may provide an incentive for those seeking to relinquish a companion animal to avoid taking their animal to a shelter at all, perhaps leading to greatly increased rates of abandonment.

A third possible legal response to the problem of relinquishment of companion animals to shelters is to make it more difficult to acquire animals in the first place, by placing restrictions on the sale of companion animals, especially in circumstances where impulsive buying is likely. Clover Moore, an independent member of the New South Wales Parliament, has introduced a bill in that State aiming to ban the sale of animals through pet shops and markets. Under the terms of the proposed legislation, the *Animals (Regulation of Sale) Bill 2008* (NSW), people would still be able to buy cats and dogs from recognised breeders, animal shelters, rescuers, council pounds and vets who rehouse companion animals. In her Second Reading Speech, Moore highlighted pet shops as being the major cause of companion animal overpopulation.¹⁰⁹ She stressed their focus on animals as commodities, the high likelihood of impulse buying, and the fact that animals sold through pet shops are not desexed. Her proposal makes intuitive sense, but even here more empirical research is required:

Do people engage in appropriate pre-acquisition behaviours and, if not, why not? Is it because animals are acquired impulsively or because appropriate information is not widely disseminated? Pet shops and 'backyard' breeders are often the target of campaigns to prevent impulsive animal purchases but we could find no convincing evidence of animal source being a significant predictor of admission to a shelter or pound.¹¹⁰

In summary, there is a range of possible regulatory responses to the problem of owner relinquishment of animals to shelters, although the application of each of these may not be straight-forward, and even, for some, counter-productive.

I would argue there is a broader problem with all of these proposals though: they fail to come to grips with the underlying legal status of companion animals as property. Underlying most of the reasons given for relinquishment, considered earlier, is the idea that a companion animal, even if only for a small but significant percentage of the population, is a dispensable item – an object of property that can be disposed of when it is no longer convenient to continue bearing responsibility for the animal's well-being. Cases of relinquishment show an absence of a sense of an acquired, ongoing obligation, assumed when a companion animal becomes a 'member of the family'. How then can the idea of a companion animal as disposable property be legally destabilised?

109 New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 November 2008, 11531 (Clover Moore).

110 Marston et al, above n 75, 98.

One way in which this is occurring already is through pet custody disputes, admittedly much more common in North America than in Australia.¹¹¹ In these disputes, parties to a relationship breakdown have been 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.¹¹²

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’.¹¹³ 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 the companion animal should simply be distributed as a chattel, as part of the overall distribution of the parties’ property.¹¹⁴

Another way of destabilising the idea of animals as property, without abolishing the categorisation altogether, has been put forward by David Favre.¹¹⁵ Favre champions a politically astute approach, seeking to incrementally modify the property status of animals, rather than to abolish it outright.¹¹⁶ He draws on an amalgam of equity and guardianship law to provide the basis for a modified property status for animals – the proposal that equitable self-ownership should be recognised in animals.¹¹⁷ As in a trust, there would be a separation between legal and equitable interest, but with the legal owner taking on a *guardian* role in protecting the equitable self-ownership of the animal. The separation of legal and

111 See Eithne Mills and Keith 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; Tony Bogdanoski, ‘The Marriage of Family Law and Animal Rights: How Should Australian Family Law Approach the Rise of “Pet Custody” Disputes?’ (2006) 31 *Alternative Law Journal* 216. For an overview of the United States case law in this area: see Sonia Waisman, Bruce Wagman and Pamela Frasch, *Animal Law: Cases and Materials* (2nd ed, 2002) 674–80. See also Rebecca Huss, ‘Separation, Custody, and Estate Planning Issues Relating to Companion Animals’ (2003) 74 *University of Colorado Law Review* 181.

112 Waisman, Wagman and Frasch, above n 113, 674–5.

113 David Favre, *Animal Law: Welfare, Interests and Rights* (2008) 67.

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

115 David Favre, ‘A New Property Status for Animals: Equitable Self-Ownership’ in Sunstein and Nussbaum, above n 7, 234. This précis of Favre’s argument is drawn from Steven White, ‘Animals and the Law – A New Legal Frontier?’ (2005) 29 *Melbourne University Law Review* 298, 313–14.

116 The alternative, of course, is to abolish the property status of animals and recognise animals as ‘persons’. Such a significant reform, at least in relation to companion animals, is unlikely in the foreseeable future. The leading lawyer proponents of this sort of argument are Gary Francione and Steven Wise. For an account and critique of their arguments: see White, ‘Exploring Different Philosophical Approaches to Animal Protection in Law’, above n 93.

117 Favre, ‘A New Property Status for Animals’, above n 115, 237–9.

equitable ownership could be effected by the animal owner or be imposed by legislation. The content of the duty would be found in animal welfare statutes and in the guardianship obligations owed by a parent to a child. An essential requirement of the relationship would be the need for the human legal owner to take into account the interests of the equitably self-owned animal in making decisions that affect the animal.¹¹⁸ The juristic status of the self-owned animal would also be significant – the modified status of the animal would provide a basis for private parties to bring an action on behalf of the animal to enforce the obligations owed to it, or to seek recompense for damage suffered as a result of breach of those obligations.¹¹⁹ Although acknowledging that determining the precise content and structure of this modified property status for animals ‘will require books to be written in the future’,¹²⁰ Favre argues that the virtue of this approach is that ‘if the next step for animal jurisprudence continues to be spoken in terms of traditional property concepts, then the judges and lawmakers will be more comfortable in pushing the process along.’¹²¹

Such an approach has yet to be legally tested in practice in Australia.¹²² It holds some promise in bringing home the idea of an ongoing obligation, effectively performing an educative role, and so could perhaps lead to a reduction in the rate at which companion animals are relinquished, although more work is required on how it could be applied in practice. One suggested approach is to develop a guardianship model for animals analogous to that for children. This would entail legislatively specified duties and responsibilities, interpreted according to a ‘best interests of the animal’ standard; and enforcement effected through local or magistrates courts, including standing for human guardians and animal welfare groups (with government support) to seek to uphold duties, and retributive penalties for breach.¹²³

Even at a symbolic level, however, a simple change in language from ‘owner’ to ‘guardian’ may be important. Some local municipalities in the United States, and the state of Rhode Island, have enacted laws formally changing the language of the relationship between humans and animals from ‘ownership’ to ‘guardianship’, while retaining the same substantive law on the treatment of animals (in particular the property status of animals).¹²⁴ Although still too early to evaluate the consequences of this change, the reasons for change are significant:

118 Ibid 242–4.

119 Ibid 239–40.

120 Ibid 242.

121 Ibid 239.

122 A non-property, guardianship model was argued recently in the Austrian court system, on behalf of a Great Ape named Hiasl, but was unsuccessful: see Kate Douglas, ‘Just Like Us’ (2007) 194(2606) *The New Scientist* 46. The same article reports the adoption of a non-property, guardianship model by the regional parliament of Spain's Balearic Islands.

123 See Pollard, above n 6.

124 Susan Hankin, ‘Making Decisions About Our Animals’ Health Care: Does It Matter Whether We Are Owners or Guardians’ (2009) 2 *Stanford Journal of Animal Law and Policy* 1, 1.

The jurisdictions that have enacted laws changing or supplementing “owner” with “guardian” have cited a number of related reasons for the change, suggesting that, for instance, this symbolic language change will educate the public and encourage people to think of and treat their pets more like family and household members and less like disposable property. Pet “guardians” will be less inclined to mistreat their animals, less likely to leave them tied up outside, and less likely to abandon them or leave them at shelters. Others hope that the change might even encourage more people to adopt pets from shelters and will have a positive impact on children, who will grow up with a stronger regard for animals and be less likely to abuse them. Advocates also hope that this language change will lead to a strengthening of animal cruelty laws and better enforcement of current laws.¹²⁵

VII CONCLUSION

In answering the question posed in the title of this article, the evidence is clear that companion animals are regarded as *both* members of the family and as objects to be discarded without legal sanction when it suits. This article has demonstrated that a very high proportion of Australians own companion animals, and that an overwhelming number regard their animals as ‘members of the family’. This understanding of the role of companion animals extends beyond mere sentiment, given the access to intimate household space enjoyed by companion animals and the extent to which companion animals form part of the fabric of everyday family life.

At the same time, a significant number of companion animals are relinquished by owners to animal shelters every year, and many of these animals are ultimately killed. The relinquishment of companion animals brings no legal sanction nor, arguably, social censure. Animal shelter staff bear the burden of dealing with relinquished animals, including the need to kill unwanted animals. The reasons most commonly proffered for relinquishment of animals centre around the needs of owners rather than of the companion animals. These factors raise important ethical issues in our treatment of companion animals, and suggest that change is required in the regulation of the management of unwanted companion animals. Given the extent to which the relinquishment is underpinned by an understanding of companion animals as commodities, it has been argued in this article that legal change which destabilises the idea of companion animals as personal property should be a part of any reform agenda.

125 Ibid 6 (citations omitted). Hankin argues that more than symbolic change is required. In particular, she argues that convenience euthanasia needs to be addressed by amending animal welfare law, ‘to make it clear that requesting the euthanasia of a healthy companion animal solely for the owner’s convenience is a form of animal abuse and is therefore prohibited’: at 51. See above n 108 and surrounding text for an account of the undesirable, unintended consequences which could follow such a change.

APPENDIX

Table 1: Animals Received By RSPCA Shelters 2003–04 to 2007–08¹²⁶

<i>Animal Type</i>	<i>2003–04</i>	<i>2004–05</i>	<i>2005–06</i>	<i>2006–07</i>	<i>2007–08</i>
<i>Dogs</i>					
Reclaimed/re-homed/other	36 415	39 372	44 790	45 730	46 742
Euthanased	22 169	20 658	21 554	21 973	23 772
<i>Total Dogs</i>	58 594	60 030	66 344	67 703	70 514
<i>Cats</i>					
Reclaimed/re-homed/other	20 192	23 350	24 173	25 137	26 303
Euthanased	35 934	31 941	37 010	33 343	42 731
<i>Total Cats</i>	56 126	55 291	61 183	58 480	69 034
<i>Others</i>					
Reclaimed/re-homed/other	8583	8105	9768	9149	11 431
Euthanased	11 887	8733	9626	9 089	11 015
<i>Total Others</i>	20 470	16 838	19 394	18 238	22 446
<i>Total Animals</i>	135 180	132 159	146 921	144 421	161 994

Table 2: Reasons for Euthanasia of Dogs and Cats by Each State and Territory RSPCA 2007–08¹²⁷

	ACT	NSW	QLD	SA#	TAS	VIC	WA	TOTAL
<i>Dogs</i>								
Medical reasons	46	3009	2836	220	119	1853	57	8140
Behavioural problems	61	4229	4093	639	389	2192	100	11 703
No room for adoption	0	656	33	4	4	225	0	922
Other	0	1844	0	394	21	149	0	2408
<i>Total Dogs Euthanased</i>	107	9738	6962	1350	533	4419	157	23 772 [^]
<i>Cats</i>								
Medical reasons	506	7628	4381	55	453	5255	51	18 329
Behavioural problems	322	1185	1723	518	272	1624	19	5663
No room for adoption	0	1322	3310	70	189	1365	0	6256
Feral	527	1357	1829	248	250	2256	1	6468
Other	0	1775	0	1832	17	67	0	3691
<i>Total Cats Euthanased</i>	1355	13 267	11 243	4252	1181	10 567	71	42 731 [^]

*Data not available for NT.

#Figures only relate to animals euthanased at certain shelters across the State.

[^] Including total animals euthanased in NT.

126 Source: RSPCA Australia, *RSPCA National Statistics 2007–2008*

<<http://rspca.org.au/assets/files/Resources/RSPCAAnnualStats2007-2008.pdf>> at 10 October 2009.

127 Ibid.