

EVOLVING CONCEPTIONS OF LEGAL PERSONHOOD: WHAT MIGHT RECENT LEGAL DEVELOPMENTS HERALD FOR NON-HUMAN ANIMALS IN AUSTRALIA?

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Legal personhood has traditionally been associated with human persons and their representatives, for example, corporations. Recent years, however, have seen the binary conception of legal personhood challenged and reconceived, and the circle of legal persons expanded in numerous jurisdictions. In particular, the utter failure of environmental laws to protect the environment has led to the recognition of nature bodies as legal persons. Within this context, this article considers whether these developments might lead to recognition of animals as legal persons in Australia. The parallel deficiencies of environmental and animal laws, together with the willingness of some Australian legislatures to entertain legal personhood for nature, may suggest that the concept of legal personhood for animals in Australia is not completely far-fetched.

I INTRODUCTION

Maitland ... described a legal ‘person’ as ‘a right-and-duty-bearing unit’. Implicit in that description ... is the traditional, essentially functional, understanding of legal ‘personality’ as lying in the existence of legally conferred or legally recognised capacity to have or to form legal relations. Implicit also is the traditional understanding of legal personality as unitary.¹

The legal landscape appears to be shifting from the traditional view of legal personhood described by the High Court in the above quote. This traditional view sees legal personhood as being based on individual autonomy and rationality: a legal person should be able to independently exercise their legal rights and carry out legal duties.² The traditional approach has, however, been subject to significant

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1 *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171, 192 [53] (Gageler J) (‘*Queensland Rail*’).

2 Maneesha Deckha, *Animals as Legal Beings: Contesting Anthropocentric Legal Orders* (University of Toronto Press, 2021) 87 <<https://doi.org/10.3138/9781487538248>>.

criticism. It has been attacked on the basis that it fails to protect the interests of vulnerable individuals that lack the capacity to exercise legal rights, including animals, and that it ignores the interdependence of individual persons, animals and the environment.³ Further, it has been argued that the concept itself is inexorably tied to ‘a colonial and otherwise exclusionary logic’.⁴ Accordingly, scholars have sought to reformulate personhood – for example, as ‘relational personhood’⁵ – or have rejected the concept and advocated for adoption of an alternative legal model that better recognises vulnerability and interconnectedness.⁶

In tandem with these conceptual developments, the circle of legal persons has been expanding. Outside of human persons, the law has long recognised their representatives – for example, corporations or churches – as legal persons. Laws in some jurisdictions have also recognised deities, or gods, as legal persons. More radically, and largely as a response to the overwhelming failures of environmental law to protect the environment, legislatures and courts have been engaging in ‘legal experimentation’ in recognising bodies of nature as legal persons.⁷ For example, the Whanganui River in New Zealand,⁸ all rivers in Bangladesh⁹ and the Mar Menor lagoon in Spain¹⁰ have all been declared legal persons. A small number of jurisdictions have gone even further and recognised animals as legal persons.¹¹

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- 3 Erin O'Donnell and Anna Arstein-Kerslake, ‘Recognising Personhood: The Evolving Relationship between the Legal Person and the State’ (2021) 30(3) *Griffith Law Review* 339, 339 <<https://doi.org/10.1080/10383441.2021.2044438>>. More broadly, see Karen Bradshaw, ‘Humans as Animals: Pluralizing Humans’ [2021] (1) *Utah Law Review* 185 <<https://doi.org/10.26054/0D-4TQQ-35C7%20>>.
 - 4 Deckha (n 2) 96.
 - 5 Anna Arstein-Kerslake et al, ‘Relationship Personhood: A Conception of Legal Personhood with Insights from Disability Rights and Environmental Law’ (2021) 30(3) *Griffith Law Review* 530, 530 <<https://doi.org/10.1080/10383441.2021.2003744>>. See also *ibid*.
 - 6 Deckha (n 2) 96.
 - 7 Ruth Barcan, ‘The Campaign for Legal Personhood for the Great Barrier Reef: Finding Political and Pedagogical Value in a Spectacular Failure of Care’ (2020) 3(3) *Nature and Space* 810, 813 <<https://doi.org/10.1177/2514848619886975>>.
 - 8 *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) (*‘Whanganui River Claims Settlement Act’*).
 - 9 *Human Rights and Peace for Bangladesh v Government of Bangladesh*, Supreme Court of Bangladesh, High Court Division (Writ Petition No 13989/2016, 3 February 2019) 283, directive no 2, cited in Mohammad Sohikul Islam and Erin O'Donnell, ‘Legal Rights for the Turag: Rivers as Living Entities in Bangladesh’ (2020) 23(2) *Asia Pacific Journal of Environmental Law* 160, 161 <<https://doi.org/10.4337/apjel.2020.02.03>>.
 - 10 *Ley 19/2022, de 30 de septiembre, para el reconocimiento de personalidad jurídica a la laguna del Mar Menor y su cuenca* [Law 19/2022, of September 30, for the Recognition of the Legal Personality of the Mar Menor Lagoon and Its Basin], BOE No 37 of 2022, 135131 (*‘Ley 19/2022’*).
 - 11 *Animal Welfare Board of India v A Nagaraja* (Civil Appeal No 5387/2014, Civil Appellate Jurisdiction) [62] (Supreme Court of India); *Re Cecilia* (Tercer Juzgado de Garantías, File No P-72.254/15, 3 November 2016) [Third Court of Guarantees, Argentina] (*‘Re Cecilia’*); *Islamabad Wildlife Management Board v Metropolitan Corporation Islamabad* (Writ Petition No 1155/2019, 21 May 2020) (Islamabad High Court) (*‘Islamabad Wildlife Management Board’*); Corte Suprema de Justicia [Supreme Court of Colombia], AHC4806-2017, 26 July 2017. However, this ruling was reserved in Corte Constitucional [Constitutional Court of Colombia], File No T-6.480.577–Sentence No SU-016/20, 23 January 2020.

In the context of sustained advocacy for legal personhood for animals¹² and research indicating very high levels of public concern for animals in Australia,¹³ this article investigates whether these developments in relation to legal personhood are likely to have any implications for non-human animals in Australia. In this respect, the article seeks to ascertain whether there is any reasonable prospect of animal legal personhood in Australia but remains largely neutral in terms of whether advocates should seek the attribution of personhood (perhaps with a view of progressing to an improved legal model in the future) or of some alternative legal model.¹⁴ It assumes that an improved legal status for animals is necessary and desirable, but does not analyse the various merits of legal personhood and its proposed replacements.

The willingness of some Australian legislatures to adapt legal personhood models for nature bodies may suggest that the concept of animals as legal persons is not as far-fetched as it might seem. While existing research has considered the potential for animal legal personhood in Australia,¹⁵ this article analyses the conceptual challenges to legal personhood and recent legislative changes to determine the practicability of arguing for legal personhood for animals in Australia. Further, in the event of legal personhood recognition for animals, this article draws on the experience of nature rights to identify considerations that should influence personhood construction for animals.

This article contends that the evolution of the concept of legal personhood over recent decades, public concern for animals, legal recognition of animal sentience and legal experimentation in relation to nature rights in Australia, suggests that personhood may be a realistic path to greater legal protection for animals in the medium to long-term future in Australia. The article focuses on Australia because a thorough discussion of the potential for global personhood developments would require a lengthier analysis, beyond the word limitations of a typical journal article. Australia also presents a strong case study given that it has a comparatively high rate of meat consumption and is not considered a leader in matters of animal protection.¹⁶ As such, the potential for change found in

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- 12 See, eg, 'Progress: The Power of Persistence in the Fight for Nonhuman Rights', *Nonhuman Rights Project* (Web Page) <<https://www.nonhumanrights.org/progress/>>; Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011); George Seymour, 'Animals and the Law: Towards a Guardianship Model' (2004) 29(4) *Alternative Law Journal* 183 <<https://doi.org/10.1177/1037969X0402900404>>; Steven Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Perseus Books, 2000) ('*Rattling the Cage*').
 - 13 Futureye, 'Commodity or Sentient Being? Australia's Shifting Mindset on Farm Animal Welfare' (Research Report, 2018) 4 <<https://www.sheepcentral.com/wp-content/uploads/2019/05/190129-Commodity-or-Sentient-Being-Australias-Shifting-Mindset-on-Farm-Animal-Welfare-v.-7.0.pdf>>.
 - 14 See discussion at Part II(C) below.
 - 15 Ruth Hatten, 'Legal Personhood for Animals: Can It Be Achieved in Australia?' (2015) 11 *Australian Animal Protection Law Journal* 35; Randall S Abate and Jonathan Crowe, 'From inside the Cage to outside the Box: Natural Resources as a Platform for Nonhuman Animal Personhood in the US and Australia' (2017) 5(1) *Global Journal of Animal Law* 54; Philip Jamieson, 'The Legal Status of Animals under Animal Welfare Law' (1992) 9(1) *Environmental Planning and Law Journal* 20.
 - 16 Hannah Ritchie, Pablo Rosado and Max Roser, 'Meat and Dairy Production', *Our World in Data* (Web Page, November 2019) <<https://ourworldindata.org/meat-production>>; 'Australia', *Animal Protection Index* (Web Page) <<https://api.worldanimalprotection.org/country/australia>>.

Australia is likely also applicable to other jurisdictions and would potentially meet less resistance. In terms of implementation, however, thought should be given to how legal personhood would best be framed for animals. In this respect, attention should be paid to who should be enabled to speak on behalf of animals and what powers they should be given. While legal personhood for animals would constitute a profound legal achievement, it would nevertheless be insufficient to challenge the broader economic and political frameworks that rely on animal exploitation. As Benjamin J Richardson and Nina Hamaski identify in relation to nature rights, '[p]roperty tenure, markets, business corporations, economic growth policies and other drivers of environmental upheaval remain intact'.¹⁷ The same critique may be made in relation to potential legal personhood for animals. Nevertheless, along with other legal developments, legal personhood may assist in shifting society forward to a point where challenges directed at political and economic frameworks can be made.

The next Part of this article explores the meaning and significance of legal personhood. This includes analysis of why the concept is important in the context of protecting individual interests, how it has traditionally been conceived, challenges to those traditional conceptions and the connection between legal personhood and rights. This discussion serves to highlight both the importance of legal personhood as well as its current fluid state. Part III outlines the ways in which the circle of legal persons has been expanding in recent years as part of pressing 'legal experimentation'.¹⁸ Part IV then addresses some common criticisms of advocacy for animal legal personhood.

II THE MEANING AND SIGNIFICANCE OF LEGAL PERSONHOOD

A The Importance of Legal Personhood

The dichotomy between 'person' and 'thing' in Western legal systems has been well-traversed in animal law scholarship. This 'legal bifurcation',¹⁹ in which animals are categorised as legal property while human beings are classified as legal persons, is widely considered a critical junction in the context of animal welfare.²⁰ For instance, Steven Wise, President of the Nonhuman Rights Project

17 Benjamin J Richardson and Nina Hamaski, 'Rights of Nature versus Conventional Nature Conservation: International Lessons from Australia's Tarkine Wilderness' (2021) 51(3) *Environmental Policy and Law* 159, 170 <<https://doi.org/10.3233/EPL-201066>>.

18 Barcan (n 7) 813.

19 Christine M Korsgaard, 'Kantian Ethics, Animals, and the Law' (2013) 33(4) *Oxford Journal of Legal Studies* 629, 629 <<https://doi.org/10.1093/ojls/gqt028>>.

20 See, eg, Gary L Francione, 'Animals: Property or Persons?' in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2005) 108 ('Animals: Property or Persons?') <<https://doi.org/10.1093/acprof:oso/9780195305104.003.0006>>; Tony Bogdanoski, 'A Companion Animal's Worth: The Only "Family Member" Still Regarded as Legal Property' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia* (Federation Press, 2nd ed, 2013) 84; Wise, *Rattling the Cage* (n 12).

(‘NhRP’), describes the division between legal persons and legal things as a ‘thick and impenetrable wall’ that establishes who or what is visible before the law.²¹ Gary L Francione is similarly critical of this division, arguing that animals need only one right – the right not to be treated as property.²²

Debates surrounding this legal categorisation are not exclusive to animal law. Demands for inclusion in the category of legal person have been an enduring feature in movements to gain equal consideration for marginalised groups.²³ For instance, married women were denied an individual legal identity prior to statutory enactments in the nineteenth century, which granted this group of women property rights.²⁴ The common law doctrine of coverture saw women largely subsumed into the legal personality of their husbands.²⁵ As William Blackstone explained in 1765, ‘the very being or legal existence of the woman is suspended during the coverture’.²⁶ Similarly, despite being held accountable as persons for their crimes, slaves were often denied full legal personality.²⁷

Personhood, therefore, is a tool used to define who matters within Western liberal societies. It is a necessary mechanism for identifying the proper subject of law. Legal things lack this type of legal recognition – they are not stakeholders in decisions that may impact them. The significance of legal personhood is such that, for many, gains that occur inside the realm of legal thinghood will never be adequate without the transformation to legal being. For instance, proponents of Wild Law – an alternative legal framework predicated on the rights of nature – claim that the current hierarchical separation of legal persons and legal things is detrimental to the health of the environment.²⁸ Cormac Cullinan, a primary figure in Wild Law, argues that ‘our legal and political establishments perpetuate, protect and legitimise the continued degradation of Earth by design, not by accident’.²⁹

21 Wise, *Rattling the Cage* (n 12) 4.

22 See Gary L Francione, *Animals as Persons: Essays on the Abolition of Animal Exploitation* (Columbia University Press, 2008) (*‘Animals as Persons’*); Gary L Francione, *Introduction to Animal Rights: Your Child or the Dog?* (Temple University Press, 2000) 93–6 (*‘Your Child or the Dog?’*). As Francione notes, ‘wild animals’ are often considered the property of the State and can become the property of humans through hunting or confinement: Francione, *‘Animals: Property or Persons?’* (n 20) 117.

23 Note that once these groups have been granted legal personhood, it does not mean they are automatically on the same, equal footing as previously existing legal persons: Barcan (n 7) 817–18.

24 See Emily Ireland, ‘Re-examining the Presumption: Coverture and “Legal Impossibilities” in Early Modern English Criminal Law’ (2022) 43(2) *Journal of Legal History* 187, 187–8 <<https://doi.org/10.1080/001440365.2022.2092945>>.

25 Ibid 187–8.

26 William Blackstone, *Commentaries on the Laws of England*, ed George Sharswood (JB Lippincott, 1893) 432.

27 See Ngaire Naffine, ‘What We Talk about When We Talk about Persons: The Language of a Legal Fiction’ (2001) 114(6) *Harvard Law Review* 1745, 1747–50 (*‘What We Talk about’*); *Bryan v Walton*, 14 Ga 185, 197–8 (Lumpkin J for the Court) (Ga Sup Ct, 1853); *State v Van Lear*, 5 Md 91, 95 (Tuck J for the Court) (Md Ct App, 1853); *Ex parte Boylston*, 33 SCL 41, 43 (Wardlaw J for the Court) (SC Cr App, 1847).

28 For a description of anthropocentrism in the law, see Peter Burdon, ‘The Great Jurisprudence’ in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011) 59, 59–61 (*‘Great Jurisprudence’*). For a discussion on the human view of nature as a resource, see Ian Mason, ‘One in All: Principles and Characteristics of Earth Jurisprudence’ in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011) 35.

29 Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (Green Books, 1st ed, 2003) 67.

Thus, being a person before the law is tied to both legal and moral value. The value of property is instrumental – legal property is available for the use of legal subjects, and the interests of property may only be considered where those interests align with the interests of (human) legal persons. Conversely, legal persons are treated as ends in themselves – their interests are directly valuable.³⁰

B Traditional Conceptions of Legal Personhood

In the traditional conception of legal personhood, legal personality is defined by reference to rights – legal personhood is ‘the legal capacity to bear rights and duties’.³¹ In this respect, personhood grounds rights. There are, however, some distinctions within the traditional view. For instance, in relation to rights and duty bearing, some define legal personality as the ability to bear at least one right *or* one duty.³² Here, recognising that a particular entity currently categorised as legal property holds a single right or bears a single duty would transform that entity into a legal person. On the other hand, some accounts emphasise the need for at least one right *and* duty.³³

This latter understanding has been invoked in decisions requiring a determination as to the legal status of animals. For instance, in *Nonhuman Rights Project Inc v Lavery* (‘*Lavery*’),³⁴ the Appellate Division of the New York Supreme Court determined that Tommy was not a legal person and thus not entitled to habeas corpus relief. In finding that legal personhood did not extend to chimpanzees, the Court held that it was Tommy’s inability to bear any legal duties that prevented him from being recognised as a legal person.³⁵ The difficulty with this interpretation was noted in an Australian family law case in which the Federal Circuit Court referred to the reasoning in *Lavery* and stated that, under this interpretation, ‘the child would not be considered a “person” as they are unable to comprehend or fulfil their duties. Thus, they would have no rights, no more than Tommy’.³⁶

Despite this distinction, under the traditional conception of legal personhood, one is either a holder of rights and/or duties, and thus a legal person, or does not

30 Ngairé Naffine, ‘Our Legal Lives as Men, Women and Persons’ (2004) 24(4) *Legal Studies* 621, 625 <<https://doi.org/10.1111/j.1748-121X.2004.tb00265.x>>. For further discussion on the significance of personhood see Ngairé Naffine, *Law’s Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart, 2009) <<https://doi.org/10.5040/9781472564658>>.

31 Richard Tur, ‘The “Person” in Law’ in Arthur Peacocke and Grant Gillett (eds), *Persons and Personality: A Contemporary Inquiry* (Basil Blackwell, 1987) 116, 121.

32 John Chipman Gray, *The Nature and Sources of the Law*, ed David Campbell and Philip Thomas (Ashgate, 1997) 27 <<https://doi.org/10.4324/9780429243417>>.

33 See, eg, *ibid* 19; *Nonhuman Rights Project Inc v Lavery*, 124 AD 3d 148 (NY, 2014) (‘*Lavery*’); David Bilchitz, ‘Moving beyond Arbitrariness: The Legal Personhood and Dignity of Non-human Animals’ (2009) 25(1) *South African Journal on Human Rights* 38 <<https://doi.org/10.1080/19962126.2009.11865192>>.

34 *Lavery* (n 33).

35 As ‘chimpanzees can’t bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions’, it would not be appropriate to award them legal rights: *ibid* 4. For further discussion on this case and other NhRP decisions, see Ashleigh PA Best and Sophie Riley, ‘Property or “Penumbral” Persons? An Examination of Two Jurisprudential Approaches to the Nonhuman Rights Project Litigation’ (2018) 14(1) *Journal of Animal and Natural Resource Law* 33.

36 *Dawes & Dawes* [2014] FCCA 3154, [88] (Judge Harman).

bear rights/and or duties and is therefore property. This is a binary status – the entity either is, or is not, a legal person. This traditional understanding of legal personality as binary was reinforced by the High Court in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail*.³⁷ Here, Gageler J found that, implicit in the description of a legal person as ‘a right-and-duty-bearing-unit’,³⁸ ‘is the traditional understanding of legal personality as unitary’.³⁹ In support, Gageler J quotes Fullagar J in *Williams v Hursey*, who said that the ‘notion of qualified legal capacity is intelligible, but the notion of qualified legal personality is not’.⁴⁰ Thus, on the traditional understanding, an entity cannot be a legal person for some purposes and legal property for others.⁴¹ Further, given that a legal person is a holder of rights and/or duties, property can therefore not hold rights and/or duties. Rights are attributed only to those entities that hold the requisite legal status – personhood. This traditional understanding of personhood is also evident in the above-cited quote from the Federal Circuit Court – if an entity is not considered a person, that entity would have no rights.

Outside of this rights-holding barrier to entry, there are also several entitlements that legal persons may hold. A primary entitlement is legal standing – the ability of an entity to enforce its claims in legal proceedings. Standing is what ensures a rights-holder can ‘count jurally’.⁴² A legal person may also own property, be a party to contract and be held legally responsible (amongst other entitlements).⁴³ Within this binary, traditional understanding, there are variations. While property cannot hold any rights under this conception, it does not follow that a legal person holds all rights or holds each entitlement associated with legal personhood in all contexts.

C Critiques of the Binary Model and Re-conceptions of Legal Personhood

The binary conception of legal personhood is, however, being challenged and re-examined. A re-conception of legal personhood is considered fundamental for solving the ‘hard cases’ of personhood – those entities that do not fit neatly into either person or property. Animals are a prime example, given that they are legally classified as property but benefit from a range of legal protections (which some argue can be construed as rights)⁴⁴ due to their position as sentient beings. They can be owned and sold but cannot be reduced to property alone.

37 *Queensland Rail* (n 1).

38 Ibid 19 [53] (Gageler J), quoting FW Maitland, ‘Moral Personality and Legal Personality’ (1905) 6(2) *Journal of the Society of Comparative Legislation* 192, 193.

39 *Queensland Rail* (n 1) 19 [53] (Gageler J).

40 *Williams v Hursey* (1959) 103 CLR 30, 52 [19] (Fullagar J.), quoted in *ibid*.

41 Sebastian Howard Hartford Davis, ‘The Legal Personality of the Commonwealth of Australia’ (2019) 47(1) *Federal Law Review* 3 <<https://doi.org/10.1177/0067205X18816236>>.

42 Christopher D Stone, ‘Should Trees Have Standing: Toward Legal Rights for Natural Objects’ (1972) 45(2) *Southern California Law Review* 450, 458 (emphasis in original).

43 See, eg, Visa Kurki, ‘Legal Personhood and Animal Rights’ (2021) 11(1) *Journal of Animal Ethics* 47, 53 (‘Legal Personhood and Animal Rights’); Barcan (n 7) 817.

44 Saskia Stucki, ‘Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights’ (2020) 40(3) *Oxford Journal of Legal Studies* 533. On the other hand, Jamieson argues that ‘the “legal rights of animals” is still a notion foreign to [the Australian] ... legal system’: Jamieson (n 15) 20.

Against this backdrop, some scholars have sought to reconceptualise legal personhood and provide an alternative to the binary understanding of person-property. For example, Angela Fernandez has developed a ‘quasi’ conception of personhood and property in the context of animals. Fernandez explains that animals are not like other forms of property.⁴⁵ They are sentient and lead complex lives, tied to human beings through varied relationships.⁴⁶ Further, unlike other forms of property, legislative provisions are in place that seek to protect animals from at least some harms, and may be considered to constitute legal rights.⁴⁷ For this reason, she argues that animals are best described as quasi-property or quasi-persons.⁴⁸ Fernandez claims, ‘[i]f nonhuman animals are property with some rights then we cannot keep referring to them as property, not persons, or holding that they cannot be persons until they are no longer property. That binary thinking is both unhelpful and untrue’.⁴⁹ Thus, Fernandez seeks to blur the thick line between property and person as drawn in the traditional conception.

Similarly, Visa Kurki has critiqued the binary, traditional conception of legal personhood (which he calls ‘the orthodox view of legal personhood’) at length.⁵⁰ Kurki finds the orthodox view untenable and provides examples reflecting widely agreed beliefs about who or what possesses legal personhood to establish this position. For instance, Kurki points to the claim that slaves were not legal persons – a belief he attributes to the orthodox view.⁵¹ To this case of personhood, Kurki applies the dominant theories of rights-holding, the interest theory and the will theory to demonstrate the incoherence of the orthodox view.⁵² The interest theory connects rights-holding with interests – the entity must have interests in order to have rights.⁵³ The will theory requires the relevant entity to have control over another’s duty in order to hold rights.⁵⁴ Slaves, however, could be held accountable for their crimes,⁵⁵ and could also appeal criminal convictions, satisfying the will theory of rights-holding.⁵⁶ Slaves were also protected from certain types of treatment (for instance, the South Carolina *Slave Code of 1740* prohibited the

45 Angela Fernandez, ‘Not Quite Property, Not Quite Persons: A “Quasi” Approach for Nonhuman Animals’ (2019) 5(1) *Canadian Journal of Comparative and Contemporary Law* 155.

46 Ibid 198–201.

47 Ibid 214–15.

48 Ibid 228–31.

49 Ibid 219.

50 Visa AJ Kurki, *A Theory of Legal Personhood* (Oxford University Press, 2019) 31–86 (‘*A Theory of Legal Personhood*’) <<https://doi.org/10.1093/oso/9780198844037.001.0001>>.

51 Ibid ch 2.

52 For an overview of these theories, see generally Visa AJ Kurki, ‘Rights, Harming and Wronging: A Restatement of the Interest Theory’ (2018) 38(3) *Oxford Journal of Legal Studies* 430 <<https://doi.org/10.1093/ojls/gqy005>>.

53 See generally Joel Feinberg, ‘The Rights of Animals and Unborn Generations’ in William T Blackstone (ed), *Philosophy & Environmental Crisis* (University of Georgia Press, 1974) 43, 61.

54 See generally Matthew H Kramer, NE Simmonds and Hillel Steiner, *A Debate over Rights: Philosophical Enquiries* (Oxford University Press, 2000) <<https://doi.org/10.1093/acprof:oso/9780198298991.003.0001>>; Kurki, ‘Legal Personhood and Animal Rights’ (n 43) 51.

55 See Naffine, ‘What We Talk about’ (n 27) 1747–50; *Bryan v Walton* (n 27); *State v Van Lear* (n 27); *Ex parte Boylston* (n 27).

56 Kurki, *A Theory of Legal Personhood* (n 50) 65, 68.

wilful murder of slaves),⁵⁷ which constitutes an interest theory right. Under the traditional conception of legal personhood, the accepted understanding that slaves were not legal persons requires that slaves held no rights and/or bore no duties. Kurki concludes that widely held beliefs about who holds legal personhood can therefore not be explained via the two dominant theories of rights, and thus the traditional conception of personhood, which defines legal persons as rights-holders, is incoherent and requires review.⁵⁸

Kurki proposes a re-conception of legal personhood, one which considers personhood as ‘a cluster property’.⁵⁹ Kurki maintains that the line between legal person and legal property (or nonpersons) is not always clearly defined – some entities may hold what Kurki calls ‘passive incidents of legal personhood’ as well as ‘active incidents of legal personhood’, whereas some may hold only passive incidents.⁶⁰ Passive incidents include claim-rights, such as the protection of liberty, the capacity to own property and to sue and be sued (amongst others).⁶¹ Active incidents involve legal competences, such as the capacity to enter into contracts, and thus are endowed only on those with the requisite capacities (typically adult humans of sound mind).⁶² Kurki concludes that, under the interest theory, ‘animals can certainly be passive persons and hold claim-rights’.⁶³ Although he notes that, while animals may currently hold legal rights, ‘they are endowed with such a limited number of the incidents [of personhood] that they are not properly classifiable as legal persons’.⁶⁴ Kurki’s theory of personhood is unable to be explored fully here, but, as presented, the benefit of this conception is that it once again blurs the line between person and property. If animals can already be considered rights-holders, the ‘thick and impenetrable wall’⁶⁵ is not so insurmountable.⁶⁶

Anna Arstein-Kerslake et al reconceive the concept of legal personhood more broadly. They note that the concept of legal personhood has historically ‘only included white, able-bodied, heterosexual, cisgender men’,⁶⁷ and that while it has broadened over time, it still fails to recognise ‘the inherent interconnectedness

57 *An Act for the Better Ordering and Governing of Negroes and Other Slaves in this Province*, 670 SC Code Ann § XXXVII (McCord 1740), cited in Kurki, *A Theory of Legal Personhood* (n 50) 65.

58 Kurki, *A Theory of Legal Personhood* (n 50) 55–87.

59 Ibid ch 3.

60 Kurki notes that courts have ‘denied that one could be a purely passive legal person, with only the benefits of legal personhood but no duties’: Kurki, ‘Legal Personhood and Animal Rights’ (n 43) 53. However, Kurki rejects the will theory understanding of rights-holding, explaining that such an understanding of rights-holding places those human beings who are legal persons but unable to bear legal duties in a strange position. Kurki thus understands claim-rights according to the interest theory of rights: at 54.

61 These are also accompanied by remedy incidents, such as standing: see Kurki, *A Theory of Legal Personhood* (n 50) ch 3.

62 Ibid 96, 101.

63 Kurki, ‘Legal Personhood and Animal Rights’ (n 43) 55.

64 Ibid 53.

65 Wise, *Rattling the Cage* (n 12) 4.

66 Although any development here must be tailored to the specific problem that personhood for animals seeks to solve: see Michelle Worthington and Peta Spender, ‘Constructing Legal Personhood: Corporate Law’s Legacy’ (2021) 30(3) *Griffith Law Review* 348 <<https://doi.org/10.1080/10383441.2021.2003742>>.

67 Arstein-Kerslake et al (n 5) 530–1.

of all entities'.⁶⁸ Accordingly, they propose a conception of legal personhood based on relationality.⁶⁹ More specifically, their conception of legal personhood supports 'exercising autonomy through a collaborative process of acknowledging, interpreting, and acting on an individual's expressions of will and preference'.⁷⁰ In relation to legal personhood for nature, including animals, this would then require that animals' will and preference are understood by humans in order for it to be acted upon.⁷¹

Bernet Kempers argues that legal personhood does not need to be a precondition for the holding of rights.⁷² Instead, she asserts, the existing 'rights' that animals have can be made gradually stronger by legislators, eventually culminating in recognition of legal personhood. In this respect, 'animal legal personhood is regarded not as a condition for holding rights, but as the possible consequence of it'.⁷³

D Distinction between Legal Personhood and Rights

Legal personhood transforms the holder into a subject of law by making the subject the possessor of rights. The connection between rights and personhood explains why the legal concept of the person consistently features in arguments that concern rights entitlements, be this in relation to animals,⁷⁴ fetuses,⁷⁵ or nature.⁷⁶ In terms of animals, legal personality is generally employed in the context of transforming animals into the holders of fundamental rights, such as the right to life and liberty. For instance, Francione argues that the balancing of interests between humans and animals is fundamentally flawed due to the status of animals as property.⁷⁷ He claims that it is 'absurd to suggest that we can balance human interests, which are protected by claims of right in general and of a right to own

68 Ibid 531.

69 Ibid 546.

70 Ibid 532.

71 Ibid 543.

72 Eva Bernet Kempers, 'Transition Rather than Revolution: The Gradual Road towards Animal Legal Personhood through the Legislature' (2022) 11(3) *Transnational Environmental Law* 581.

73 Ibid 601. Cf the discussion below at Part II(D).

74 See, eg, Steven Wise, 'Animal Rights, One Step at a Time' in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2005) 19 <<https://doi.org/10.1093/acprof:oso/9780195305104.003.0002>>.

75 For discussion of 'Jayden's Law' and 'Zoe's Law' see, eg, Catherine Kevin, 'Defining the Edge of Legal Personhood: A History of Recent Campaigns for Recognition of Pregnancy Loss in Two Australian States' (2018) 69 *Women's Studies International Forum*: 135–42 <<https://doi.org/10.1016/j.wsif.2018.06.003>>; Elizabeth Chloe Romanis, 'Challenging the "Born Alive" Threshold: Fetal Surgery, Artificial Wombs, and the English Approach to Legal Personhood' (2020) 28(1) *Medical Law Review* 93 <<https://doi.org/10.1093/medlaw/fwz014>>.

76 See, eg, Stone (n 42) 455; Burdon, 'Great Jurisprudence' (n 28) 59–61.

77 Francione, 'Animals: Property or Persons?' (n 20). As Francione explains, 'because animals are property, they are the object of legal claims and not the subject, and they of course have no standing at all to make legal claims on their own behalf': Francione, *Your Child or the Dog?* (n 22) 69. Note, however, that when Francione talks of 'person', he typically is referring to moral persons, not legal persons: see Fernandez (n 45) 192.

property in particular, against the interests of property, which exists only as a means to the ends of humans'.⁷⁸

It is evident here that legal personhood is a mechanism to bring about increased protection via an award of certain rights, which serves to dismantle the imbalance between the interests of legal persons and legal things. Fundamental rights are typically said to be possessed by 'persons' in Western legal systems, and thus animals can also possess such fundamental rights if transformed into legal persons. In this sense, personhood is a necessary step on the way to holding fundamental rights. This strategy can be seen in the 2014 case initiated by the NhRP on behalf of a chimpanzee named Tommy, in which the NhRP called on the Appellate Division of the New York Supreme Court to 'enlarge the common-law definition of "person" in order to afford legal rights to an animal'.⁷⁹

Personhood, however, does not guarantee the holding of certain fundamental rights such as those typically argued for by animal law scholars. While personhood and rights-holding are intertwined, personhood cannot be equated to fundamental rights-holding – it does not confer a stable group of rights on each legal person, irrespective of the individual characteristics of that legal person. For instance, while corporations are legal persons, the artificial nature of this legal personality is often invoked to explain why certain rights held by natural (human) legal persons cannot be extended to nonhuman persons. This can be seen in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*,⁸⁰ in which the High Court left open the possibility of recognising a tort of invasion of privacy. However, Gummow and Hayne JJ, writing in the joint judgment, concluded that this would not extend to a corporation, stating that '[w]hatever development may take place in that field will be to the benefit of natural, not artificial, persons'.⁸¹ Thus, some rights appear to be tied to 'humanness'.⁸²

III THE EXPANDING CIRCLE OF LEGAL PERSONS

While the concept and theory of legal personhood is being challenged and re-examined, legal developments in multiple jurisdictions are also expanding the circle of legal persons. This section of the article provides an overview of some new categories of legal person, outside of the traditional categories of human beings and their organisations.⁸³ These categories include deities, aquatic bodies and animals.

78 Francione, 'Animals: Property or Persons?' (n 20) 108, 117.

79 Lavery (n 33) 1.

80 (2001) 208 CLR 199.

81 Ibid 258 [132].

82 Naffine, 'What We Talk about' (n 27) 1752. See also Ngiare Naffine, 'Legal Personality and the Natural World: On the Persistence of the Human Measure of Value' (2012) 3 (June) *Journal of Human Rights and the Environment* 68 <<https://doi.org/10.4337/jhre.2012.02.04>>.

83 Here, 'their organisations' refers to corporations, churches, etc.

A Deities

In India, deities have been held to be legal persons. In relation to deities, or gods, the deity may be represented in law by trustees or a managing board in charge of the temple. For example, in the Ayodhya matters, the Supreme Court of India determined in 2010 that the deity Rama was a legal person who could be represented by a lawyer appointed by trustees for the deity.⁸⁴ The Court held that the premises believed to be Rama's birthplace was vested in the deity.⁸⁵ Likewise, in 2018, the Court held that the deity Ayyappa was a legal person.⁸⁶

B Rivers and Other Aquatic Environments

Legal personhood has been used to elevate the legal status of rivers and other aquatic environments in various jurisdictions.⁸⁷ One purpose of such 'legal experimentation' is to increase the environmental protection of specific aquatic environments within a context of 'failures of mainstream environmental law'.⁸⁸ This section will discuss the way legal personhood has been applied to aquatic environments in New Zealand, India and Spain, before turning to developments in Australia. These cases have been selected for analysis because they are widely known (in the case of New Zealand and India) or exceptionally recent (in the case of Spain). These examples, however, are far from exhaustive.⁸⁹

84 *Bhagwan Sri Rama Virajman v Sri Rajendra Singh* (AHC, OOS No 236/1989, 1989) ('Rama'); Ananya Bhattacharya, 'Birds to Holy Rivers: A List of Everything India Considers "Legal Persons"', *Quartz* (Web Page, 7 June 2019) <<https://qz.com/india/1636326/who-apart-from-human-beings-are-legal-persons-in-india/>>.

85 *Rama* (n 84).

86 *Indian Young Lawyers Association v The State of Kerala* (SC, WP No 373/2006, 2018).

87 For further discussion in relation to how rights of nature can be instructive for those seeking recognition of animal rights, see Kristen Stilt, 'Rights of Nature, Rights of Animals' (2021) 134 *Harvard Law Review Forum* 276.

88 Barcan (n 7) 813.

89 Further examples include constitutional protections in Ecuador and Bolivia; judicial findings in Colombia, Bangladesh and Uganda; and the imposition of new local laws in United States and Canada. For specific references to each of the previous examples, see International Rivers, Earth Law Centre and Cyrus R Vance Center for International Justice, *Rights of Rivers: A Global Survey of the Rapidly Developing Rights of Nature Jurisprudence Pertaining to Rivers* (Report, October 2020) <<https://www.internationalrivers.org/wp-content/uploads/sites/86/2020/10/DIGITAL-Rights-of-Rivers-Report-Exec-Summary-English-optimized.pdf>>. See also Katie O'Bryan, 'Legal Rights for Rivers' (2022) 50(3) *Georgia Journal of International and Comparative Law* 769, 771. In relation to calls for legal personhood recognition for nature see Devon Alexandra Berman, 'Lake Erie Bill of Rights Gets the Ax: Is Legal Personhood for Nature Dead in the Water?' (2019) 20(1) *Sustainable Development Law and Policy* 15 <<https://doi.org/10.1007/s11196-022-09920-7>>; Tineke Lambooy, Jan van de Venis and Christiaan Stokkermans, 'A Case for Granting Legal Personality to the Dutch Part of the Wadden Sea' (2019) 44(6-7) *Water International* 786 <<https://doi.org/10.1080/02508060.2019.1679925>>. In 2006, the *Tamaqua Borough Sewage Sludge Ordinance* made Pennsylvania the first community ordinance to accord rights to a local ecosystem via legal personhood: see David R Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (ECW Press, 2017) 112.

1 Whanganui River/Te Awa Tupua, New Zealand

In March 2017, the Whanganui River in New Zealand was granted legal personhood as part of the conclusion of the *Treaty of Waitangi Claims of Tuhoe*.⁹⁰ This represents the first instance globally in which a river has been declared to be a legal person.⁹¹ This development is suggestive of the ways that the classically Western doctrine of legal personhood can be applied in different ways.⁹² It also suggests a path towards evolving the doctrine of legal personhood to embrace legal pluralism. In this respect, the nature of the Whanganui experience suggests that legal personhood can be adapted to accommodate diverse cultures, beliefs and laws where they coexist.⁹³ Further, the Whanganui experience indicates a way that the legal regulation of human and non-human relationships may change in the future.⁹⁴

The recognition of the Whanganui River as a legal person came about because of a claim brought by the Te Atihaunui-a-Paparangi people⁹⁵ to rights of ‘ownership, management, and control’ of the river.⁹⁶ The Atihaunui refer to the river as *Te Awa Tupua*, which means that the river ‘either is an ancestor itself or derives from ancestral title’.⁹⁷ According to the Atihaunui, the river is something that cannot be owned but rather is a living body that is indivisible from them. In this respect, ‘land, water and people are treated as one and the same’.⁹⁸ This can be seen from the description of the river as ‘the aortic artery, the central bloodline of that one heart’.⁹⁹ The nature of the relationship between the Atihaunui and the Whanganui River, and the importance of ensuring that the resolution of claims to the river sufficiently respected Māori law were critical to the granting of legal personhood to the river.¹⁰⁰

The *Te Urewera Act 2014* (NZ) establishes the personhood and rights of the Whanganui River. Pursuant to the Act, the Whanganui River has all the rights of a legal person,¹⁰¹ which it exercises through an independent body that acts as the voice of the river. Representation on the independent body is comprised of one person nominated by the Atihaunui and one person nominated by the Crown.¹⁰² While the Atihaunui people are entitled to continued use of the river, they are not

90 *Whanganui River Claims Settlement Act* (n 8).

91 Jeremy Lurgio, ‘Saving the Whanganui: Can Personhood Rescue a River’, *The Guardian* (online, 30 November 2019) <<https://www.theguardian.com/world/2019/nov/30/saving-the-whanganui-can-personhood-rescue-a-river>>; Matthias Kramm, ‘When a River Becomes a Person’ (2020) 21(4) *Journal of Human Development and Capabilities* 307, 307 <<https://doi.org/10.1080/19452829.2020.1801610>>.

92 Barcan (n 7) 821.

93 On legal pluralism, see John Griffiths, ‘What is Legal Pluralism?’ (1986) 18(24) *Journal of Legal Pluralism and Unofficial Law* 1 <<https://doi.org/10.1080/07329113.1986.10756387>>; Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, 11 June 1986) 167 <<https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC31.pdf>>.

94 Liz Charpleix, ‘The Whanganui River as Te Awa Tupua: Place-based Law in a Legally Pluralistic Society’ (2017) 184(1) *Geographical Journal* 19, 19 <<https://doi.org/10.1111/geoj.12238>>.

95 The Māori people of the Whanganui River.

96 Waitangi Tribunal, *The Whanganui River Report* (Report, 1999) xiii.

97 *Ibid* xiv.

98 *Ibid* 46.

99 *Ibid* 379.

100 See, eg, Kramm (n 91) 310.

101 *Ruruku Whakatupua: Te Mana o Te Awa Tupua* (Deed of Settlement, 5 August 2014) s 2.3.

102 Charpleix (n 94) 24.

entitled to prevent public access to the river and existing Western private property rights remain.¹⁰³

2 *Yamuna and Ganges River, India*

Only days following the enactment of legislation granting legal personhood to the Whanganui River, the High Court of Uttarakhand in India granted legal personhood to the Yamuna and Ganges Rivers.¹⁰⁴ In its judgment, the High Court stated ‘the Rivers Ganga and Yamuna, all their tributaries, streams, every natural water flowing with flow continuously or intermittently of these rivers, are declared as juristic/legal persons/living entities having the status of a legal person with all corresponding rights, duties and liabilities of a living person’.¹⁰⁵ The Court granted legal personhood to the rivers on the basis that the rivers were of great significance to the Indian people and that they were being exposed to environmental destruction that threatened their existence.¹⁰⁶

The framework for the rivers’ legal personhood is distinct from that of the Whanganui River. The High Court drew upon a guardianship model like that used for minors, identifying positions within the state government to act as guardian for the rivers. These positions included the Director of Namami Gange, the Chief Secretary of the State of Uttarakhand and the Advocate General of the State of Uttarakhand. The guardians are responsible for being ‘the human face’ of the rivers and are obligated to ‘protect, conserve and preserve’ the rivers.¹⁰⁷

These appointments, however, led to an appeal against the High Court’s decision. The State Government of Uttarakhand contended that the duties of the guardians were uncertain because the rivers stretch outside the borders of Uttarakhand. The Supreme Court of India agreed to hear the appeal and accordingly, arrested any impact of the initial case. This appeal is yet to be resolved and thus the High Court’s judgment is yet to be implemented.¹⁰⁸

3 *Mar Menor Saltwater Lagoon, Spain*

More recently in Spain, the *Law for the Recognition of Legal Personality of the Mar Menor and Its Basin* (‘*Mar Menor Law*’) was enacted.¹⁰⁹ Mar Menor is the largest saltwater lagoon in both Spain and Europe, and its existence is

103 *Whanganui River Claims Settlement Act* (n 8) ss 16, 46(2); Kramm (n 91) 308.

104 Erin L O’Donnell and Julia Talbot-Jones, ‘Creating Legal Rights for Rivers: Lessons from Australia, New Zealand, and India’ (2018) 23(1) *Ecology and Society* 7:1–10, 1 <<https://doi.org/10.5751/ES-09854-230107>>.

105 *Mohd Salim v State of Uttarakhand* (UHC, WPIL 126/2014, 20 March 2017) (High Court of Uttarakhand).

106 *Ibid* 4, 11 (Sharma J).

107 *Ibid* 11–12; O’Donnell and Talbot-Jones (n 104) 4.

108 O’Donnell and Talbot-Jones (n 104) 4. See also Erin O’Donnell, ‘Rivers as Living Beings: Rights in Law, but No Rights to Water?’ (2020) 29(4) *Griffith Law Review* 643, 654 <<https://doi.org/10.1080/10383441.2020.1881304>>; Erin O’Donnell, ‘At the Intersection of the Sacred and the Legal: Rights for Nature in Uttarakhand, India’ (2018) 30(1) *Journal of Environmental Law* 135 <<https://doi.org/10.1093/jel/eqx026>>.

109 *Ley 19/2022* (n 10).

seriously threatened by pollution as a result of agricultural and mining activities. The *Mar Menor Law* was prompted by the significant ‘environmental, ecological and humanitarian crisis’ faced by the lagoon and its inhabitants, as well as the inadequacy of current legal protections.¹¹⁰ Passage of the legislation makes the lagoon the first European ecosystem to be awarded legal personhood and rights.¹¹¹

The *Mar Menor Law* recognises Mar Menor as a legal person, having the right to life, the right to protection, the right to conservation and the right to recuperation.¹¹² Under the *Mar Menor Law*, positive obligations in relation to conservation of the lagoon are imposed on Spanish public authorities,¹¹³ including a requirement to ‘immediately restrict those activities that could lead to the extinction of species, the destruction of ecosystems or the permanent alteration of the natural cycles’.¹¹⁴ Mar Menor is to be represented by a Committee of Representatives, a Monitoring Commission and a Scientific Committee, which includes the involvement of citizens and scientific experts.¹¹⁵ In addition, any citizen or legal entity is allowed to commence litigation on behalf of the lagoon in order to defend the ecosystem.¹¹⁶

4 Australian Developments

In Australia, there have been several developments towards the recognition of legal rights for nature. While Australia is a federation, power to legislate in relation to water rests with the states and territories.¹¹⁷ In 2010, the Victorian Government adapted the idea of legal rights for nature to protect rivers within its jurisdiction.¹¹⁸ This involved establishing the Victorian Environmental Water Holder (‘VEWH’) as a body corporate to hold and exercise water rights to safeguard the aquatic environment.¹¹⁹ In essence, this meant that the VEWB was a legal person with legal rights, which it was able to exercise on behalf of the aquatic environment.¹²⁰

Further, in 2017 in Victoria, the Yarra River/Birrarung was granted legal rights via the *Yarra River Protection (Wilip-gin Birrarung murrn) Act 2017* (Vic) (‘*Yarra River Protection Act*’). While the Act does not grant the river legal

110 Ibid preamble.

111 Carolijn Terwindt and Jessica den Outer, ‘Legal Personality for the Mar Menor Lagoon in Spain’, *Embassy of the North Sea* (Web Page) <<https://www.embassyofthenorthsea.com/legal-personality-for-the-mar-menor-lagoon-in-spain/>>. See also Sam Jones, ‘Endangered Mar Menor Lagoon in Spain Granted Legal Status as a Person’, *The Guardian* (online, 22 September 2022) <<https://www.theguardian.com/world/2022/sep/21/endangered-mar-menor-lagoon-in-spain-granted-legal-status-as-a-person>>.

112 *Ley 19/2022* (n 10) arts 2.1–2.2; Terwindt and den Outer (n 111).

113 *Ley 19/2022* (n 10) art 7.

114 Ibid art 7(4); Terwindt and den Outer (n 111).

115 *Ley 19/2022* (n 10) arts 3.1–3.4. Note that while the government still plays a significant role in both the Commission of Representatives and Monitoring Commission, ‘[a]ny act or action of any of the public administrations that violates the provisions contained in this Law shall be considered invalid and shall be reviewed administratively or judicially’: at art 5 [tr Editors]. See also Terwindt and den Outer (n 111).

116 *Ley 19/2022* (n 10) art 6; Terwindt and den Outer (n 111).

117 O’Donnell and Talbot-Jones (n 104) 3.

118 Ibid.

119 Ibid; Erin O’Donnell and Elizabeth Macpherson, ‘Voice, Power and Legitimacy: The Role of the Legal Person in River Management in New Zealand, Chile and Australia’ (2019) 23(1) *Australasian Journal of Water Resources* 35, 38 <<https://doi.org/10.1080/13241583.2018.1552545>>.

120 O’Donnell and Talbot-Jones (n 104) 3; O’Donnell and Macpherson (n 119) 38.

person status, it does acknowledge it as ‘one living and integrated natural entity’.¹²¹ Similar to the Whanganui River example, the Act recognises the significant role that the Yarra River/Birrarung holds for Indigenous Australians.¹²² In this respect, the Act’s preamble recognises the ‘intrinsic connection of the traditional owners to the Yarra River and its Country’,¹²³ while section 49 requires that at least two members of the Birrarung Council be nominees of the Wurundjeri Tribe Land and Compensation Cultural Heritage Council.¹²⁴ The *Yarra River Protection Act* sets up a framework for the management and protection of the Yarra River. It establishes legal guardianship of the river via the Birrarung Council, which is independent of government and responsible for ‘advocat[ing] for protection and preservation of the Yarra River’.¹²⁵

Similar legislation has also recently been enacted in relation to the Great Ocean Road (‘GOR’) and environs in Victoria. The *Great Ocean Road and Environs Protection Act 2020* (Vic) (‘GOR Act’) recognises the GOR as ‘one living and integrated natural entity’,¹²⁶ though stops short of granting it legal personhood. Like the *Yarra River Protection Act*, it recognises the ‘intrinsic connection of the traditional owners’ to the GOR,¹²⁷ and provides for partnership with and inclusion of traditional owners in policy development and management of the GOR.¹²⁸ It also creates a legal guardianship arrangement for the GOR, which is represented by the Great Ocean Road Coast and Parks Authority, responsible for the ‘protect[ion], conserv[ation], rehabilitat[ion] and manage[ment]’ of the GOR.¹²⁹

In Queensland, the Environmental Defenders Office of North Queensland launched a campaign in 2014 seeking legal person status for the Great Barrier Reef.¹³⁰ Like other natural environments, the Great Barrier Reef has suffered significant environmental damage, particularly from mass bleaching events caused by global warming,¹³¹ which have been compounded by heavily criticised political decisions relating to the Reef.¹³² Unfortunately, significant funding cuts to the

121 *Yarra River Protection (Wilip-gin Birrarung murrn) Act 2017* (Vic) s 1(a) (‘*Yarra River Protection Act*’). See Richardson and Hamaski (n 17) 163; Katie O’Byrne, ‘New Law Finally Gives Voice to the Yarra River’s Traditional Owners’, *The Conversation* (online, 25 September 2017) <<https://theconversation.com/new-law-finally-gives-voice-to-the-yarra-rivers-traditional-owners-83307>> (‘New Law’). See also Erin O’Donnell, *Legal Rights for Rivers: Competition, Collaboration and Water Governance* (Routledge, 1st ed, 2018) 183 (‘*Legal Rights for Rivers*’).

122 Richardson and Hamaski (n 17) 163.

123 *Yarra River Protection Act* (n 121) preamble para 2.

124 *Ibid* s 49.

125 *Ibid* s 5(d). See Katie O’Byrne, ‘The Changing Face of River Management in Victoria: The *Yarra River Protection (Wilip-gin Birrarung murrn) Act 2017* (Vic)’ (2019) 44(6–7) *Water International* 769, 770 <<https://doi.org/10.1080/02508060.2019.1616370>>.

126 *Great Ocean Road and Environs Protection Act 2020* (Vic) s 1(a) (‘GOR Act’).

127 *Ibid* preamble para 1.

128 *Ibid* ss 14(2)–(3), 48(3)(a).

129 *Ibid* s 47.

130 Barcan (n 7) 812.

131 *Ibid*; Great Barrier Reef Marine Park Authority, Australian Institute of Marine Science and Commonwealth Scientific and Industrial Research Organisation, *Reef Snapshot: Summer 2021–22* (Report, 2022) 3.

132 See Barcan (n 7) 812.

Environmental Defenders Offices have stalled the campaign and made a successful outcome unlikely.¹³³

Arguments have also been made for the attribution of nature rights to other significant environments in Australia. The Murray-Darling Basin has suffered considerable damage because of overuse.¹³⁴ To prevent further damage, Peter Burdon argues that an approach based on Earth Jurisprudence¹³⁵ would offer ‘a unique holistic insight into the management of the Basin’.¹³⁶ Similarly, Benjamin J Richardson and Nina Hamaski contend that rights of nature protections would ‘ostensibly offer material benefits relative to conventional protect[ions]’ in relation to the Tarkine wilderness in Tasmania.¹³⁷

C Animals

While significant changes in law to recognise legal rights for nature have been achieved, arguments for legal personhood for animals have also received some success, although perhaps to a lesser extent. Change has been sought in various jurisdictions through both the legislature and the courts. To date, two of the most successful efforts have resulted from legal cases initiated in Ecuador and Argentina. In Ecuador, an action was filed seeking the release of a woolly monkey named Estrellita from a zoo. Estrellita had been seized from her home of 18 years and transferred to the zoo on the basis that keeping a ‘wild animal’ is banned in Ecuador. While Estrellita died within a month of her transfer to the zoo, the Constitutional Court of Ecuador held that non-human animals can have legal rights and ordered the drafting of new legislation to protect the rights of animals.¹³⁸ Similarly, in Argentina, a legal case was initiated seeking liberty from imprisonment at a zoo for a chimpanzee named Cecilia. Cecilia had been held in captivity at the Mendoza Zoo in Argentina for over 20 years until a habeas corpus writ seeking release from imprisonment was filed on her behalf. The writ was granted in November 2016 along with a declaration that Cecilia is a non-human person and the subject of rights.¹³⁹ While numerous habeas corpus writs have been

133 Ibid.

134 Peter Burdon, ‘Earth Jurisprudence and the Murray-Darling: The Future of a River’ (2012) 37(2) *Alternative Law Journal* 82, 83 <<https://doi.org/10.1177/1037969X1203700203>> (‘Earth Jurisprudence’).

135 Earth Jurisprudence ‘stresses human interconnectedness and dependence with the natural world’, with one of its key principles being the recognition of the rights of nature: ‘Earth Jurisprudence’, *Australian Earth Laws Centre* (Web Page) <<https://www.earthlaws.org.au/aclc/earth-jurisprudence/>>.

136 Burdon, ‘Earth Jurisprudence’ (n 134) 85.

137 Richardson and Hamaski (n 17) 160.

138 Corte Constitucional del Ecuador [Constitutional Court of Ecuador], *Rights of Nature and Animals as Subject of Rights, ‘Estrellita Monkey’ Case*, No 253-20-JH/22, 27 January 2022 <<https://animal.law.harvard.edu/wp-content/uploads/Final-Judgment-Estrellita-w-Translation-Certification.pdf>>; ‘A Landmark Ruling for Animal Rights in Ecuador’, *Nonhuman Rights* (Blog Post, 23 March 2022) <<https://www.nonhumanrights.org/blog/landmark-ruling-animal-rights-ecuador/>>; ‘Historic Milestone in Ecuador: Constitutional Court Recognizes Individual Animals as Subjects of Rights Protected by the Rights of Nature’, *World Lawyers’ Pledge on Climate Action* (Web Page, 8 May 2022) <<https://lawyersclimatepledge.org/historic-milestone-in-ecuador-constitutional-court-recognizes-individual-animals-as-subjects-of-rights-protected-by-the-rights-of-nature/>>.

139 *Re Cecilia* (n 11); Macarena Montes Franceschini, ‘Animal Personhood: The Quest for Recognition’ (2021) 17 *Animal and Natural Resource Law Review* 93, 124.

filed on behalf of animals in various jurisdictions, to date this is the only one that has been successful.¹⁴⁰

Nevertheless, some habeas corpus cases may be understood as resulting in positive outcomes for animals. For example, in Brazil in 2005, Judge Cruz agreed to hear arguments in relation to a writ for habeas corpus filed on behalf of Suíça the chimpanzee, rather than declare the case inadmissible on procedural grounds.¹⁴¹ This constituted the first instance in which an animal obtained standing to claim a right to liberty in court.¹⁴² Further, in several cases initiated by the NhRP, judges have made statements that have been interpreted positively by animal advocates. For example, in a writ heard by the New York Court of Appeals in 2018, Judge Fahey declared:

The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a ‘person’, there is no doubt that it is not merely a thing.¹⁴³

Similarly, Tuitt J of the Supreme Court of New York expressed sympathy for the situation of Happy the elephant in *Nonhuman Rights Project Inc v Breheny* in her judgment of 18 February 2020.¹⁴⁴ She stated that ‘[t]his Court agrees that Happy is more than just a legal thing, or property. She is an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty’.¹⁴⁵ Nevertheless, Tuitt J held that the Court was bound by precedent to find against the case brought on behalf of Happy.¹⁴⁶

Outside of habeas corpus cases, increased legal recognition for animals has been achieved in several jurisdictions. For example, in July 2018, the High Court of Uttarakhand in India recognised ‘[t]he entire animal kingdom ... as legal entities having a distinct persona with corresponding rights, duties and liabilities of a living person’.¹⁴⁷ Similarly, in 2019, the Punjab and Haryana High Court of India granted animals the ‘rights, duties, and liabilities of a living person’.¹⁴⁸ These decisions have been criticised on the basis that they both involved the respective courts seeking to

140 For example, the NhRP has filed numerous habeas corpus writs in the United States but none have been successful thus far: see ‘Litigation’, *Nonhuman Rights Project* (Web Page) <<https://www.nonhumanrights.org/litigation/>>.

141 Montes Franceschini (n 139) 97; Pedro Pozas Terrados, ‘Por parte del Proyecto Gran Simio, se presenta un Habeas Corpus a un chimpancé en Brasil’ [‘On the Part of the Great Ape Project, a Habeas Corpus Is Presented to a Chimpanzee in Brazil’], *Great Ape Project* (Press Release, 25 February 2010) [tr Editors] <<https://www.projetogap.org.br/es/noticia/por-parte-del-proyecto-gran-simio-se-presenta-un-habeas-corpus-a-un-chimpance-en-brasil/>>.

142 Unfortunately, Suíça died from poisoning the day before her hearing: Montes Franceschini (n 139) 97.

143 *Lavery* (n 33) 7.

144 (NY Sup Ct, No 260441/19, 18 February 2020).

145 *Ibid* 10.

146 Note also that a further judgment concerning Happy was passed down by the New York Court of Appeals in June 2022, finding once again that Happy could not be a legal person: *Nonhuman Rights Project Inc v Breheny* (NY Ct App, 14 June 2022) slip op 3859.

147 *Narayan Dutt Bhatt v Union of India* (UHC, PIL No 43/2018, 4 July 2018) [99A] (Sharma J).

148 *Karnail Singh v State of Haryana* (PHHC, CRR-533-2013, 31 May 2019) [29] (Sharma J).

enforce animal welfare law, rather than recognising animals as the subject of rights.¹⁴⁹ Neither court identified which rights animals were entitled to or how legal personhood would operate, and thus these rights may be seen as primarily symbolic.¹⁵⁰ Perhaps of more significance then is that in May 2020, the Islamabad High Court of Pakistan held that animals are rights-holders rather than mere property,¹⁵¹ and ordered the release of Kaavan the elephant from Marghazar Zoo.¹⁵²

IV EVOLVING CONCEPTIONS OF LEGAL PERSONHOOD AND POSSIBLE IMPLICATIONS FOR ANIMALS IN AUSTRALIA

Given that the binary conception of personhood has been endorsed in Australia, it follows that animals are not typically accepted as holding legal rights in Australian jurisdictions. If, however, the traditional conception was rejected and the current legal status of animals was approached from the perspective of Kurki's proposed re-conception of legal personhood, it could be accepted that animals in Australia hold limited legal rights. For instance, in Queensland (and across Australia, with some variation) the *Animal Care and Protection Act 2001* (Qld) prohibits a person from causing an animal 'pain that, in the circumstances, is unjustifiable, unnecessary or unreasonable'.¹⁵³ Here, the interest of an animal in not experiencing pain grounds a duty in others, which could conceptually be considered a legal animal right.¹⁵⁴ Thus, animals (as defined in the legislation) would have a right to not be subjected to unjustifiable pain. However, as Saskia Stucki explains, this process of legal reasoning would result in 'a rather odd subgroup of "animal welfare rights" that have a narrow substantive scope protecting highly specific, secondary interests'.¹⁵⁵ Further, given that the animals protected by this limited right would have no ability to enforce their interests and are endowed with so few incidents of legal personhood, any rights that animals may currently be said to hold under Australian law are far from having any of the normative power typically associated with rights. Against this backdrop, this Part explores the ways in which personhood may evolve to improve the current legal status of animals in Australia.

A Public Support for Animals

Any change to the property status of animals in Australia would likely result from an action of the legislature as opposed to the judiciary.¹⁵⁶ Given that Australia is a representative democracy, the opinion of the Australian public is therefore a

149 Montes Franceschini (n 139) 143.

150 Ibid.

151 *Islamabad Wildlife Management Board* (n 11) 57–9 (Minallah CJ).

152 Ibid 62.

153 *Animal Care and Protection Act 2001* (Qld) s 18(2)(a) ('*Qld Animal Protection Act*').

154 See generally Stucki (n 44).

155 Ibid 549.

156 As discussed in Part IV(B) below.

crucial element in any effort to transform the property status of animals.¹⁵⁷ There is, however, limited evidence that the Australian public is aware of the legal status of animals or supports a transformation of their property status. Geeta Shyam has conducted one of the only empirical enquiries into the attitudes of the Australian community towards the property status of animals.¹⁵⁸ Shyam found that 58% of respondents did not know that animals were legally classified as property.¹⁵⁹ Shyam also found that only 26% of respondents agreed that the legal status of animals should be one of property.¹⁶⁰ As Shyam notes: '[t]his knowledge gap potentially explains why the legal status of animals has remained static. One cannot be expected to challenge the status if they are unaware of its existence.'¹⁶¹ Thus, further educational efforts and research into community attitudes are required to ascertain the stance of the Australian public in relation to animal personhood.

While personhood itself may not be at the forefront of public opinion, there is support for increased animal protection over and above what the current welfarist framework is providing. For instance, a 2018 report commissioned by the federal Department of Agriculture and Water Resources found that a majority of respondents agree 'that animals possess rights and freedoms'.¹⁶² While not directly related to personhood, a large majority of respondents believed that animals should be free from unnecessary suffering, fear and distress, and pain, injury or disease.¹⁶³ There have also been legal developments that seemingly operate to distance animals from their property status, and these changes are largely supported by the Australian public. For instance, the Australian Capital Territory ('ACT') now explicitly recognises the sentience of animals in their animal welfare legislation.¹⁶⁴ This legislative change was backed by the community, with public consultation in relation to the Animal Welfare Legislation Amendment Bill 2019 (ACT) demonstrating a 'very high degree of support' for '[r]ecognising animals as sentient beings that deserve a quality of life'.¹⁶⁵ Similarly, the Victorian Government has committed to legally

157 This is not to understate the impact of the law itself as a source of normativity that will influence public opinion. See generally Cass R Sunstein, 'On the Expressive Function of Law' (1996) 144(5) *University of Pennsylvania Law Review* 2021 <<https://doi.org/10.2307/3312647>>.

158 Geeta Shyam, 'Is the Classification of Animals as Property Consistent with Modern Community Attitudes?' (2018) 41(4) *University of New South Wales Law Journal* 1418 <<https://doi.org/10.53637/HENG4704>> ('Classification of Animals').

159 Ibid 1430.

160 Ibid 1431. This study was limited to Victorian respondents only with a small sample size of 286. Note also that respondents differed on the classes of animals they agreed should be legal property, but these classes were not defined.

161 Ibid 1443.

162 Futuerey (n 13) 39.

163 Ibid.

164 'Animals are sentient beings that are able to subjectively feel and perceive the world around them' and 'have intrinsic value and deserve to be treated with compassion and have a quality of life that reflects their intrinsic value': *Animal Welfare Act 1992* (ACT) ss 4A(1)(a)–(b) ('ACT Animal Welfare Act').

165 Transport Canberra and City Services, *Animal Welfare Legislation Amendment Bill 2019* (Consultation Report, May 2019) 3.

recognising animal sentience in their animal welfare legislation.¹⁶⁶ The public has demonstrated support for this change, with 60% of survey respondents supporting the explicit recognition of animal sentience in Victorian legislation.¹⁶⁷ While not directly related to personhood, the explicit recognition of sentience does portray animals as different to other forms of property, which may over time contribute to increased awareness of and support for a transformation of property status.¹⁶⁸

Incremental changes such as sentience recognition are important because they may provide a bridge from being a legal thing to being a legal person.¹⁶⁹ Personhood constitutes a significant transformation that is unlikely to gain widespread community support in the first instance because it may engender fear of unknown consequences or seem ridiculous. As Christopher D Stone explained in his now famous proposal concerning legal rights for nature: '[t]he fact is, that each time there is a movement to confer rights onto some new "entity", the proposal is bound to sound odd or frightening or laughable'.¹⁷⁰ Further support for incremental changes that, to some extent, differentiate animals from their status as legal property may come to introduce the notion of legal personhood in Australia in such a way that a transformation of property status no longer appears a jarring or laughable change. In this respect, the differences in animal protection between countries are not so much the result of the varying legal status of animals, but of the political interaction between interested groups, public opinion and the legislator, and of different political ideologies.¹⁷¹

Thus, animal personhood can be considered a long-term goal, such that animals receive full personhood within the foreseeable future but with sufficient time for impacted industries to adapt to the transition.¹⁷² It is difficult to predict how long it will take to reach a level of sufficient political will required to enact these legal

166 Department of Economic Development, Jobs, Transport and Resources (Vic), *Animal Welfare Action Plan: Improving the Welfare of Animals in Victoria* (Action Plan, December 2017) 14 ('Action Plan'); Department of Economic Development, Jobs, Transport and Resources (Vic), 'A New Animal Welfare Act for Victoria' (Directions Paper, October 2020) 11 ('A New Animal Welfare Act for Victoria').

167 Department of Jobs, Precincts and Regions (Vic), *A New Animal Welfare Act for Victoria* (Engagement Summary Report, April 2021) 8.

168 Several European jurisdictions including France and Germany have also enacted provisions asserting that animals are 'not things'. Other jurisdictions like the Netherlands have passed laws recognising the intrinsic worth of animals. Further, jurisdictions like the United Kingdom and New Zealand have legally recognised that animals are sentient, meaning that they experience the world subjectively and can have both positive and negative feelings. See, eg, *Code Rural et de la Pêche Maritime* [Rural and Maritime Fisheries Code] (France) art L214-1; *Bürgerlichen Gesetzbuches* [Civil Code] (Germany) § 90a; *Wet dieren* [Animals Act] (Netherlands) 22 December 2022, DNO 2022, art 1.3 ('Animals Act (Netherlands)'); *Animal Welfare Sentience Act 2022* (UK); *Animal Welfare Act 1999* (NZ).

169 In relation to the role of animal dignity in overcoming the dichotomy between humans and the 'more-than-human', see, eg, Eva Bernet Kempers, 'Animal Dignity and the Law: Potential, Problems and Possible Implications' (2020) 41(2) *Liverpool Law Review* 173, 183 <<https://doi.org/10.1007/s10991-020-09244-1>>.

170 Stone (n 42) 455.

171 Robert Garner, 'Political Ideology and the Legal Status of Animals' (2002) 8 *Animal Law* 77, 85.

172 Will Kymlicka, 'Membership Rights for Animals' in Julian Baggin (ed), *A Philosophers' Manifesto: Ideas and Arguments to Change the World* (Cambridge University Press, 2022) 213, 219 <<https://doi.org/10.1017/S1358246122000078>>.

changes, although the recent developments described in this article are promising in this respect. In terms of transition, however, some guidance may be gained from the current phase out of battery cages in Australia. In this respect, the Federal Government's decision to phase out battery cages was announced on 18 August 2022 and the phase out process will be complete by 2036.¹⁷³ Thus, a transition period of 10 to 20 years might reasonably be expected.

B Framing Legal Personhood for Animals in Australia

1 The Legislature Must Lead Change

As mentioned above, any change to the legal status of animals in Australia would likely be led by the legislature, rather than the judiciary.¹⁷⁴ The categorisation of animals as property is explicit in various pieces of legislation¹⁷⁵ and animal welfare is thoroughly regulated by the states and territories.¹⁷⁶ The Commonwealth also has general strategies or policies on animal welfare, although these are not legislative instruments.¹⁷⁷ As a consequence, the common law is unlikely to be the place for the development of animal law in Australia. Judges would most likely consider the area to be occupied by the legislature, such that Parliament would be the appropriate place for this development to occur. Mike Radford explains, in the context of Britain (although, equally applicable to Australia), that

it is highly improbable that the judges would consider it appropriate for they themselves to introduce such a novel principle into the law. The courts' subordinate status in relation to Parliament militates against a radical development of this nature: because there already exists a significant body of animal protection legislation, the judges would most likely conclude that the territory has been occupied by Parliament and it would therefore be proper to leave it to that institution to take the initiative in deciding whether it should be further extended.¹⁷⁸

Given the likelihood of legislative involvement in any change to the property status of animals, development in this respect would likely be fiercely contested by interest groups, which may impact regulatory outcomes.¹⁷⁹ Currently, government

173 'Australia Is Banning Battery Cages by 2036 – but It Needs to Happen Sooner', *Australian Alliance for Animals* (Blog Post, 18 August 2022) <<https://www.allianceforanimals.org.au/resources/australian-is-banning-battery-cages-by-2036-but-it-needs-to-happen-sooner/>>.

174 The assumption here is that the legislature is free to create any legal person it sees fit: see Davis (n 41) 5.

175 *Competition and Consumer Act 2010* (Cth) s 4; *Animal Protection Act 2018* (NT) ('an owner of the animal'); *Old Animal Protection Act* (n 152) s 12(1)(a) ('other proprietary interest in the animal'); *Animal Welfare Act 1993* (Tas) s 3A ('is the owner of the animal'); *Animal Welfare Act 2002* (WA) ss 26(a) ('the animal is stock'), 44 ('dealing with seized property' and 'this section does not apply in relation to a seized animal that is fauna, unless the animal had been lawfully taken') ('*WA Animal Welfare Act*').

176 Regardless of the effectiveness of this regulation, the states and territories have clearly taken legislative responsibility for the regulation of animal welfare. For a detailed discussion of the legislative framework, see Elizabeth Ellis, *Australian Animal Law: Context and Critique* (Sydney University Press, 2022) ch 2.

177 Department of Agriculture, Fisheries and the Forestry (Cth), 'Australian Animal Welfare Strategy (AAWS) and National Implementation Plan 2010–2014', *Animal Welfare* (Web Page, April 2011) <<https://www.awe.gov.au/agriculture-land/animal/welfare/aaws/australian-animal-welfare-strategy-aaws-and-national-implementation-plan-2010-14>>.

178 Mike Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (Oxford University Press, 2001) 104.

179 See generally Sophie Riley, *The Commodification of Farm Animals* (Springer, 2022) 205–6.

departments with responsibility for animal welfare also hold responsibility for animal agriculture.¹⁸⁰ This ensures that industry bodies are considered in animal welfare decisions that will impact them. However, it also creates a conflict of interest, whereby the interests of animals may be significantly overshadowed by human interests in commercial activity.¹⁸¹ Nevertheless, if there is a global trajectory towards recognising legal personhood in animals, Australia may follow despite industry resistance. For example, as mentioned above, many jurisdictions have come to explicitly recognise animal sentience in their respective animal welfare legislation, and the Victorian Government is set to follow this legislative trend.¹⁸² This commitment was made despite the then Victorian Farmers Federation president ‘sending a stern warning to the Government that introducing sentience is unnecessary’ following the release of the Victorian Government’s *Animal Welfare Action Plan*.¹⁸³

It is also feasible that an animal rights framework could become a feature of international trade agreements. If this occurred, it would likely influence the Australian Government to recognise animal rights. The recently concluded *Australia-United Kingdom Free Trade Agreement* states that ‘[t]he Parties recognise that animals are sentient beings’.¹⁸⁴ This inclusion was likely a result of the UK Government’s commitment that ‘[i]n all of our trade negotiations, we will not compromise on our high ... animal welfare ... standards’.¹⁸⁵ A similar provision is likely to be included in a forthcoming free trade agreement between Australia and the European Union.¹⁸⁶ To the extent that sentience recognition might constitute a step along a path to legal personhood for animals, similar political pressures would increase the likelihood that Australia may come to recognise animals as legal persons.

It is also important to note that any such change would require a significant shift from the legislature. To date, the Australian legal system has embraced the traditional conception of legal personhood. As discussed in Part II(B), the High Court has endorsed an understanding of the legal person as a ‘right-and-duty-bearing-unit’.¹⁸⁷ Michelle Worthington and Peta Spender explain that courts

180 For example, the Department of Primary Industries (NSW) is responsible for the ‘regulation and administration of biosecurity, food safety, animal welfare and hunting in NSW’: ‘Who We Are’, *Department of Primary Industries (NSW)* (Web Page) <<https://www.dpi.nsw.gov.au/about-us/who-we-are>>.

181 See generally Christine Parker et al, ‘A Public Appetite for Poultry Welfare Regulation Reform: Why Higher Welfare Labelling Is Not Enough’ (2018) 43(4) *Alternative Law Journal* 238, 239 <<https://doi.org/10.1177/1037969X18800398>>.

182 *Action Plan* (n 166) 14; ‘A New Animal Welfare Act for Victoria’ (n 166) 11.

183 Kath Sullivan, ‘Warning on Feelings “Chaos”’, *The Weekly Times* (Melbourne, 10 January 2018) 5.

184 *Australia-United Kingdom Free Trade Agreement*, Australia-United Kingdom, signed 17 December 2021 (not yet in force) art 25.1 (‘AUKFTA’).

185 The Conservative and Unionist Party, ‘Get Brexit Done: Unleash Britain’s Potential’ (Manifesto, 2019) 57.

186 European Union-Australia, ‘European Union’s Free Trade Agreement Proposal’ (Proposal, 10 August 2018) ch XX art X.17(1) <https://web.archive.org/web/20220102175531/https://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157573.pdf> (‘EUFTA Proposal’).

187 Frederic William Maitland, ‘Moral Personality and Legal Personality’ in HAL Fisher (ed), *The Collected Papers of Frederic William Maitland* (Cambridge University Press, 1911) vol 3, 314–5; Worthington and Spender (n 66) 352.

have not taken an expansive approach to corporate legal personhood, ‘generally denying claims for extension and conferring rights only to the extent that they are necessary to give effect to corporate personhood’.¹⁸⁸ With this restricted view of legal personhood, any recognition of personhood and fundamental rights for animals would not only fundamentally change the law concerning animals, but would also have a significant impact on the conceptualisation of personhood in Australia as a whole.

As discussed in Part III(B)(4), however, the Australian legal system has, to some extent, embraced the legal rights for nature approach. It is noteworthy that animals face similar problems to the environment, such that many of the benefits of recognising legal rights in nature are also applicable to animals. Erin L O’Donnell and Julia Talbot-Jones explain that the key problems that necessitate legal developments, such as recognising personhood for nature, ‘involve interconnected ecological and social systems, and include ecological degradation, the under representation of indigenous peoples in decision making, declining resource availability, and climate change’.¹⁸⁹ Animals are an integral part of ecological systems and are similarly impacted by each of these factors. Their use in systems such as factory farming also contributes directly to issues like climate change,¹⁹⁰ making them unwilling participants in the problems they face. However, the approach taken regarding nature rights in Australia does not constitute full legal personhood as has been advocated for animals. This approach is also jurisdictionally limited, given such developments have not been applied consistently across Australia. Thus, while the traditional conception of legal personhood has evolved somewhat in Australia, the recognition of legal personhood for animals would still be considered a significant and radical development from the perspective of the legislature.

2 Practical Considerations

Against this backdrop, it is worthwhile considering how legislatures could best frame legal personhood for animals in Australia. In this respect, Worthington and Spender emphasise the importance of ascribing a legislative purpose to personhood recognition.¹⁹¹ Without a clear purpose underpinning an extension of personhood, ‘courts will be forced to fashion makeshift or “working” purposes, a move which can have profound, unintended consequences for the overall function and influence of synthetic legal persons’.¹⁹² In this respect, guidance may be gleaned

188 Worthington and Spender (n 66) 360.

189 O’Donnell and Talbot-Jones (n 104) 1.

190 See Charlotte E Blattner, ‘Just Transition for Agriculture? A Critical Step in Tackling Climate Change’ (2020) 9(3) *Journal of Agriculture, Food Systems, and Community Development* 53 <<https://doi.org/10.5304/jafscd.2020.093.006>>; Helen Harwatt, ‘Including Animal to Plant Protein Shifts in Climate Change Mitigation Policy: A Proposed Three-Step Strategy’ (2019) 19(5) *Climate Policy* 533 <<https://doi.org/10.1080/14693062.2018.1528965>>; Gowri Koneswaran and Danielle Nierenberg, ‘Global Farm Animal Production and Global Warming: Impacting and Mitigating Climate Change’ (2008) 116(5) *Environmental Health Perspectives* 578 <<https://doi.org/10.1289/ehp.11034>>.

191 Worthington and Spender (n 66) 357.

192 Ibid.

from the limited developments in relation to nature rights occurring in Australia. Both the *Yarra River Protection Act* and the *GOR Act* identify protection as a main purpose supporting each instrument. For instance, the *Yarra River Protection Act* is underpinned by ‘the purpose of protecting it as one living and integrated natural entity’.¹⁹³ Further, both Acts adopt similar phrasing, with the *GOR Act* also recognising the intrinsic value of the GOR as ‘one living and integrated natural entity’.¹⁹⁴

Extrapolating from animal welfare legislation in the ACT, a similar purpose could be found in the protection of animals as beings with ‘intrinsic value’.¹⁹⁵ As Richardson and Hamaski note, however, ‘[f]or most legal systems around the world, the notion of ecosystems or individual species having legal rights for no other purpose than to protect and preserve their health and wellbeing is unorthodox’.¹⁹⁶ Within the current anthropocentric framework, environmental protection typically has some connection to human interests. For instance, while the *GOR Act* recognises the GOR as ‘one living and integrated natural entity’, it also recognises the GOR’s value to ‘the economic prosperity and liveability of Victoria’.¹⁹⁷ Thus, where legal personhood for individual animals does not align with human interests (or goes directly against it), identifying a purpose may be a more ambitious task.

The Australian experience of nature rights also highlights some further practical considerations for constructing legal personhood. In relation to the rights of rivers, O’Donnell and Talbot-Jones identify that ‘an individual or organization must be appointed to act on a river’s behalf, to uphold the rights of, and speak for nature’.¹⁹⁸ They further note the resource implications of ensuring ‘that the rights of the river can be upheld in court’ and emphasise the need for ‘some form of independence’ to exist between the river’s representative and relevant governments.¹⁹⁹ Similarly, in relation to animals, a person or body will need to be empowered to act on behalf of animals. Similar arrangements already exist in the law, for example, a guardianship-model is already in place for infants and other humans that are unable to exercise their autonomy directly.²⁰⁰ An infant bears rights and duties but cannot assert and fulfill those directly. An adult will therefore be appointed as their guardian, and in that capacity, will be expected to ‘administer the legal platform’ of the infant, in the

193 *Yarra River Protection Act* (n 121) s 1(a). Similar phrasing is also evident in the *GOR Act* (n 126). See Richardson and Hamaski (n 17) 163; O’Byrne, ‘New Law’ (n 121).

194 *GOR Act* (n 126) s 1(a).

195 *ACT Animal Welfare Act* (n 164) ss 4A(1)(b), (2)(a).

196 Richardson and Hamaski (n 17) 160.

197 *GOR Act* (n 126) s 1(a).

198 O’Donnell and Talbot-Jones (n 104) 1. See also O’Donnell, *Legal Rights for Rivers* (n 121) 194.

199 O’Donnell and Talbot-Jones (n 104) 1–2.

200 Seymour (n 12).

infant's name and to the infant's benefit.²⁰¹ Hence, as Wise notes, the introduction of animal guardians would hardly be a revolution.²⁰²

Consideration would need to be given to who an appropriate guardian for animals would be. One option is to appoint a legal guardian for animals. In Austria, the *Bundesgesetz über den Schutz der Tiere 2004* establishes an independent Animal Welfare Ombudsman²⁰³ who can represent animal interests in judicial (administrative) proceedings and can refer potential violations of the Act to the prosecuting authorities. In Australia, animal advocates have been seeking the establishment of an independent office for animal welfare for some time,²⁰⁴ which has also been recommended by the Productivity Commission.²⁰⁵ The new Labor Government has committed to establishing an independent animal welfare office.²⁰⁶ Once created, such a body would likely constitute an appropriate legal guardian for animals, particularly given its independence from both government and animal industry bodies.

Any future guardian for animals must have standing to bring actions before a court on behalf of animals. An entity may be said to hold some limited legal rights without being considered a legal person.²⁰⁷ However, if the legal system does not recognise that the entity has standing, those claims are not enforceable in court unless they coincide with the interests of an entity with standing.²⁰⁸ Animals may therefore be considered rights-holders 'without the legal capacity to enforce their rights'.²⁰⁹ Pragmatically, holding a right without being able to defend it in court is of little value to the rights-holder. Thus, in each of the examples of legal personhood for deities, rivers and animals outlined in Part III, personhood enabled

201 Visa Kurki, 'Active but Not Independent: The Legal Personhood of Children' (2021) 30(3) *Griffith Law Review* 395, 402 <<https://doi.org/10.1080/10383441.2021.1996881>>.

202 Steven M Wise, 'Hardly a Revolution: The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy' (1998) 22(4) *Vermont Law Review* 793; Steven Tudor, 'Some Implications for Legal Personhood of Extending Legal Rights to Non-human Animals' (2010) 35 *Australian Journal of Legal Philosophy* 134, 136.

203 *Bundesgesetz über den Schutz der Tiere 2004* [Animal Welfare Act] (Austria) § 41.

204 Independent Office of Animal Welfare Bill 2021 (Cth); 'Independent Office of Animal Welfare', *Animal Liberation* (Web Page) <<https://www.al.org.au/ioaw>>; Voiceless, 'What Is an Independent Office of Animal Welfare?', *Animal Welfare Office* (Web Page, April 2020) <<https://voiceless.org.au/hot-topics/animal-welfare-office/>>; 'Should Australia Have a National Body to Oversee Animal Welfare', *Royal Society for the Prevention of Cruelty to Animals Knowledge Base* (Web Page, 24 February 2021) <<https://kb.rspca.org.au/knowledge-base/should-australia-have-a-national-body-to-oversee-animal-welfare/>>.

205 Productivity Commission, *Regulation of Australian Agriculture* (Inquiry Report No 79, 15 November 2016) 236. See also Steven White, 'Farm Animal Protection Policymaking and the Law: The Impetus for Change' (2018) 43(4) *Alternative Law Journal* 244, 248–9 <<https://doi.org/10.1177/1037969x18788658>>.

206 'What Does the 2022 Federal Election Mean for Animals?', *Australian Alliance for Animals* (Web Page, 24 May 2022) <<https://www.allianceforanimals.org.au/resources/what-does-the-2022-federal-election-mean-for-animals>>.

207 Cass R Sunstein, 'Standing for Animals (with Notes on Animal Rights)' (2000) 47(5) *University of California, Los Angeles Law Review* 1333, 1363 ('Standing for Animals'); Kurki, 'Legal Personhood and Animal Rights' (n 43) 47.

208 See, eg, Stone (n 42) 459–60. For a discussion on the practical implications, see Meg Good, 'Implications for the Law on Standing in Australia' (2014) 10 *Australian Animal Protection Law Journal* 61.

209 Tudor (n 202) 135.

legal representation of the protected entity before the court. As such, a guardian for animals must have standing to bring legal claims on behalf of animals.

Another option is to allow any citizen or organisation to sue on behalf of animals – called open standing. This is the framework adopted for the Mar Menor saltwater lagoon.²¹⁰ This option might arguably provide wider access to justice for animals²¹¹ and give voice to a broader array of perspectives on animal interests.²¹² On the other hand, following Anna Arstein-Kerslake et al's relational personhood concept, because of the lack of a close and active relationship between the plaintiff and the relevant animal(s), open standing would likely lead to a substitution of the plaintiff's will and preference for that of the animal.²¹³ In any event, under an open standing model, the right to sue would ideally be subject to certain conditions. For example, one would only be able to sue *in favour* of animals, defend existing welfare standards or strive for higher ones. Such a right could be considered the procedural extension of the positive 'duty of care' for animal owners and custodians, as currently set out in animal welfare legislation.²¹⁴

In Australia, animal persons would be granted abstract standing in the first instance.²¹⁵ This would allow them, figuratively speaking, into the courtroom, without their interests having to be translated to human interests first. Granting animals abstract standing would in turn open the *possibility* of standing for animals in a particular lawsuit (standing *in casu*).²¹⁶ It would, however, still be up to courts to allow or deny standing in each case by deciding whether the animal has a sufficient interest therein.²¹⁷

3 Including Indigenous Perspectives

It is important to note that while Indigenous perspectives are commonly drawn upon in movements to extend rights to non-human entities, it does not follow that legal personhood itself is always a consistent or suitable manifestation of these perspectives. Virginia Marshall, for example, contends that, in the context of Australia, '[a]n Aboriginal concept of Country is antithetical to the concept of legal personhood'.²¹⁸ Applying Western legal concepts to specific elements of the environment may in fact operate to isolate these areas from the land, to which it is inextricably connected. In this respect, Arstein-Kerslake et al explain that, while nature rights 'may attempt to embody and reflect the laws and cultural protocols

210 See discussion at Part III(B)(3) above.

211 Sunstein, 'Standing for Animals' (n 207) 1366.

212 Laura Spritz and Eduardo M Peñalver, 'Nature's Personhood and Property's Virtues' (2021) 45(1) *Harvard Environmental Law Review* 67, 86.

213 Arstein-Kerslake et al (n 5) 544.

214 *Old Animal Protection Act* (n 153) s 17(2); *ACT Animal Welfare Act* (n 164) ss 6A–6F.

215 Kurki, *A Theory of Legal Personhood* (n 50) 109.

216 Spritz and Peñalver (n 212) 85; Worthington and Spender (n 66) 363. In this respect, it is interesting to note that the potential for standing in environmental matters in the United Kingdom appears to be expanding: see *Walton v The Scottish Ministers* [2012] UKSC 44.

217 Kurki, *A Theory of Legal Personhood* (n 50) 109.

218 Virginia Marshall, 'Removing the Veil from the "Rights of Nature": The Dichotomy between First Nations Customary Rights and Environmental Legal Personhood' (2019) 45(2) *Australian Feminist Law Journal* 233, 238 <<https://doi.org/10.1080/13200968.2019.1802154>>.

of Indigenous peoples, [they] are a Euro-Western interpretation or translation of Indigenous laws and cultural protocols, and often only a weak form of legal pluralism'.²¹⁹ Personhood may therefore serve only to entrench dominant legal orders – gaining improvements in animal treatment from within an anthropocentric framework, rather than challenging that framework directly.

As Maneesha Deckha states, however, 'the consequences of not engaging with the law are too great for animals'.²²⁰ While Deckha advocates for the replacement of legal personhood with a concept of beingness, her point here might also be used to counsel caution before completely dismissing legal personhood, a concept which is firmly entrenched in Western legal systems. Moreover, in light of the developing conceptions of legal personhood, this legal mechanism may present a realistic opportunity to gain greater legal protection for animals in the future – and in this respect, possibly a more realistic opportunity than is presented by advocating for the replacement of this legal concept with a new and untested one. In pursuing this path, it is therefore critical to ensure that the interests of all stakeholders are considered and that the purpose underwriting an extension of legal personhood is itself consistent with the ultimate aims. This will help to ensure that personhood is directed at protecting animals as subjects, without excluding or erasing Indigenous rights or perspectives.

V SOME QUALIFICATIONS

A Australia as an Animal Care and Protection Laggard

While global developments in relation to legal personhood are promising for animals, Australia remains a laggard in terms of animal care and protection.²²¹ For example, under the Voiceless Animal Cruelty Index which focuses on treatment of farmed animals,²²² Australia ranks equal last.²²³ This is due to the high numbers of animals being farmed in Australia, use of factory farms and intensive farming systems, consumption of farmed animals and poor legislative protection for farmed animals.²²⁴ Similarly, under the World Animal Protection's Animal Protection Index, which focuses on legal protections for animals more broadly,²²⁵ Australia has an overall ranking of 'D', well behind global leaders in animal care and protection including the United Kingdom, Sweden, Switzerland and the Netherlands, and on

219 Arstein-Kerslake et al (n 5) 539.

220 Deckha (n 2) 24. Note, however, that Deckha proposes a model of legal 'beingness' to replace legal personhood, as opposed to a re-conception of personhood.

221 'Rankings', *Animal Protection Index* (Web Page) <<https://api.worldanimalprotection.org/>>.

222 Voiceless selects 50 countries from the major producers of farmed animal products and ranks them based on the extent to which they inflict cruelty on farmed animals: 'The Voiceless Animal Cruelty Index', *Voiceless* (Web Page, 2020) <<https://vaci.voiceless.org.au/>>.

223 With Belarus: *ibid*.

224 Voiceless, 'Australia', *VACI Countries* (Web Page) <<https://vaci.voiceless.org.au/countries/australia/>>.

225 The World Animal Protection's Animal Protection Index ranks 50 countries based on their legislative and policy protections for animals: 'Rankings' (n 221).

par with countries including the United States, Russia and Turkey.²²⁶ This might suggest that, despite the promising global context, Australia is unlikely to embrace legal person status for animals.

Nevertheless, three additional elements may influence Australia to take a stronger stance on animal care and protection. The first is the trend towards legally recognising animals as sentient and its recent manifestation in free trade agreements.²²⁷ As discussed in Part IV(B)(1), it appears that Australia is following this legal development.²²⁸ This context is suggestive of the way that international pressure from Australia's allies may influence Australia to follow international moves to recognise animals as legal persons. Second, climate change pressures have highlighted the need for countries to reduce the consumption of animal products.²²⁹ A significant factor in Australia's poor animal welfare reputation is its lack of protection for farmed animals. A reduction in demand for Australian animal products may dispose Australia more favourably to animal personhood. Third, the COVID-19 pandemic has highlighted the need for the global community to take a more ecocentric worldview, captured to some extent in the United Nations' endorsement of One Health.²³⁰ An ecocentric worldview recognises the intrinsic value in humans, animals and the environment, and recognises that humans are interconnected with nature.²³¹ Embracing an ecocentric worldview and/or One Health is likely to heighten awareness of the plight of animals in Australia.

It could be countered that even if Australian legislators came to embrace legal personhood for animals, they may well continue to exclude farmed animals from legal protection. This has broadly been the approach taken in Australian animal welfare legislation and may be seen as a way to enable the continuation of high levels of animal flesh consumption. The argument that farmed animals are unlikely to receive legal protection might also find some support in the international experience of animal rights to date, which has largely focused on the interests of wild animals in captivity. Nevertheless, the legal positioning of sentience as the reason that animal welfare matters provides a strong case for the extension of legal personhood to all sentient animals. Even if legal personhood was initially extended only to non-farmed animals, such a move would be unlikely to go unnoticed by animal advocates who would continue to press for legal personhood for all animals. Moreover, the imperative to reduce carbon emissions and the desire to reduce the risk of future zoonotic disease transmission both require improvements to specifically farmed animal welfare.

226 See 'Australia', *Animal Protection Index* (Web Page) <<https://api.worldanimalprotection.org/country/australia>>. Cf *ibid*.

227 See, eg, *AUKFTA* (n 184) art 25.1.

228 *Ibid*.

229 Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation and Vulnerability* (Report, 2022) 799–801 <https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf>.

230 United Nations Environmental Programme, *Preventing the Next Pandemic: Zoonotic Diseases and How to Break the Chain of Transmission* (Report, 6 July 2020) 39–42, 53 ('*Preventing the Next Pandemic*'). For excellent critical discussion of One Health, see Irus Braverman, *More-than-One-Health: Humans, Animals, and the Environment Post-COVID* (Routledge, 2022).

231 *Preventing the Next Pandemic* (n 230) 39.

B Lack of Human Interest

This article's suggestion that animal personhood is not entirely unrealistic rests, to some extent, on the willingness of at least the jurisdiction of Victoria to embrace nature rights.²³² It might be argued, however, that a clear distinction can be made between legal person status for nature versus animals in Australia. Cases of nature rights in Australia each involve a significant aspect of serving human interest. For example, while the *Yarra River Protection Act* establishes the Birrarung Council to 'advocate for the protection and preservation of the Yarra River',²³³ it also seeks 'to recognise the importance of the Yarra River ... to the economic prosperity, vitality and liveability of Melbourne and the Yarra Valley', which are human rather than nature interests.²³⁴ Similarly, the *GOR Act* aims to recognise the significance of the GOR to 'the economic prosperity and liveability of Victoria'.²³⁵ This might suggest that where animal and human interests conflict, for example, in the case of farmed animals, Australia may be unwilling to prioritise animal interests. In this respect, it will be important to emphasise the interconnectedness of humans, animals and the environment, and the way human exploitation of animals has contributed to social problems including climate change and zoonotic disease transmission.

C Welfarism as an Easier, but Inadequate, Path Forward

Some critics of campaigns for legal personhood for animals argue that better animal protection may be just as successfully accomplished within the current welfarist paradigm, relying on existing doctrines.²³⁶ Pursuant to this argument, it is unnecessary to change animals' legal status. Instead, the focus should be to 'ensure that such rights as are now recognized on paper are actually enjoyed by animals in the world'.²³⁷ For instance, wider access to justice for animals could also be achieved by a flexible interpretation of the standing rules.²³⁸ While these points have merit, animal personhood and welfarist progression are not mutually exclusive. Advocates can and should seek progress in animal welfare and consider the potential of existing law at the same time as seeking attribution of legal personhood for animals. Legal scholars should consider questions of animal welfare, animal personhood and rights as well as the potential for future animal

232 See discussion at Part IV(A) above.

233 *Yarra River Protection Act* (n 121) s 5(d).

234 *Ibid* s 5(a).

235 *GOR Act* (n 126) s 1(a). Moreover, in many successful rights of nature-cases, (Indigenous) culture, being a human interest, has played a vital role: see, eg, Jan Darpö, *Can Nature Get It Right? A Study on Rights of Nature in the European Context* (Report, Policy Department for Citizen's Rights and Constitutional Affairs, March 2021) 48.

236 Richard A Posner, 'Animal Rights' (2000) 110(3) *Yale Law Journal* 539.

237 Cass R Sunstein 'Can Animals Sue?' in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2005) 251, 252.

238 'The critical question of "standing" would be simplified and also put neatly in focus if we ... allowed environmental issues to be litigated ... in the name of the inanimate object about to despoiled, defaced, or invaded': *Sierra Club v Morton*, 405 US 727, 741–2 (Douglas J dissenting) (1972); Sunstein, 'Can Animals Sue?' (n 237) 251; Spritz and Peñalver (n 212) 85.

law.²³⁹ Moreover, this criticism ignores the rhetorical and society-shaping value of animal personhood.²⁴⁰ While they may be easier to achieve, welfarist reforms fail to challenge legal anthropocentrism and thus fall short of what is required to sufficiently acknowledge the interdependence of humans, animals and the environment.²⁴¹ When animals remain objects in the law, they are more likely to remain objects in the public mind.

D Lack of Practical Benefits Flowing from Legal Personhood

Recognition of animals as legal persons would not necessarily improve the situation for animals and may even be counterproductive.²⁴² Some advocates consider personhood to be the ‘holy grail’ for animal protection,²⁴³ erasing most animal suffering and fundamentally changing the human relationship with animals.²⁴⁴ Consideration of nature rights-cases, however, counsels caution. Nature rights have not been particularly successful in achieving practical environmental benefits and often do not survive appeal or lack implementation.²⁴⁵ In Ecuador, for example, while legal personhood for nature is embedded in the *Constitution*,²⁴⁶ courts tend to interpret the relevant provisions restrictively, instead giving preference to human economic interests. The overall practical result of legal personhood for nature in Ecuador has therefore been limited.²⁴⁷

Nevertheless, these potential issues should serve to highlight the importance of close attention to framing animal personhood in the law.²⁴⁸ The recent European experience of ‘dereification’²⁴⁹ of animals suggests that courts may well take animal

239 Regina Binder, ‘Animal Welfare Regulation: Shortcomings, Requirements, Perspectives’ in Anne Peters, Saskia Stucki and Livia Boscardin (eds), *Animal Law: Reform or Revolution?* (Schulthess, 2015) 67, 83.

240 Geeta Shyam, ‘The Legal Status of Animals: The World Rethinks Its Position’ (2015) 40(4) *Alternative Law Journal* 266 <<https://doi.org/10.1177/1037969X1504000411>>.

241 For an explanation of how increased enforcement of existing animal welfare legislation would be insufficient to overcome the ‘human-animal divide’, see Alexia Staker, ‘Should Chimpanzees Have Standing? The Case for Pursuing Legal Personhood for Non-human Animals’ (2017) 6(3) *Transnational Environmental Law* 485, 494 <<https://doi.org/10.1017/s204710251700019x>>.

242 Garner writes that ‘[m]erely abolishing the property status of animals and granting them rights does not guarantee that they will cease to be exploited’: Garner (n 171) 80.

243 See, eg, Jerrold Tannenbaum, ‘Animals and the Law: Property, Cruelty, Rights’ (1995) 62(3) *Social Research* 539, 540–1. Garner calls this belief the ‘animal rights Garden of Eden’: *ibid* 78.

244 See Spritz and Peñalver (n 212) 71 proposing this critique in relation to nature rights.

245 Darpo (n 235) 48.

246 *Constitución del Ecuador de 2008* [Constitution of Ecuador 2008] (Ecuador), 20 October 2008, title II ch 7.

247 Darpo (n 235) 20. Note also that Ecuador utilises a ‘nature’s rights model’. For a discussion on the difference between a ‘nature’s rights model’ and legal personhood models, see Craig M Kauffman and Pamela L Martin, *The Politics of Rights of Nature: Strategies for Building a More Sustainable Future* (MIT Press, 2021) <<https://doi.org/10.7551/mitpress/13855.001.0001>>.

248 For further discussion on framing, see Worthington and Spender (n 66).

249 Tomasz Pietrzykowski, ‘The Idea of Non-personal Subjects of Law’ in Visa Kurki and Tomasz Pietrzykowski (eds), *Legal Personhood: Animals, Artificial Intelligence and the Unborn* (Springer, 2017) 49, 55 <https://doi.org/10.1007/978-3-319-53462-6_4>; Global Research Network, ‘Roundtable Animal Legal Personhood: Perspectives from Continental Law’ (YouTube, 27 March 2021) 01:20:20 <<https://www.youtube.com/watch?v=VsV7MP9YPVlk>>.

interests seriously if given the opportunity.²⁵⁰ Further, to avoid any unnecessary juxtaposition of human and animal interests, efforts should be directed towards educating the public (and the courts) in relation to the interdependence of humans, animals and the environment, and in particular that animal wellbeing may be (in)directly aligned with human wellbeing.²⁵¹

E Challenges in Identifying Which Animals Should Have Which Rights

While animal personhood may be theoretically attractive, legal implementation will present challenges.²⁵² One of the first challenges will be to determine a relevant criterion for inclusion in the category of ‘animal’. Proposals may include sentience, cognition²⁵³ or dignity. With such choice, however, comes the risk of discrimination – either the chosen criterion (temporarily) leaves out certain animal categories or species, or the criterion is not applied indiscriminately. For instance, the Great Apes Project and the NhRP have been criticised for their focus on animals who are not the most exploited in Western countries, such as elephants and chimpanzees as opposed to farmed animals.²⁵⁴

A further challenge will be for courts to determine what animal personhood means in terms of animal rights. As Laura Spritz and Eduardo M Penalver state, ‘the scope and meaning of ... [animal] rights are neither immediately obvious nor easily ascertainable’.²⁵⁵ Even today, centuries after the first recognition of corporate personhood, there is still a lack of clarity in relation to corporate rights.²⁵⁶ It therefore seems important to admit to the evolving nature of animal personhood and its fluid boundaries, while at the same time giving some idea of where the path of animal personhood might lead.²⁵⁷

250 For example, the Western Australian case of *Department of Local Government and Regional Development v Emanuel Exports Pty Ltd* (Magistrates Court of Western Australia, Magistrate Crawford, 8 February 2008) provides one of the only examples of the application of the proportionality test in relation to unnecessary animal suffering. Here, Magistrate Crawford found that the live export of sheep to the Middle East in November 2003 caused them unnecessary harm. The defendant in this case was acquitted due to an inconsistency between the *WA Animal Welfare Act* (n 175) and the Commonwealth law concerning live exports. However, this case provides an otherwise scarce Australian example of the opportunity for a court to consider animal interests, and it is clear in this case that Magistrate Crawford gave serious consideration to the interests of the sheep.

251 Nicholas Kristof, ‘Choosing Animals over People?’, *The New York Times* (online, 7 April 2018) <<https://www.nytimes.com/2018/04/07/opinion/sunday/wildlife-central-african-republic.html>>; Ariel M Tarazona, Maria C Ceballos and Donald Broom, ‘Human Relationships with Domestic and Other Animals: One Health, One Welfare, One Biology’ (2020) 10(1) *Animals* 43 <<https://doi.org/10.3390/ani10010043>>.

252 This is also a point of criticism as regards to rights of nature: see Darpö (n 235) 49.

253 Both Posner and Epstein argue that cognitive capacity should not be the basis for granting personhood or rights: Posner (n 236); Richard A Epstein, ‘Animals as Objects, or Subjects, of Rights’ (Working Paper No 171, University of Chicago, 2002) <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1052&context=law_and_economics>.

254 Kymlicka (n 172) 220.

255 Spritz and Peñalver (n 212) 88.

256 Ibid 72.

257 Posner (n 236) 532.

VI CONCLUSION

Although previously a topic of little scholarly interest,²⁵⁸ legal personhood is now increasingly discussed and critiqued. In this respect, legal personhood has been criticised based on its exclusionary logic: that unless an individual has the capacity to exercise autonomy, their interests are not recognised by the law.²⁵⁹ This approach seems counterintuitive in the context of contemporary human rights law, which is premised at least to some degree on the protection of marginalised and vulnerable populations from oppression and cruelty.²⁶⁰

While legal personhood has been criticised in the literature, its practical operation has also changed. The category of persons recognised by the law has been expanding. Not only are humans and their representatives (corporations, churches, etc) legal persons, but so too are some deities, nature bodies and even animals. Notably, in Australia, the State of Victoria appears to be at least somewhat open to the expansion of legal personhood, in that it has adapted the legal person model to provide legal protection for the Yarra River/Birrarung and the GOR.²⁶¹

This article has investigated whether these developments might foreshadow legal personhood for animals in Australia. Animal advocates have argued that animals need to be re-categorised as legal persons for any meaningful improvement in their circumstances to be achieved.²⁶² Globally, many jurisdictions have sought to improve legal protection for animals within existing animal welfare frameworks, for example, by legally recognising animals as ‘not things’,²⁶³ as having ‘intrinsic worth’,²⁶⁴ or as being ‘sentient’.²⁶⁵ This latter approach of legally recognising animal

258 Kurki, *A Theory of Legal Personhood* (n 50) 18.

259 Arstein-Kerslake et al (n 5).

260 Upendra Baxi, ‘Voices of Suffering and the Future of Human Rights’ (1998) 8(2) *Transnational Law and Contemporary Problems* 125, 127; ‘Universal Declaration of Human Rights: History of the Declaration’, *United Nations* (Web Page) <www.un.org/en/about-us/udhr/history-of-the-declaration>; Jacob Dolinger, ‘The Failure of the Universal Declaration of Human Rights’ (2016) 47(2) *University of Miami Inter-American Law Review* 164, 164.

261 *Yarra River Protection Act* (n 121); *GOR Act* (n 126).

262 See Francione, *Animals as Persons* (n 22); Francione, *Your Child or the Dog?* (n 22) 93–6.

263 See Birgitta Wahlberg, ‘Animal Law in General and Animal Rights in Particular’ (2021) 67 *Scandinavian Studies in Law* 13, 17–18.

264 *Animals Act* (Netherlands) (n 168); *ACT Animal Welfare Act* (n 164) s 4A(1).

265 *Treaty on European Union*, opened for signature 7 February 1992, [1992] OJ C 224/6 (entered into force 1 November 1993), as amended by *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, opened for signature 2 October 1997, [1997] OJ C 340/1 (entered into force 1 May 1999) *Protocol on Protection and Welfare of Animals*; *Consolidated Version of the Treaty on the Functioning of the European Union*, opened for signature 13 December 2007, [2012] OJ C 326/01 (entered into force 1 December 2009) art 13; *Animal Welfare Act 2008* (Tanzania) ss 3, 4(b)(i); Or Rev Stat §167.305 (2021); *Animal Welfare and Safety Act*, CQLR 2016, c B-3.1, preamble; *Ley No 1774 de 2016* [Law 1774 of 2016] (Colombia) arts 1, 665; *Animals Act* (Netherlands) (n 168) art 1.3; *Gyvūnų Gerovės ir Apsaugos Įstatymas* [Law on Welfare and Protection of Animals] (Lithuania) 20 October 2012, TAR, 2012, art 1(a); *Code Civil* [Civil Code] (France) art 515–14; *Djurskyddslag* [Animal Welfare Act] (Sweden), SFS, 2018; *Government Bill* (Sweden) No 2017/18:147; *Law Relating to the Protection and Welfare of Animals 2018* (Brussels) art 1; *Dyrevernsløven* [Animal Welfare Act] (Denmark) 11 January 2017, Lovtidende, 2017, art 1; *Ley 5/2006, de 10 de mayo, del libro quinto del Código Civil de Cataluña* [Civil Code of Catalonia] (Spain), 10 May

sentience has been adopted in the ACT,²⁶⁶ and is set to be followed in Victoria and in Australian free trade agreements.²⁶⁷ At least in Australia, these developments appear to represent attempts by the legislature to respond to increasing public concern for animal wellbeing.²⁶⁸

These developments seem to suggest that legal personhood has become a fluid and fast-moving concept. In the context of the gross failure of other bodies of law, such as environmental law, to protect the natural environment, legal personhood is being grasped at as a tool that may have the potential to protect nature and animals. In Ruth Barcan's words, what we are seeing constitutes 'legal experimentation'.²⁶⁹ While this might sound risky, the unprecedented dire circumstances of the global natural environment call for desperate measures. Thus, while animal personhood in Australia might seem far-fetched, these circumstances may mean it is a realistic possibility in the medium to long-term.

If Australian legislatures do consider animal personhood in the future, they will need to grapple with decisions about how to frame this personhood. This article has extracted some lessons for framing animal personhood from the experiences to date of constructing 'synthetic' legal persons.²⁷⁰ In this respect, a clear purpose for animal personhood would need to be identified. This may be to protect the intrinsic worth of animals as sentient beings. Animals would also need a guardian to represent their interests, who must be independent of government and industry, adequately resourced, and have standing to bring matters relating to animal interests before a court.

2006, BOE 2006, 11130, art 511–1(3); *Animal Welfare Act 1999* (NZ) notes, para (a)(i); *Animal Welfare Sentience Act 2022* (UK) ss 1–2.

266 *ACT Animal Welfare Act* (n 164) s 4A(1)(a).

267 *AUKFTA* (n 184) art 25.1; 'EUFTA Proposal' (n 186) ch XX art X.17(1).

268 Futureye (n 13); Shyam, 'Classification of Animals' (n 158).

269 Barcan (n 7) 813.

270 Worthington and Spender (n 66).