Recognising the Sentience of Animals in Law: A Justification and Framework for Australian States and Territories

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Abstract

Scientific research is clear that most animals are sentient. This means that they have the capacity to subjectively perceive or feel things such as happiness and suffering. At present in Australia, animal sentience is, to some degree, implicitly recognised in animal welfare legislation that is in operation in all state and territory jurisdictions. This legislation criminalises human cruelty towards some animals because of the capacity such action has to cause animal pain and suffering. There is growing public concern in Australia, however, that such legislation does not adequately protect animals from pain and suffering. The Australian Capital Territory ('ACT') has recently responded to this concern by passing amendments to the *Animal Welfare Act 1992* (ACT), which makes it the first Australian jurisdiction to explicitly recognise animal sentience. The ACT amendments follow international precedent. This article analyses this novel development in the law's recognition of animal sentience. It considers the extent to which the ACT legislation is likely to enhance the protection of animals and whether it should be a paradigm, in this respect, for other Australian jurisdictions. It argues that the ACT amendments, while largely symbolic, are a welcome development, and other Australian jurisdictions should follow suit. Nevertheless, further legislative change to increase protections for animals is also required.

I Introduction

If you watch a Labrador retriever bound towards you, tail wagging and tongue hanging out, it appears that he or she is experiencing happiness. In contrast, observing a Whippet or Weimaraner pull his or her ears back, pace around, whine and paw suggests that the dog is feeling insecure and anxious. While such inferences may be anthropomorphic, research in relation to animal capabilities is clear that most animals are sentient.[1] In this respect, sentience refers to the capacity to have

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1 Note this paper uses the term 'animal' to refer to all animals, excluding human beings. While human beings are themselves animals, this popular use of the term animal is helpful for the purposes of clear

feelings.[2] Sentience requires a certain level of consciousness and intellectual capacity, and may include positive feelings such as happiness and pleasure, as well as negative states such as pain and suffering.[3] In particular, it is clear that most animals have the capacity to feel both physical and psychological pain that is similar to that experienced by humans.[4]

At present in Australia, states and territories are largely responsible for regulating animal welfare.[5] Legislation in each of these jurisdictions implicitly recognises, to some degree, that some animals are sentient by criminalising human cruelty towards them and providing examples of such conduct, all of which would cause such animals to suffer. For example, the *Prevention of Cruelty to Animals Act 1979* (NSW) states that an act of cruelty towards an animal includes acts or omissions that 'unreasonably, unnecessarily or unjustifiably' cause the animal to experience pain.[6] Such acts include beating, kicking, killing and wounding an animal.[7]

In recent times, however, there has been growing public concern that, in light of the evidence that most animals are sentient, current laws do not adequately ensure animal wellbeing.[8] Partly in response to such concerns, the Australian Capital Territory ('ACT') amended the *Animal Welfare Act 1992* (ACT) ('*AWA*') by the

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communication: see Peter Singer, *Animal Liberation* (Random House, 2015) xx. In relation to sentience, see Gary E Varner, *Personhood, Ethics, and Animal Cognition: Situating Animals in Hare's Two Level Utilitarianism* (Oxford University Press, 2012) ch 5 especially at 106; David J Mellor, 'Welfare-Aligned Sentience: Enhanced Capacities to Experience, Interact, Anticipate, Choose and Survive' (2019) 9(7) *Animals* 440; Philip Low, 'The Cambridge Declaration on Consciousness' (Conference Paper, Francis Crick Memorial Conference on Consciousness in Human and Non-Human Animals, 7 July 2012); Helen Lambert, Gemma Carder and Neil D'Cruze, 'Given the Cold Shoulder: A Review of the Scientific Literature for Evidence of Reptile Sentience' (2019) 9(10) *Animals* 821; Helen S Proctor, Gemma Carder and Amelia R Cornish, 'Searching for Animal Sentience: A Systematic Review of the Scientific Literature' (2013) 3(3) *Animals* 882; Helen Proctor, 'Animal Sentience: Where Are We and Where Are We Heading?' (2012) 2(4) *Animals* 628. See also the discussion at IIA below.

2 Academic Press, *Encyclopedia of Animal Behavior* (online at 5 October 2020) vol 1, 2 Animal Welfare and Conservation, 'Sentience' [131].

3 Ibid.

4 See Hope Ferdowsian and Debra Merskin, 'Parallels in Sources of Trauma, Pain, Distress, and Suffering in Humans and Nonhuman Animals' (2012) 13(4) *Journal of Trauma and Dissociation* 448, 461; David DeGrazia and Andrew Rowan, 'Pain, Suffering, and Anxiety in Animals and Humans' (1991) 12(3) *Theoretical Medicine* 193, 208; Frank McMillan, 'Psychological Trauma in Animals: PTSD and Beyond' (Conference Paper, International Association of Animal Behavior Consultants Conference, 2 April 2011).

5 The *Australian Constitution* lacks an express power enabling the Commonwealth Parliament to legislate with regard to animal welfare. Several indirect powers, however, empower the Commonwealth Parliament to pass legislation that relates to animals. For example, s 51(i) of the *Australian Constitution*, relating to trade and commerce, underpins Commonwealth legislation in relation to the live export of animals. See Alex Bruce, *Animal Law in Australia: An Integrated Approach* (LexisNexis Butterworths, 2nd ed, 2018) 75–82.

6 *Prevention of Cruelty to Animals Act 1979* (NSW) s 4(2) ('*NSW Act*').

7 Ibid s 4(2)(a).

8 See, eg, Futureye, 'Commodity or Sentient Being? Australia's Shifting Mindset on Farm Animal Welfare' (Research Report, 2018) 10; Transport Canberra and City Services, *Animal Welfare Legislation Amendment Bill 2019* (Consultation Report, May 2019) 8. Note that the term 'wellbeing' rather than 'welfare' is used here to distinguish the discussion from the animal welfare versus animal rights debate: see Jane Kotzmann and Nick Pendergrast, 'Animal Rights: Time to Start Unpacking What Rights and for Whom' (2019) 46(1) *Mitchell Hamline Law Review* 158.

Animal Welfare Legislation Amendment Act 2019 (ACT) ('ACT amendments').[9] The ACT amendments make the ACT the first Australian jurisdiction to *explicitly* recognise animals' sentience in the law — as part of the objects of its animal protection legislation.[10] The ACT amendments are also atypical in Australian animal welfare legislation in that they recognise the 'intrinsic value' of animals and that animals 'deserve to be treated with compassion and have a quality of life that reflects their intrinsic value'.[11]

The ACT amendments seem to constitute an important step in enhancing the legal protection of animals. Specifically, the amendments signify an attempt to soften the traditional legal approach to animals that constructs and treats them as property.[12] This approach to animals permits humans to own animals and generally to treat them in any manner that suits their own interests, subject to the limited conditions placed on them by animal welfare legislation.[13] This approach is found in the common law and statute. By way of example, s 4 of the *Competition and Consumer Act 2010* (Cth) defines 'goods' to include animals — along with ships, aircraft and other vehicles.

Recognition of animal sentience and animals' intrinsic value in the ACT amendments has the potential to improve protection for some animals in that territory. This is primarily because courts are required to take into account the statutory purposes of the *AWA*, including the recognition of animals' sentience, when interpreting the provisions of the *AWA*.[14] This may be important in determining whether particular conduct that causes pain to an animal is 'unjustifiable, unnecessary or unreasonable' and thus constitutes cruelty.[15] Case law from foreign jurisdictions, including that considering relevant provisions in the laws of New Zealand[16] and Quebec,[17] provides some indication of the influence that legal recognition of animal sentience might have in statutory interpretation.[18] Moreover, the symbolic nature of such provisions should not be undervalued. In a context where animals are legally categorised as property, recognising that they are sentient, while not impacting their legal status, may be interpreted as a symbolic rejection of that categorisation.

This article analyses the symbolic importance of the ACT amendments, as well as whether they translate into a meaningful increase in protection for animals. In this respect, the article contributes to the literature on animal law and welfare in that it critiques a novel development in the law's recognition of animal sentience,

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9 Note that as all provisions of the *Animal Welfare Legislation Amendment Act 2019* (ACT) have commenced (at different times: s 2), that Act has been automatically repealed in accordance with the *Legislation Act 2001* (ACT) s 89(1).

10 *Animal Welfare Act 1992* (ACT) s 4A(1)(a) ('*AWA*').

11 Ibid s 4A(1)(b).

12 Bruce (n 5) 76–7.

13 Ibid 77.

14 *Acts Interpretation Act 1901* (Cth) s 15AA ('*Acts Interpretation Act*').

15 *AWA* (n 10) s 6A.

16 *Animal Welfare Act 1999* (NZ) long title ('*AWANZ*').

17 *Animal Welfare and Safety Act*, CQLR 2016, c B-3.1, preamble ('*AWSA (Quebec)*').

18 See Part IV of this article below.

which to date is 'nebulous' and lacks 'scholarly conceptualization'.[19] The article argues that the ACT amendments constitute a positive step in animal protection and that other Australian jurisdictions should consider incorporating similar provisions into their own animal protection legislation. Nevertheless, increased legal protection is required.

In light of animal sentience and public concern for animals, this article argues that the ACT amendments fall short in terms of providing meaningful protection for animals from cruelty inflicted by humans. This is because the *AWA* (and equivalent state and territory legislation) excludes conduct that is in accordance with an approved code of practice or mandatory code of practice relating to animal welfare from the scope of its anti-cruelty obligations,[20] significantly limiting the contexts in which many animals are protected by the law. Moreover, it is usually human needs and wants that determine whether conduct that causes pain to animals is 'unjustifiable, unnecessary or unreasonable'.[21] In this respect, what legislation proscribes in one circumstance may be permissible in another if the relevant animal is used to produce goods like milk or leather.[22]

Part II of this article examines the contextual background to the ACT amendments. Part III considers the ACT amendments' parliamentary history and substantive content. Part IV provides an analysis of the significance of these legislative amendments, with respect to their symbolic importance and ability to provide meaningful increases in protection for animals. In Part V, the article makes recommendations for the reform of animal protection laws both in the ACT and in other Australian jurisdictions. The recommendations made in the article are summarised in the concluding remarks in Part VI.

II Background to the ACT Amendments

A *The Animal Advocacy Movement*

Animal advocacy has flourished over the last 50 years, particularly following the publication of Peter Singer's text, *Animal Liberation*, in 1975.[23] At the same time, pronounced differences in ideology between people within the animal advocacy movement have become apparent. The main division is between those advocating animal rights and those advocating improvements to animal welfare. In this respect, animal rights advocates challenge the legitimacy of human use of animals, and seek fundamental rights for animals.[24] For example, Francione argues that animals need only one right, 'the right not to be treated as the property of humans',[25] and that

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19 Charlotte Blattner, 'The Recognition of Animal Sentience by the Law' (2019) 9(2) *Journal of Animal Ethics* 121, 122.
20 *AWA* (n 10) s 20.
21 Ibid s 6A; Bruce (n 5) 208.
22 Bruce (n 5) 208.
23 Kotzmann and Pendergrast (n 8) 158.
24 Ibid 159.
25 Gary L Francione, 'One Right for All', *New Scientist* (Web Page, 5 October 2005) <https://www.newscientist.com/article/mg18825205-100-one-right-for-all/>.

'vegan education' is the best way to work towards this goal.[26] In contrast, welfare advocates argue that when 'humans use animals for their own ends', animals are entitled to minimum living conditions.[27] For example, welfare advocates might support banning sow stalls, but not challenge the right of humans to raise and kill pigs for human consumption. Animal welfare ideology thus represents an attempt to strike a balance between human interests in using animals and animal interests in living happily and healthily. In contrast, animal rights ideology asserts that animal interests in a good life should outweigh any human interests in using animals. The colossal failure of animal welfare laws to protect animals from human harm together with the inherent strength of rights protections compared with welfare protections support a conclusion that legal rights are more likely to protect animals from human harm.[28] Accordingly, this article adopts the animal rights framework as the normative yardstick against which to assess changes to animal law.

It may be asked where the legal recognition of animal sentience sits within the context of this ideological spectrum. In this respect, it is clear that legally recognising animal sentience will not prevent humans continuing to use animals in various ways and will not change the legal status of animals as property.[29] Nevertheless, legally recognising animal sentience may achieve other objectives. In particular, recognising that animals are capable of experiencing feelings may lead to a reduction in animal suffering caused by humans and a strengthening of legal protection for animals. It might also better reflect community sentiment in relation to how humans should treat animals and provide a scientific foundation to animal welfare laws. Further, legal changes have the potential to improve public awareness and thus generate further change. This article evaluates the likely actual impact of the recognition of animal sentience in the ACT amendments.[30]

B *Animal Sentience in Science*

One of the notable aspects of the ACT amendments is that they make the ACT the first Australian state or territory to explicitly recognise animal sentience in the law. Scientists generally use sentience as a concept that refers to the capacity to have feelings.[31] In this respect, feelings may include sensations like pain, as well as emotional responses like fear, suffering, happiness and joy.[32] A sentient being may also have more complex features including having some ability 'to evaluate the actions of others in relation to itself and third parties, to remember some of its own

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26 Gary L Francione, 'The Abolition of Animal Exploitation' in Gary L Francione and Robert Garner, *The Animal Rights Debate: Abolition or Regulation?* (Columbia University Press, 2010) 64–5, 71; Kotzmann and Pendergrast (n 8) 171.

27 Kotzmann and Pendergrast (n 8) 166.

28 Ibid 182.

29 See Part IV(F)(1) of this article below.

30 See Parts IV–V of this article below.

31 Donald M Broom, 'Considering Animals' Feelings' (2016) 5(1) *Animal Sentience* 1, 2.

32 Donald M Broom, *Sentience and Animal Welfare* (Cabi, 2014) 20; David Degrazia, 'The Ethics of Animal Research: What Are the Prospects for Agreement?' (1999) 8(1) *Cambridge Quarterly of Healthcare Ethics* 23, 26.

actions and their consequences, to assess risks and benefits, to have some feelings, and to have some degree of awareness'.[33]

While there has been a recent global trend towards the express legal recognition of animal sentience,[34] there has been scientific consensus for some time that many animals are sentient.[35] In particular, there is general agreement that vertebrate animals are sentient.[36] Scientific research indicates that parrots, dogs, pigs, cattle, other farm animals, companion animals, laboratory animals, wild mammals and birds are sentient.[37] Further, studies in relation to amphibians, reptiles, fish, cephalopods and crustaceans indicate that they are sentient.[38] There is even the suggestion that snails may be sentient.[39]

C *Public Concern for the Wellbeing of Animals*

Growing public concern in relation to the wellbeing of animals prompted, at least in part, the ACT amendments.[40] This concern stems from increasing awareness of the extent of animal sentience, as well as increased media attention directed towards animal welfare, which has exposed the environments and practices to which sentient animals are often subject.[41] In this respect, critics argue that animals require greater protections than welfare laws generally provide.[42] For example, laws often permit animals used for food to be: subject to painful procedures that may be undertaken

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33 Academic Press (n 2).

34 See, eg, *Animals Act 2011* (Netherlands) art 1.3; *Code Civil* [Civil Code] (France) art 515–14; *Animal Welfare Act 2008* (Tanzania) s 4(b)(i); *AWSA (Quebec)* (n 17) preamble; *Civil Code 2016* (Colombia) art 655; *AWANZ* (n 16) long title; *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 ('*TFEU*'); Donald M Broom, 'Animal Welfare and Legislation' in Frans J M Smulders and Bo Algers (eds), *Welfare of Production Animals: Assessment and Management of Risks* (Wageningen Academic Publishers, 2009) 339, 339.

35 Broom, *Sentience and Animal Welfare* (n 32) 127; Proctor, Carder and Cornish (n 1) 882; Proctor (n 1) 628; Marc Bekoff, 'Animal Emotions: Exploring Passionate Natures' (2000) 50(10) *BioScience* 861.

36 Robert C Jones, 'Science, Sentience, and Animal Welfare' (2013) 28(1) *Biology & Philosophy* 1, 6.

37 Broom, 'Considering Animals' Feelings' (n 31) 8.

38 Ibid; Jones (n 36) 6–8.

39 Broom, 'Considering Animals' Feelings' (n 31) 8.

40 See 'Consultation on the Exposure Draft of the Animal Welfare Legislation Amendment Bill 2019', *ACT Legislation Register* (online) <https://www.legislation.act.gov.au/DownloadFile/ca/db_59376/current/PDF/db_59376.PDF> 3; Futureye (n 8) 4; Responsible Investment Association Australasia, *From Values to Riches: Charting Consumer Attitudes and Demand for Responsible Investing in Australia* (Report, November 2017) 9. See also Department of Economic Development, Jobs, Transport and Resources (Vic), *Animal Welfare Action Plan: Improving the Welfare of Animals in Victoria* (Report, 2018) 12, which showed that 75% of respondents were of the view that animals should be better protected by the law: cited in Sentencing Advisory Council (Vic), *Animal Cruelty Offences in Victoria* (Report, February 2019) 1.

41 Futureye (n 8) 4; Donald M Broom, 'Animal Welfare in the European Union' (Research Paper, European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, January 2017) 9.

42 See, eg, Siobhan O'Sullivan and Dinesh Wadiwel, 'We Have Animal Welfare Laws but They Don't Stop the Suffering', *The Conversation* (online, 21 August 2014) <https://theconversation.com/we-have-animal-welfare-laws-but-they-dont-stop-the-suffering-30703>.

without anaesthetic[43] (including debeaking,[44] dehorning,[45] tail docking,[46] castration[47] and hot branding);[48] kept in restrictive conditions (such as battery cages[49] and sow stalls[50]); deprived of natural light;[51] and killed using painful or violent methods. Animals used for other purposes including entertainment,[52] experimentation,[53] companionship,[54] and animals that live in the wild,[55] are also subject to practices that have been criticised on the basis of their perceived cruelty.

Some countries have amended existing legislation or passed new legislation, including prohibitions on some of these practices, in order to address an increased concern for animal welfare and to better protect animals. It is notable that several countries and regions have recently passed laws that explicitly recognise that animals are sentient beings. These countries and regions include the European Union ('EU') in 2008,[56] France in 2014,[57] Quebec in 2015,[58] New Zealand in 2015,[59] and Colombia in 2016.[60]

Government consultation in relation to the ACT amendments showed that most people consulted supported the proposed Animal Welfare Legislation Amendment Bill

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43 Note that this is the case under both the Model Codes of Practice (see below nn 44–6, 48) and the Australian Animal Welfare Standards and Guidelines. At present, the Model Codes of Practice for the Welfare of Animals are being updated and replaced by the Australian Animal Welfare Standards and Guidelines: 'Australian Animal Welfare Standards and Guidelines', *Department of Agriculture, Water and the Environment* (Cth) (Web Page, 4 February 2020) <https://www.agriculture.gov.au/animal/welfare/standards-guidelines>.

44 See Primary Industries Standing Committee, *Model Code of Practice for the Welfare of Animals: Domestic Poultry* (CSIRO Publishing, 4th ed, 2002) 17 cl 12.5 ('*Poultry MCOP*').

45 See Primary Industries Standing Committee, Parliament of Australia, *Model Code of Practice for the Welfare of Animals: Cattle* (CSIRO Publishing, 2nd ed, 2004) 19 cl 5.8 ('*Cattle MCOP*').

46 See Primary Industries Standing Committee, Parliament of Australia, *Model Code of Practice for the Welfare of Animals: Pigs* (CSIRO Publishing, 3rd ed, 2008) 14 cl 5.6.10 ('*Pigs MCOP*').

47 *Cattle MCOP* (n 45) 17 cl 5.4.

48 See Animal Health Australia, *Australian Animal Welfare Standards and Guidelines for Cattle* (1st ed, 2014) 19–20.

49 See *Poultry MCOP* (n 44) 25–6 (appendix).

50 See *Pigs MCOP* (n 46) 23.

51 *Poultry MCOP* (n 44) 17 cl 12.5.

52 Bruce (n 5) ch 7; Jackson Walkden-Brown, 'Animals and Entertainment' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia* (Federation Press, 2nd ed, 2013) 129, 129; Dominique Thiriet, 'Out of Eden: Wild Animals and the Law' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia* (Federation Press, 2nd ed, 2013) 226, 235–8.

53 Kathrin Herrmann and Kimberley Jayne, *Animal Experimentation: Working Towards a Paradigm Change* (Brill, 2019); Elisa Galgut, 'Raising the Bar in the Justification of Animal Research' (2015) 5(1) *Journal of Animal Ethics* 5.

54 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, 84; Steven White, 'Companion Animals: Members of the Family or Legally Discarded Objects?' (2009) 32(3) *University of New South Wales (UNSW) Law Journal* 852.

55 Thiriet (n 52) 226; Keely Boom and Dror Ben-Ami, 'Shooting Our Wildlife: An Analysis of the Law and Its Animal Welfare Outcomes for Kangaroos & Wallabies' (2011) 5 *Australian Animal Protection Law Journal* 44.

56 *TFEU* (n 34) art 13.

57 *Code Rural et de la Peche Maritime* [Rural and Maritime Fisheries Code] (France) art L214–1.

58 Bill 54, *An Act to Improve the Legal Situation of Animals*, 1st session, 41st Leg, Quebec, 2015, s 1.

59 *AWANZ* (n 16).

60 *Ley No 1774 de 2016* (Colombia) art 665.

2019 (ACT) ('Amendment Bill').[61] The consultation took place from December 2018 to February 2019 and involved 120 individuals and 21 businesses and organisations. Feedback generally showed a 'very high degree of support' for recognising that animals are sentient and accordingly merit a quality of life and universal support for amendments to the law in order to better protect animals.[62]

D *Animal Welfare Laws in Australia*

The legal status of animals facilitates the manner in which humans have treated them. Animals have historically been categorised as property in the same manner that furniture or vehicles are characterised as property.[63] Since they are legal property, owners of animals can buy and sell them, force them to work and generally treat them as they see fit (subject to welfare laws, discussed below).[64] However, given that animals are sentient in a way that other forms of personal property are not, the categorisation of animals as property has been cause for concern and society has become increasingly uneasy with this aspect of law.[65] Indeed, it is notable that animals are the only sentient beings that continue to be categorised as property in law.[66]

All Australian states and territories have enacted laws that seek to protect some animals from exploitation,[67] in accordance with the prevailing ethic that animals are sentient beings deserving of protection.[68] Generally, animal welfare legislation operates to criminalise human conduct towards animals that would cause an animal unnecessary pain or suffering, and to impose positive duties of care on the owners or persons who are in charge of animals. Such legal protections limit the ways in which humans can use and derive benefit from animals, but do not grant animals themselves legal rights.

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61 Transport Canberra and City Services (n 8).

62 Ibid 3. See also Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 16 May 2019, 1809 (Chris Steel, Minister for City Services) ('May 2019 Speech').

63 Geeta Shyam, 'Is the Classification of Animals as Property Consistent with Modern Community Attitudes?' (2018) 41(4) *University of New South Wales (UNSW) Law Journal* 1418, 1418; Steven White, 'Exploring Different Philosophical Approaches to Animal Protection in Law' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia* (Federation Press, 2nd ed, 2013) 31, 31; James Gacek and Richard Jochelson, '"Animal Justice" and Sexual (Ab)use: Consideration of Legal Recognition of Sentience for Animals in Canada' (2017) 40(3) *Manitoba Law Journal* 337, 339; Richard L Cupp Jr, 'Animals as More than "Mere Things," But Still Property: A Call for Continuing Evolution of the Animal Welfare Paradigm' (2016) 84(4) *University of Cincinnati Law Review* 1023, 1026, 1028.

64 Bruce (n 5) 76−7; Gacek and Jochelson (n 63) 339.

65 Broom, 'Animal Welfare in the European Union' (n 41) 35; Cupp (n 63) 1027; Shyam (n 63) 1418.

66 Gacek and Jochelson (n 63) 339. Note that the law has treated slaves, women and children as property in the past.

67 See *AWA* (n 10); *NSW Act* (n 6); *Animal Welfare Act 1999* (NT); *Animal Care and Protection Act 2001* (Qld); *Animal Welfare Act 1985* (SA); *Animal Welfare Act 1993* (Tas); *Prevention of Cruelty to Animals Act 1986* (Vic); *Animal Welfare Act 2002* (WA). In relation to Codes of Practice, see Arnja Dale and Steven White, 'Codifying Animal Welfare Standards – Foundations for Better Animal Protection or Merely a Façade?' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia* (Federation Press, 2nd ed, 2013) 151, 151–6.

68 Steven White, 'Standards and Standard-Setting in Companion Animal Protection' (2016) 38(4) *Sydney Law Review* 463, 463.

E *The* Animal Welfare Act 1992 (ACT) *Framework*

The *AWA* is similar to animal protection legislation in operation in other Australian states and territories. The *AWA* applies to a broad range of animals, comprising various vertebrate species, including amphibians, birds, fish, mammals (other than human beings), as well as reptiles, cephalopods and crustaceans intended for human consumption.[69]

Part 2 of the *AWA* criminalises a range of human conduct in relation to animals. Such conduct includes: failure by a person in charge of an animal to fulfil a duty of care to the animal, such as failing to provide appropriate food and water;[70] cruelty or aggravated cruelty to animals;[71] failure by a person who injures an animal to take reasonable steps to assist with the animal's injury;[72] administering electric shock to an animal in an unauthorised manner;[73] transporting or containing an animal in a way that causes the animal unnecessary injury, pain or suffering;[74] carrying a dog unrestrained in a moving vehicle on a road or road-related area;[75] and carrying out a medical or surgical procedure on an animal where the person undertaking the procedure is not a veterinary practitioner or where the procedure is not for an authorised purpose.[76]

A key distinction between the *AWA* and legislation in other Australian jurisdictions is the prohibitions on particular conduct towards animals in ss 9, 9A, 9B and 9C. In this respect, s 9 creates offences for confining an animal where that confinement causes or is likely to cause injury, pain or death to the animal;[77] an owner confining an animal where the animal is not able to move in a way that is appropriate;[78] and a person in charge of an animal confining the animal in or on a vehicle where such confinement causes or is likely to cause the animal injury, pain, stress or death.[79] Section 9A criminalises the keeping of laying fowls for commercial egg production in battery cages, as they fail to meet the conditions in the *Eggs (Labelling and Sale) Regulation 2019* (ACT).[80] Similarly, s 9B criminalises the keeping of pigs in sow stalls. Finally, s 9C criminalises the removal or trimming of a fowl's beak.

Pursuant to s 20 of the *AWA*, however, the anti-cruelty provisions described above do not apply if the conduct the subject of the alleged offence was in accordance with an approved code of practice or a mandatory code of practice. There are some exceptions to this provision, including the prohibitions in ss 9A, 9B and 9C, which

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69 Note only 'live' animals are included within the definition: *AWA* (n 10) Dictionary (definition of 'animal').
70 Ibid s 6B.
71 Ibid ss 7, 7A.
72 Ibid s 10.
73 Ibid s 13.
74 Ibid s 15.
75 Ibid s 15A.
76 Ibid ss 19, 19A.
77 Ibid s 9(1)(b).
78 Ibid s 9(2)(b).
79 Ibid ss 9(4)(a)–(b).
80 Ibid s 9A(1)–(3).

impose strict liability. Nevertheless, these exemptions operate to remove animals that are the subject of codes of practice — generally farmed animals — from the reach of most anti-cruelty provisions.

The ACT Minister for City Services, Chris Steel, introduced the Amendment Bill into the Legislative Assembly of the ACT Parliament on 16 May 2019.[81] The Bill was developed in line with the Labor Government's *Animal Welfare and Management Strategy 2017–22*, which acknowledges that animals are 'sentient beings' and seeks to ensure a consistent approach to promoting improved animal welfare outcomes.[82] The amendments contained in the Amendment Bill continued the ACT's approach of enacting progressive animal welfare reforms.[83]

III The ACT Amendments

A *Parliamentary History*

Reference to the Hansard record of parliamentary discussion regarding the Amendment Bill shows that the ACT Parliament considers the recognition of animal sentience in legislation to be a very significant change.[84] Chris Steel, the Minister for City Services, Australian Labor Party, stated that the '[B]ill reflects [animals'] … intrinsic value'.[85] Caroline Le Couteur, for the Greens, referred to the change as 'a great step forward'.[86] In particular, her statement revealed that the Greens see the amendments as a change in the way that humans see animals, a better relationship between humans and other species on the earth, a critical step towards that improved relationship and a recognition that humans have 'rights and responsibilities' with regards to animals.[87] The statement from Nicole Lawder, for the Liberal Party, indicated that the Liberals see the change as a shift away from the categorisation of animals as property:

> I must confess that, in some ways, this was something I had to grapple with, because the law and our community have historically treated animals as property, and sentience and reason were reserved for humans. This [B]ill challenges the norm, and it is natural that we should question and be cautious about such a big step in our legislative framework.[88]

It is also evident that the ACT Parliament sees the legal recognition of sentience as both reflective of community opinion and in step with global legislative changes. In parliamentary debate, Labor emphasised the extensive community consultation process and the high level of community support for the legal

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81 Steel, May 2019 Speech (n 62) 1806.

82 Naomi Maxwell, *Animal Welfare and Management Strategy 2017–2022* (Transport Canberra and City Services Directorate, ACT Government, 2016) 5.

83 For example, banning battery cages and sow stalls.

84 Part IIIB discusses other noteworthy changes contained in the *Animal Welfare Legislation Amendment Act 2019* (ACT) (n 9).

85 Steel, May 2019 Speech (n 62) 1806.

86 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 26 September 2019, 3945 (Caroline Le Couteur).

87 Ibid 3945–6.

88 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 26 September 2019, 3948–9 (Nicole Lawder).

recognition of animal sentience.[89] Tara Cheyne, for Labor, indicated that the change would be reflective of community values, and that 'leading jurisdictions around the world are moving towards recognising the sentience of animals in their legislation'.[90] Chris Steel also noted the international trend towards legal recognition of animal sentience.[91]

Of particular interest is that at least some members of the ACT Parliament see recognition of animal sentience as providing a tangible and not just symbolic change. For example, Tara Cheyne (Labor) asserted that the change would enable the *AWA* 'to provide for the physical *and mental* wellbeing of animals'.[92] Nicole Lawder (Liberal) intimated that the change means that the legislation 'considers the mental as well as the physical wellbeing of animals'.[93] Similarly, Chris Steel (Labor) indicated that recognising the sentience of animals would enable the legislation to 'account for the proven fact that animals are not objects but instead beings capable of feeling emotion and pain'.[94]

Section 4A(1)(c) of the Amendment Bill, which stated that 'people have a duty to care for the physical and mental welfare of animals', created discord in the ACT Parliament. Nicole Lawder (Liberal) moved to amend the clause on the basis that the phrase 'duty of care' has significant meaning in the law and thus '[s]ection 4A(1)(c) in its current unqualified form could potentially be interpreted as prohibitive against many acceptable, responsible, humane and common environmental, commercial and recreational activities'.[95] Accordingly, she proposed amendments that expressly recognised practices in particular contexts as not being limited by s 4A(1)(a).[96] The proposed amendments were not successful.[97] Chris Steel (Labor) indicated that the amendments would make s 4 more ambiguous and 'could be seen to limit … sentience'.[98] Caroline Le Couteur (Greens) did not support the amendments on the basis that the Greens would like to see change to some practices in these areas.[99] Thus, it seems clear that the ACT Parliament's intention is that the recognition of sentience in s 4A(1)(a) applies to all animals.[100] This conclusion is supported by the Revised Explanatory Statement for the Bill, which states that

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89 Steel, May 2019 Speech (n 62) 1809. See also Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 26 September 2019, 3955 (Chris Steel, Minister for City Services) ('September 2019 Speech').

90 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 26 September 2019, 3950 (Tara Cheyne).

91 Steel, September 2019 Speech (n 89) 3952.

92 Cheyne (n 90) 3951 (emphasis added).

93 Lawder (n 88) 3948.

94 Steel, September 2019 Speech (n 89) 3952.

95 Lawder (n 88) 3957.

96 Ibid.

97 Ibid 3958.

98 Steel, September 2019 Speech (n 89) 3957.

99 Le Couteur (n 86) 3957.

100 Note that the Liberal Party also proposed amendments in relation to the Amendment Bill s 18. These amendments were similarly rejected on the basis that they might make the provision more ambiguous and might restrict the application of the *AWA*: Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 26 September 2019, 3959–61 (Chris Steel, Nicole Lawder and Caroline Le Couteur).

s 4A aims to mirror community values in relation to animal welfare 'and the proper treatment of *all* animals'.[101]

B *Substance of the ACT Amendments*

The ACT amendments aimed to recognise animals as sentient beings, and bolster animal welfare protections.[102] The amendments comprised significant changes to the *AWA*'s objects, which are set out in s 4A (as amended) as follows:

> (1) The main objects of this Act are to recognise that—
>
> (a) animals are sentient beings that are able to subjectively feel and perceive the world around them; and
>
> (b) animals have intrinsic value and deserve to be treated with compassion and have a quality of life that reflects their intrinsic value; and
>
> (c) people have a duty to care for the physical and mental welfare of animals.
>
> (2) This is to be achieved particularly by—
>
> (a) promoting and protecting the welfare of animals; and
>
> (b) providing for the proper and humane care, management and treatment of animals; and
>
> (c) deterring and preventing animal cruelty and the abuse and neglect of animals; and
>
> (d) enforcing laws about the matters mentioned in paragraphs (a), (b) and (c).

Thus, as noted, the amendments are particularly significant in that they make the ACT the first Australian jurisdiction to explicitly recognise animal sentience in the law.[103] According to the Responsible Minister, Chris Steel, this means that:

> [W]e as a community accept that animals are sentient beings with intrinsic value that can feel pain and emotions and are deserving of an acceptable quality of life. This is based on science and recognises that modern animal welfare is about considering how an animal is coping mentally and physically with the conditions in which it lives.[104]

The amendments to the objects also operate to expressly acknowledge that people have a duty of care to look after both the physical and mental welfare of animals. While the legislation, prior to the ACT amendments, already set out a duty to care for animals,[105] the ACT amendments to the objects strengthen and widen the scope of this duty.

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[101] Revised Explanatory Statement, Animal Welfare Legislation Amendment Bill 2019 (ACT) 12 (emphasis added).

[102] Steel, May 2019 Speech (n 62) 1806.

[103] Ibid.

[104] Ibid.

[105] *AWA* (n 10) s 6B.

Many of the other ACT amendments are also noteworthy. The amendments aim to make the ACT 'a national leader in animal welfare'.[106] In this respect, a number of amendments operate to broaden and strengthen existing protections. For example, the amending legislation broadened the *AWA* s 6A definition of what constitutes cruelty by changing the definition from causing pain that is 'unjustifiable, unnecessary or unreasonable' to 'doing, *or not doing*' something that 'causes, *or is likely to* cause, *injury*, pain, *stress* or death … that is unjustifiable, unnecessary or unreasonable'.[107] Thus, the definition of cruelty now encompasses the failure of a person to prevent unnecessary pain or the likelihood of unnecessary pain. Similarly, the duty of care of a person in charge of an animal set out in s 6B has been expanded and strengthened. A range of additional strict liability offences relating to failure to provide an animal with water or shelter, failure to provide animal with a hygienic environment, failing to properly groom and maintain an animal, failing to exercise a dog, and abandoning an animal supplement this duty of care.[108] The amendments also increase the penalties for a range of offences under the *AWA*.[109]

The ACT amendments also aim to achieve more effective law enforcement. For example, under s 6, the amendments broaden the power of the Animal Welfare Authority to delegate its functions. Part 7 of the *AWA* establishes an 'escalating enforcement framework'[110] to try to prevent further animal cruelty events occurring. As part of this escalating framework, the Animal Welfare Authority has the power to make interim prohibition orders to prevent individuals from being in charge of an animal for a period.[111] Further, the Animal Welfare Authority has been granted the power to seize, retain, sell, rehome or destroy (where necessary) seized animals.[112]

IV The Significance of the ACT Amendments

A *Introduction*

This section discusses the potential impact of the legal recognition of animal sentience in the ACT. In doing so, it draws on the experience of the EU, New Zealand and Quebec, which also recognise sentience in their animal welfare legislation. A small sample of cases provides the foundation for this discussion. This is because the legislative amendments in New Zealand and Quebec are very recent and, accordingly, there has been little relevant case law in those jurisdictions. The EU provisions have been in place for a longer period, however, and, as discussed below, the EU has a quite distinct legal framework and the provisions are somewhat different in nature to the ACT legislative recognition of animal sentience.

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106 Chris Steel (Minister for City Services, ACT Government), 'Bill Passed to Strengthen Animal Welfare Standards' (Media Release, 26 September 2019) <https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/chris-steel-mla-media-releases/2019/bill-passed-to-strengthen-animal-welfare-standards>.

107 *AWA* (n 10) s 6A (emphasis added).

108 Ibid ss 6C–6G. 'Strict liability' means that there are no fault elements for any of the physical elements of the offence: *Criminal Code 2002* (ACT) s 23(1)(a).

109 *AWA* (n 10) ss 7 ('cruelty to animals'), 7A(1)–(2) ('aggravated cruelty to animals').

110 Steel (n 107).

111 Ibid s 86E.

112 Ibid ss 81A, 83A, 86C–86D.

The EU has legally recognised animal sentience for some time. In 1997, a protocol to the *Treaty of Amsterdam* ('Treaty of Amsterdam') referred to animals as 'sentient beings'.[113] In 2006, the *Lisbon Treaty* amended the *Treaty on the Functioning of the European Union* ('*TFEU*') and included an explicit recognition of animal sentience in the form of art 13.[114] The recognition of sentience in both the *Treaty of Amsterdam* and the *TFEU* relates to '[a]ll animals used by people'.[115]

The *TFEU* does not define the term 'sentient' and it is unclear why it was explicitly included.[116] While the EU's brochure on its Animal Welfare Strategy 2012–15 states that recognising animals as sentient beings means that 'they are capable of feeling pleasure and pain',[117] at the time of drafting, there was little discussion as to the reasons for including TFEU art 13.[118] Contextually, however, the inclusion of a recognition of animal sentience fits in with the historical background of a growing concern for animal welfare and thus appears to constitute recognition of the importance of animal interests.[119] From 1974, the EU began introducing directives in relation to animal welfare.[120] Political developments have also demonstrated an increasing concern for animal welfare.[121]

In 2015, New Zealand amended the *Animal Welfare Act 1999* (NZ) ('*AWANZ*') to recognise animal sentience.[122] The *AWANZ* is the primary legislation relating to the welfare of animals in New Zealand, and sets out how people should and should not interact with animals and the obligations people have towards animals.[123] The *AWANZ* covers a wide range of animals, including mammals, birds, reptiles, amphibians, fish, octopus, squid, crab, lobster, and crayfish, but excludes humans.[124] The long title of the *AWANZ* was amended to state that the *AWANZ* is intended 'to reform the law relating to the welfare of animals and the prevention of their ill-treatment; and … *to recognise that animals are sentient*'.[125] While the term

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113 *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) ('*Treaty of Amsterdam*') *Protocol on Protection and Welfare of Animals*.

114 *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, opened for signature 13 December 2007, [2007] OJ C 306/1 (entered into force 1 December 2009) art 13; 'Animal Welfare', *European Commission* (Web Page) <https://ec.europa.eu/food/animals/welfare_en>.

115 Broom, 'Animal Welfare in the European Union' (n 41) 47.

116 Katy Sowery, 'Sentient Beings *and* Tradable Products: The Curious Constitutional Status of Animals under Union Law' (2018) 55(1) *Common Market Law Review* 55, 67.

117 European Commission, *EU Animal Welfare Strategy: 2012–2015*, 1 <https://ec.europa.eu/food/sites/food/files/animals/docs/aw_brochure_strategy_en.pdf>.

118 Sowery (n 116) 67.

119 See Steven White, 'Into the Void: International Law and the Protection of Animal Welfare' (2013) 4(4) *Global Policy* 391, 392.

120 *Council Directive 74/577/EEC of 18 November 1974 on Stunning of Animals before Slaughter* [1974] OJ L 316/10 cited in Sowery (n 116) 62.

121 Sowery (n 116) 64.

122 *Animal Welfare Amendment Act (No 2) 2015* (NZ) s 4.

123 *AWANZ* (n 16) long title; Ministry for Primary Industries (NZ), 'Animal Welfare', *Agriculture & Investment Services* (Web Page, 3 August 2020) <https://www.mpi.govt.nz/law-and-policy/legal-overviews/animal-welfare/>.

124 *AWANZ* (n 16) s 2(1).

125 Ibid long title (emphasis added). See also Marcelo B Rodriguez Ferrere, 'Codes vs Regulations: How Best to Enforce Animal Welfare in New Zealand?' (2018) 43(4) *Alternative Law Journal* 250, 252.

'sentience' is not defined in the *AWANZ*, it was referred to as meaning 'that animals can have feelings, perceptions, and experiences that matter to them' in the Minister for Primary Industry's second reading speech.[126]

Public consultation prompted the recognition of sentience in New Zealand law.[127] The amendment Bill, as originally introduced, did not explicitly reference animal sentience. During the passage of the Bill, it was referred to the Primary Production Committee, which consulted with the public and subsequently recommended that animal sentience be expressly recognised.[128] During consultation, the National Animal Welfare Advisory Committee, animal advocacy groups — including the World Society for the Protection of Animals, Royal New Zealand Society for the Prevention of Cruelty to Animals and New Zealand Companion Animal Council — and a large number of private individuals and bodies made submissions recommending the inclusion of a concept of sentience in the amendment Bill.[129] There were several reasons put forward for adding sentience to the Bill, including that recognising animal sentience is central to understanding how humans should treat animals, putting animal sentience beyond doubt, and maintaining New Zealand's reputation as an international leader in animal welfare.[130] Most submissions, however, 'acknowledge[d] that the change proposed would be largely symbolic'.[131] Nevertheless, the Minister for Primary Industries noted that recognising sentience in the preamble to the *AWANZ* might play an important role in influencing the future operation of the *AWANZ*, because of the relevance of sentience in interpreting provisions in the Act.[132]

The legal recognition of animal sentience in the *AWANZ* has both similarities to, and differences from, the recognition in *TFEU* art 13. The *AWANZ* includes reference to sentience as an aspect of the purpose of the Act, which may influence interpretation of the Act's provisions where a purposive approach to interpretation is applied.[133] In this respect, New Zealand courts have used long titles when applying a purposive approach.[134] Similarly, *TFEU* art 13 obliges Member States to pay regard to 'the welfare requirements of animals' in certain circumstances, *because* animals are sentient. Thus, the reference to sentience provides the purpose for the substantive obligation and may influence the interpretation of the substantive obligation.

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126 (26 November 2014) 702 NZPD 898–9 (Animal Welfare Amendment Bill — Second Reading, Nathan Guy). See also Ministry for Primary Industries (NZ), *Animal Welfare Amendment Bill: Issues Paper Developed by the Ministry for Primary Industries* (Issues Paper, 5 December 2013) 8 <https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/50SCPP_ADV_00DBHOH_BILL12118_1_A371224/ministry-for-primary-industries-issues-paper>; Marcelo B Rodriguez Ferrere, Mike King and Levi Mros Larsen, 'Animal Welfare in New Zealand: Oversight, Compliance and Enforcement' (Project Report, New Zealand Law Foundation, 2019) 29.

127 Guy (n 126) 898–9.

128 Ibid 898.

129 Ministry for Primary Industries (NZ) (n 126) 6.

130 Ibid.

131 Ibid 8.

132 Ibid 9.

133 See *Interpretation Act 1999* (NZ) s 5(1).

134 JF Burrows, *Statute Law in New Zealand* (LexisNexis Butterworths, 3rd ed, 2003) 166.

Quebec is the third jurisdiction considered here that has legally recognised animal sentience. On 4 December 2015, the General Assembly of Quebec passed Bill 54, *An Act to Improve the Legal Situation of Animals*.[135] This Act amended the *Civil Code of Quebec*[136] to formally recognise animals as sentient beings.[137] Accordingly, s 898.1 of the *Civil Code of Quebec* now stipulates that '[a]nimals are not things. They are sentient beings and have biological needs'. *An Act to Improve the Legal Situation of Animals* also operated to enact the *Animal Welfare and Safety Act* ('*AWSA (Quebec)*').[138] Like the *Civil Code of Quebec*, the *AWSA (Quebec)* recognises that 'animals are sentient beings that have biological needs'.[139] While the *Civil Code of Quebec* and the *AWSA (Quebec)* recognise animal sentience, they do not grant rights to animals;[140] indeed, s 898.1 of the *Civil Code of Quebec* explicitly indicates that laws concerning property continue to apply to animals. Further, while the *AWSA (Quebec)* imposes obligations of care and prohibitions against causing distress to animals, these protections do not extend to animals involved in agricultural activities, teaching activities, or scientific research undertaken in accordance with generally recognised rules.[141]

While there are differences between the jurisdictions considered here, the relevant provisions bear striking resemblance to each other. In each jurisdiction, concern for animal welfare and a perceived need to improve legal protections for animals provided the context for legal recognition of animal sentience. In this respect, the sentience provisions were the product of domestic pressures, but also pressures that transcend individual jurisdictions. At the same time, it is not clear that explicit recognition of sentience in any of the jurisdictions has yet had any significant consequence for animals.

B *Tangible Consequences of Recognising Sentience*

The ACT amendments expressly recognise animal sentience, but do not clearly link this acknowledgment with any substantive obligation on humans to protect animals. It could be argued that the wording of s 4A links recognition of sentience to substantive obligations, for example, via the words '[t]his is to be achieved … by … promoting and protecting the welfare of animals'.[142] This is, however, a tangential link. In this respect, it is similar to the amendments made to the *AWANZ*; the long title recognises animal sentience, but there is no link between the acknowledgement of sentience and a substantive obligation on humans in relation to their care for animals. Likewise, the legislative amendments passed in Quebec to recognise animal sentience have no link to a duty on humans to care for animals.[143]

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135 Bill 54, *An Act to Improve the Legal Situation of Animals* (n 58).

136 *Civil Code of Quebec*, CQLR c CCQ-1991 ('*Civil Code of Quebec*').

137 Bill 54, *An Act to Improve the Legal Situation of Animals* (n 58) explanatory note.

138 *AWSA (Quebec)* (n 17).

139 Ibid preamble.

140 Amanda Elizabeth Boniface, 'Animals: "Objects" or "Sentient Beings"? A Comparative Perspective of the South African Law' (2016) 2(3) *Journal of Advances in Humanities and Social Sciences* 143, 151.

141 *AWSA (Quebec)* (n 17) s 7.

142 *AWA* (n 10) s 4A(2)(a).

143 See, eg, *Esposito v 9177-3184 Quebec Inc* [2017] QCCQ 9937. In that case, the Court of Quebec identified that the *AWSA (Quebec)* would be useful to determine what a pet care business's duties

These provisions contrast with *TFEU* art 13, whose recognition of animal sentience provides the basis for the substantive obligation on the EU and its Member States to 'pay full regard' to animal welfare matters when formulating and implementing particular EU policies. In this respect, *TFEU* art 13 operates to create a linkage between sentience and animal welfare.[144] In other words, *TFEU* art 13 asserts that it is *because* animals are sentient that humans must consider animal welfare. This linkage is important because the way in which sentience is conceived, particularly in the absence of an explicit definition, affects how animal welfare is approached in EU law.[145] To be clear, the reference to sentience in *TFEU* art 13 alone does not create any legal obligation. It is instead included as justification for the legal obligation to 'pay full regard to the welfare requirements of animals'.[146]

Masterrind GmbH v Hauptzollamt Hamburg-Jonas,[147] decided in 2016, illustrates the operation of *TFEU* art 13. In that case, the Court stated that the aim of the relevant regulation was 'to avoid transporting animals in a way likely to cause them injury or undue suffering', and commented that '[t]his is in line with Article 13 *TFEU*, according to which animals are sentient beings'.[148] As a result, the Court held that *TFEU* art 13 required the EU and its Member States to pay full regard to animal welfare requirements in formulating and implementing agriculture policy.[149] Further, *European Coalition to End Animal Experiments v European Chemicals Agency (ECHA)*[150] illustrates the nature of the legal obligation to 'pay full regard'.[151] The Court identified that the Board of the European Chemicals Agency was obliged, when making decisions, such as the contested decision to require a second species prenatal developmental toxicity study, to pay full regard to animal welfare requirements.[152]

The link between *TFEU* art 13 and a substantive obligation to pay full regard to animal welfare requirements is commendable. However, the EU, to a greater extent than the ACT, New Zealand or Quebec, is limited in the matters on which it can legislate. In particular, animal welfare is not included as an area of competence

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were towards a pet dog. The Court cited the recognition of animal sentience in the *Civil Code of Quebec*, before proceeding to state that the *AWSA (Quebec)* defines the obligations of care and prohibits certain acts by an owner or custodian of an animal: at 22. While the Court did not expressly make the point, it may be inferred that the legal recognition of animal sentience in the *Civil Code of Quebec* in itself does not impose a legal obligation, but that the relevant provisions of the *AWSA (Quebec)* should be consulted in this respect.

144 Bart Driessen, 'Fundamental Animal Rights in European Law' (2017) 23(3) *European Public Law* 547, 568.

145 Sowery (n 116) 59.

146 *TFEU* (n 34) art 13; UK Centre for Animal Law, 'Brexit, Article 13, and the Debate on Recognising "Animal Sentience" in Law' (Research Paper, 28 November 2017) 2.

147 *Masterrind GmbH v Hauptzollamt Hamburg-Jonas* (Court of Justice of the European Union, C-469/14, ECLI:EU:C:2016:47, 28 July 2016) ('*Masterrind*').

148 Ibid [29]. See also *Pfotenhilfe-Ungarn eV v Ministerium für Energiewende, Landwirtschaft, Umwelt und ländliche Räume des Landes Schleswig-Holstein* (Court of Justice of the European Union, C-301/14, ECLI:EU:C:2015:589, 10 September 2015) [5].

149 *Masterrind* (n 147) [29].

150 *European Coalition to End Animal Experiments v European Chemicals Agency (ECHA)* (General Court of the European Union, T-673/13, ECLI:EU:T:2015:167, 13 March 2015) ('*European Coalition*').

151 *TFEU* (n 34) art 13.

152 *European Coalition* (n 150) [61].

to legislate and adopt legally binding acts of the EU in arts 2–6 of the *TFEU*. Thus, while the protection of animal welfare is a 'legitimate objective in the public interest',[153] the EU has no competence to adopt animal welfare standards in the absence of a relevant policy area, such as agriculture and fisheries.[154] Thus, it would not be possible for the EU to adopt an animal welfare law, like that adopted in the other jurisdictions considered here, which criminalises human conduct towards animals or imposes broad duties on humans to care for animals.

C *Impact on Statutory Interpretation*

While the ACT sentience recognition is unlikely to have a significant impact in the substantive sense outlined above, it may have more influence through the processes of statutory interpretation. When courts interpret statutory provisions in order to give them meaning, and where there is more than one interpretation of a particular provision open to them, they are required to consider the purposes of the relevant legislation and give the provision the interpretation most in line with the legislative purposes.[155] This is the purposive approach to statutory interpretation, and is common in many jurisdictions.

In the context of the *AWA*, there are numerous provisions that courts may need to interpret. Perhaps one of the provisions most amenable to varying interpretations is the definition of cruelty set out in s 6A, which informs the prohibitions on cruelty and aggravated cruelty to animals set out in ss 7 and 7A. Here, conduct (or a failure to act) in relation to an animal is defined as cruelty only if it is 'unjustifiable, unnecessary or unreasonable in the circumstances'.[156] The legislation does not define these terms, however, and they could be subject to numerous meanings.[157] For example, does the conduct need to be unjustifiable from the perspective of a human or from the perspective of an animal? Is conduct necessary if it allows farmers to adopt more efficient farming practices even though the animal would be better off under other practices?[158] In answering questions like these, courts will refer to the objects of the *AWA*, which now include a purpose to recognise that animals are sentient. It may be that reference to the objects will enable courts to take a more animal-centred approach to statutory interpretation. In particular, prosecutors and courts may give greater value to the estimation of each individual animal for the purposes of sentencing in criminal cases. In this respect, it is interesting to note that some United States' courts are recognising animals as

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153 *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen VZW v Vlaams Gewest* (Opinion of Advocate General Wahl, Court of Justice of the European Union, C-426/16, ECLI:EU:C:2017:926, 30 November 2017) [110] ('*Liga*').

154 See *TFEU* (n 34) art 4(2)(d); Sowery (n 116) 57. Although the significance of EU legislation in areas of competence such as agriculture and fisheries should not be discounted; in this respect, the EU has some of the highest standards in the world for farmed animals.

155 *Acts Interpretation Act* (n 14) s 15AA.

156 *AWA* (n 10) s 6A.

157 See Elizabeth Ellis, 'Making Sausages & Law: The Failure of Animal Welfare Laws to Protect Both Animals and Fundamental Tenets of Australia's Legal System' (2010) 4 *Australian Animal Protection Law Journal* 6, 8.

158 Note that farming practices are likely conducted pursuant to codes of practice, which are exempted from the cruelty prohibitions: *AWA* (n 10) s 20.

crime victims for sentencing purposes, meaning that each animal that is subjected to abuse counts as a separate 'victim' of the crime.[159]

Even so, relying on courts to interpret legislation in a way that is more favourable to animals is a slow way to improve protections for animals. Courts must wait for cases to come before them in which the parties ask them to consider issues of interpretation before they are able to undertake the statutory interpretation exercise. In Australia, magistrates' courts decide most animal cruelty cases,[160] and reasons for these decisions are not readily available; these factors make the potential for change via this pathway even slower. The paucity of case law from other jurisdictions in relation to legal recognition of animal sentience may be due, in part, to these issues.

Nevertheless, there is some evidence from other jurisdictions that animal sentience recognition can have influence through the processes of statutory interpretation. For example, the reference to animal sentience in *TFEU* art 13 may have assisted the interpretation of EU legislation in the case of *Zuchtvieh-Export GmbH v Stadt Kempten*.[161] *Zuchtvieh* was concerned with whether animal welfare requirements relating to the transport of animals also apply to those parts of an international journey that take place outside of the EU. The European Court of Justice held that the relevant regulation should be interpreted generously, such that the EU animal welfare rules must be complied with even if the journey continues outside of the EU, so long as it commenced within the EU.[162] *TFEU* art 13 grounds this interpretation. Moreover, EU case law establishes that 'the protection of animal welfare is a legitimate objective in the public interest'.[163] The European Court of Justice relies on *TFEU* art 13 as the foundation of this principle.[164] Nevertheless, while *TFEU* art 13 has been influential in these instances, it is unclear the extent to which the express recognition of animal sentience, as opposed to the remainder of *TFEU* art 13, has contributed to this influence.

In the New Zealand context, several cases have referenced the recognition of animal sentience in the long title of the *AWANZ*.[165] *Erickson v Ministry for*

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159 See *State v Nix*, 334 P 3d 437, 448 (Or, 2014) vacated by *State v Nix,* 345 P 3d 416 (Or, 2015); *State v Crow*, 429 P 3d 1053, 1054 (Or Ct App, 2018); Jessica Rubin, 'Desmond's Law: A Novel Approach to Animal Advocacy' (2018) 24(2) *Animal Law* 243, 275.

160 Rochelle Morton, Michelle L Hebart and Alexandra L Whittaker, 'Explaining the Gap between the Ambitious Goals and Practical Reality of Animal Welfare Law Enforcement: A Review of the Enforcement Gap in Australia' (2020) 10(3) *Animals* 482.

161 *Zuchtvieh-Export GmbH v Stadt Kempten* (Court of Justice of the European Union, C-424/13, ECLI:EU:C:2015:259, 23 April 2015) ('*Zuchtvieh*'). See also UK Centre for Animal Law (n 146) 5.

162 *Zuchtvieh* (n 161) [56].

163 Ibid [35]; *Liga* (n 153) [110]; *French Republic v European Parliament and Council of the European Union* (C-244/03) [2005] ECR 4021, 4049 [97].

164 Driessen (n 144) 552.

165 Note that enforcement of the *AWANZ* is the responsibility of the Ministry for Primary Industries (NZ) and the Royal New Zealand Society for the Prevention of Cruelty to Animals ('SPCA'): *Ministry for Primary Industries (NZ) Animal Welfare* (Web Page, 12 September 2020) <https://www.mpi.govt.nz/law-and-policy/legal-overviews/animal-welfare>. The vast majority of investigations are undertaken by the SPCA, a charitable organisation, and a very small proportion of investigations result in prosecution: SPCA, *Annual Report 2018–19*, 7 <https://www.spca.nz/downloads/assets/152111/1/spca-annual-report-2018-19.pdf>. Accordingly, the lack of case law in relation to the sentience provision is understandable. See also Annabel Markham, 'Animal Cruelty Sentencing in Australia

Primary Industries is a key case in this respect.[166] *Erickson* concerned the violent conduct of a casually employed slaughterman towards bobby calves. The defendant pleaded guilty to the charges brought against him under ss 28(1)(d), 12(c), 28A(1)(d), 29(a) and 12(a) of the *AWANZ*.[167] Two of these charges related to the wilful treatment of a calf with the result that it was seriously injured or impaired, one charge related to killing a calf in such a manner that it suffered unreasonable or unnecessary pain or distress, two representative charges were brought for recklessly ill-treating calves with the result that they were seriously injured or impaired, four representative charges were brought for ill-treating calves and one representative charge was related to failing to meet the calves' physical, health and behavioural needs.[168] In its judgment, the Court of Appeal set out the considerations that determine the gravity of offending in cases of wilful and reckless ill-treatment of animals, with a view to giving assistance to sentencing courts when sentencing offenders for these types of crimes.[169]

The Court of Appeal in *Erickson* stated that '[t]he primary purpose of the Act is stated in its title, parts of which read: … to recognise that animals are sentient'.[170] Yet the Court did not look at the long title in detail, but merely implied that one must have the purpose of the *AWANZ* in mind when interpreting it. Unfortunately, the Court did not explain how it applied the purpose when interpreting the relevant provisions in the particular circumstances of the case. Further, the Court also referred to pre-2015 amendment cases as precedent for determining the 'gravity of the offending'.[171] The discussion of these cases does not reference the 2015 amendments, and thus it seems that explicit legal recognition of sentience did not influence a determination of the gravity of the offence under s 28.

Police v Witehira[172] and *McCartney v Canterbury Society for the Prevention of Cruelty to Animals*[173] also reference the recognition of animal sentience in the *AWANZ*.[174] *Witehira* was concerned with sentencing the defendant for brutally bashing to death his son's dog while he was under the influence of alcohol. The relevant charges were brought under s 28(1)(c) of the *AWANZ*.[175] As the Court of Appeal did in *Erickson*, the District Court in *Witehira* noted the stated primary purpose of the *AWANZ*, including the recognition of animal sentience, yet failed to

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and New Zealand' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia* (Federation Press, 2nd ed, 2013) 208, 210−11.

166 *Erickson v Ministry for Primary Industries* [2017] NZAR 1015 ('*Erickson*').

167 Ibid 1018–19 [4].

168 Ibid.

169 Ibid 1018 [1]–[2]. See also *Auckland Royal New Zealand Society for the Prevention of Cruelty to Animals v MacPherson* [2019] NZDC 4102, [15]−[16]; *Waikato SPCA v Tuaupiki* [2018] NZDC 17046, 12–13; *Ministry for Primary Industries v Down Cow Ltd* [2020] DCR 138, 142 [13]–[14]; *Ministry for Primary Industries v Little* [2017] NZDC 25077, [15]; *Ministry of Primary Industries v Castlerock Dairies Ltd* [2017] NZDC 18237, [52].

170 *Erickson* (n 166) 1025 [32].

171 Ibid 1027 [42]. See also *Ministry for Primary Industries v Erasmus* [2013] NZAR 311.

172 *Police v Witehira* [2018] DCR 638 ('*Witehira*').

173 *McCartney v Canterbury Society for the Prevention of Cruelty to Animals* [2018] NZHC 2624 ('*McCartney*').

174 See also *Whangarei SPCA v Peart* [2018] NZDC 14948, [16]–[17].

175 *Witehira* (n 172) 640 [4].

explain how that purpose influenced its interpretation of provisions in the *AWANZ*.[176] The case of *McCartney* was also concerned with companion animals and a particular owner's failure to euthanise one cat and to obtain appropriate medical treatment for a second cat.[177] In its judgment, the New Zealand High Court acknowledged that the 2015 amendments 'recognised that animals are sentient' and placed obligations upon their owners.[178] As in *Erickson* and *Witehira*, however, it is not clear how this purpose influenced the High Court's interpretation of the *AWANZ*'s provisions.

Wallace v Royal Society for Prevention of Cruelty to Animals Auckland (SPCA Auckland)[179] provides a more tangible example of how recognition of animal sentience may influence statutory interpretation of the *AWANZ*. Wallace and Glover were charged with offences under the *AWANZ*.[180] Before the determination of those charges, the SPCA brought an application for disposal orders under the *AWANZ* in order to 'sell, rehome or, as a last resort, euthanise the dogs' the subject of the alleged offences.[181] Wallace and Glover applied to stay or adjourn the application pending the resolution of the criminal charges.[182] The District Court declined to grant an adjournment and the matter was appealed to the High Court.[183] In affirming the District Court's decision, the High Court identified the purpose of the disposal provision as including the prevention of negative impacts for animals, which it stated was appropriate for the purpose of the *AWANZ* as set out in its long title.[184] In other words, the High Court used the purpose of the *AWANZ*, including recognition that animals are sentient, to support their interpretation of the disposal provision as including the avoidance of harm to animals.

Recent case law in Quebec also provides some insight into how legislative recognition of animal sentience may influence statutory interpretation. In *Trahan v Ville de Montréal*,[185] the Quebec Superior Court needed to determine whether the City of Montreal was required to consider the dog owner's point of view before issuing a euthanasia order.[186] The Court referred to the legislative recognition of the sentience of animals, which it said supported answering this question in the affirmative.[187] *Road to Home Rescue Support v Ville de Montréal* provides further instruction.[188] In that case, the Quebec Court of Criminal Appeal held that there is no incompatibility between provisions that permit the euthanasia of dangerous dogs and the recognition of sentience in s 898.1.[189] In obiter dicta, the Court also indicated

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176 Ibid 640 [7].
177 *McCartney* (n 173) [16]–[17].
178 Ibid [48].
179 *Wallace v Royal Society for Prevention of Cruelty to Animals Auckland (SPCA Auckland)* [2019] NZAR 1393.
180 Ibid 1395 [5].
181 Ibid [3].
182 Ibid 1394–5 [1].
183 Ibid.
184 Ibid 1400–1 [23].
185 *Trahan v Ville de Montréal* [2019] QCCS 4607 (Quebec Superior Court, Bachand, JCS, 1 November 2019).
186 Ibid [13].
187 Ibid at [30]–[31].
188 *Road to Home Rescue Support v Ville de Montréal* [2019] QCCA 2187 (Quebec Court of Criminal Appeal, Bich JCA, Savard JCA and Rancourt JCA, 20 December 2019).
189 Ibid [56].

that s 898.1 'has the value of a behavioural standard' in that it should regulate the behaviour of those that interact with animals and may have a direct effect on the content of legal regulations.[190]

D *Sentience as a Tool for Advocacy*

In a recent study, Blattner identifies that the legal recognition of animal sentience effectively operates as a 'gateway to according animals protection under the law'.[191] In other words, it must be shown that animals have sentience before they merit legal protection. This is not immediately obvious when looking at relevant legislation. Under the *AWA*, for example, the legislative objects are set out in s 4A, which includes the aim of recognising that animals are sentient beings. The dictionary at the end of the *AWA* defines 'animal' to include live vertebrates, cephalopods and crustaceans.[192] In order to come within the scope of the *AWA* then, an animal needs to come within this definition, and does not need to demonstrate sentience. Nevertheless, the legislative reliance on the concept of sentience suggests that a species is only likely to be explicitly included within the scope of animal protection legislation if science establishes that it is sentient.

The use of sentience as a gateway to the legal protection of animals has significant potential for animal advocates, and thus for improved levels of animal protection. This is because it recognises the intrinsic value of animals and bases it on a scientific criterion, as opposed to other potential criteria, like human use, human popularity or rationality.[193] If animals are protected *because* they are sentient, then many of the exclusions and defences commonly found in animal protection laws are open to challenge.[194] In short, animal advocates will be able to present compelling arguments that if animals are protected because they are sentient, then that protection should also be commensurate with their sentience.

E *Public Awareness and Further Change*

A further way in which legal recognition of animal sentience could improve the lives and treatment of animals is through its impact on public awareness and possible further resulting changes. The nature of the ACT amendments, as an Australian legal first and as part of a broader legal movement, means that the change has generated significant media attention. Mainstream news, internet, radio and academic writing provide commentary on the ACT amendments.[195] This exposure is likely to increase

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190 Ibid [57].

191 Blattner (n 19) 125, 131.

192 *AWA* (n 10) Dictionary (definition of 'animal').

193 Blattner (n 19) 121–2.

194 In relation to exclusions, see, eg, Steven White, 'Farm Animal Protection Policymaking and the Law: The Impetus for Change' (2018) 43(4) *Alternative Law Journal* 244.

195 See, eg, Ross Kelly, 'Recognition of Animal Sentience on the Rise' *Veterinary Information Network News Service* (online, 14 May 2020) <https://news.vin.com/default.aspx?pid=210&Id=9639465>; David Brooks with Danielle Celermajer, 'Wild Lives and Broken Promises: Why are Kangaroos Deemed "Killable"?' *ABC News* (online, 20 July 2020) <https://www.abc.net.au/religion/david-brooks-danielle-celermajer-wild-lives-and-broken-promises/12474146>; Jane Kotzmann, 'ACT's New Animal Sentience Law Recognises an Animal's Psychological Pain and Pleasure, and May Lead

public awareness of the science in relation to animal sentience and the way in which some laws are changing to respond to that science. Increased awareness may generate change in the way people deal with and treat animals.

The ACT amendments are likely to generate further legal changes in other Australian jurisdictions. The Northern Territory Social Policy Scrutiny Committee undertook the *Inquiry into the Animal Protection Bill 2018* and in doing so, considered a number of submissions advocating for legal recognition of animal sentience.[196] Nevertheless, the Committee decided not to recommend recognising animal sentience in the legislation, as they felt that it was already implicitly present.[197] While there is some basis to this argument, express recognition of animal sentience does clarify, and thus elevate, the importance of animal mental states separate to the issue of physical harm to animals. Aside from the Northern Territory, Victoria is also currently reviewing its *Prevention of Cruelty to Animals Act 1986* (Vic) and is expected to amend the Act to legally recognise animal sentience.[198] Further, Western Australia is also undertaking a review of their *Animal Welfare Act 2002* (WA) and has received submissions for the legal recognition of animal sentience.[199]

F *Limitations*

While legal recognition of animal sentience is a positive step forward for animal protection, this type of legal amendment fails to address aspects of animal welfare laws that leave animals vulnerable to human exploitation. This section discusses the deficiencies in the way that animal welfare laws address the human–animal relationship.[200]

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to Better Protections', *The Conversation* (online, 3 October 2019) <https://theconversation.com/acts-new-animal-sentience-law-recognises-an-animals-psychological-pain-and-pleasure-and-may-lead-to-better-protections-124577>; Dan Jervis-Bardy, 'ACT's "Sentience" Laws Impose Tough New Penalties for Mistreating Animals', *The Sydney Morning Herald* (online, 27 September 2019) <https://www.smh.com.au/environment/sustainability/act-s-sentience-laws-impose-tough-new-penalties-for-mistreating-animals-20190927-p52vfe.html>; Elise Scott, Tahlia Roy and Niki Burnside, 'Canberra Set to Recognise Animals as "Sentient Beings" that are Able to Feel and Perceive in Australian First', *ABC News* (online, 13 May 2019) <https://www.abc.net.au/news/2019-05-13/canberra-animal-laws-fine-owners-who-dont-exercise-dogs/11106158>; *Breakfast with Ewan Gilbert* (ABC Central West NSW, 9 October 2019) <https://www.abc.net.au/radio/centralwest/programs/breakfast/breakfast/11569494>.

196 Social Policy Scrutiny Committee, Parliament of the Northern Territory, *Inquiry into the Animal Protection Bill 2018* (Report, May 2018) 19 [3.7]–[3.9].

197 Ibid 20 [3.12].

198 Minister for Agriculture (Vic), 'Andrews Labor Government Delivers More Support for Animal Welfare' (Media Release, 19 October 2017) <https://www.premier.vic.gov.au/andrews-labor-government-delivers-more-support-animal-welfare>. Note the *Prevention of Cruelty to Animals Regulations 2019* (Vic) came into force on 14 December 2019 and strengthen the requirements of the *Prevention of Cruelty to Animals Act 1986* (Vic).

199 Department of Primary Industries and Regional Development (WA), 'Review of the *Animal Welfare Act 2002*' (Web Page, 18 August 2020) <https://www.agric.wa.gov.au/animalwelfare/review-animal-welfare-act-2002?page=0%2C0#smartpaging_toc_p0_s2_h3>; Animal Welfare Review Panel (WA), *Review of the Animal Welfare Act 2002: Summary Report on the Public Consultation* (June 2020) 8–9.

200 See the discussion at Part IIA regarding welfare versus rights approaches to animals.

1 *The Legal Status of Animals*

While expressly recognising the sentience of animals in law suggests that the public perceives animals as sentient beings and not as objects, it fails to change the legal status of animals as property. In some jurisdictions, legislation expressly states the continuing application of property laws to animals. For example, in Quebec, while the *Civil Code of Quebec* and the *AWSA (Quebec)* recognise animal sentience, s 898.1 of the *Civil Code of Quebec* explicitly indicates that laws concerning property continue to apply to animals. In other jurisdictions, laws do not state that property laws will continue to apply to animals, and yet this is the case.[201] In the ACT, for example, while the *AWA* acknowledges animal sentience, the common law property status of animals is unaffected, and statutory laws such as s 4 of the *Competition and Consumer Act 2010* (Cth) continue to apply to animals.

Under EU legislation animals are referred to as both 'sentient beings' and 'tradable products', and thus according to Sowery hold a 'dual status'.[202] While EU law considers animals to be sentient beings (in keeping with popular sentiment and scientific advancements), they also remain agricultural products. For example, art 38 of the *TFEU* defines agricultural products to include the products of stock farming and fisheries.[203] Some EU legislation also describes animals merely as property.[204] The reformed EU Common Agricultural Policy instruments do not explicitly, or directly, aim to improve farm animal welfare.[205]

Many animal advocates consider the property status of animals to be a significant obstacle to achieving genuine protection for animals.[206] Francione, a leading animal rights advocate, argues that animals need only the right not to be treated as property.[207] Similarly, the animal protection organisation, Voiceless, asserts that the property status of animals is 'a key issue in their abuse and exploitation'.[208] This is because the law frames property as 'things' that have no legal rights and no standing to challenge decisions made in relation to them.

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201 This may be because the property status of animals forms part of the common law.

202 Sowery (n 116) 55.

203 *TFEU* (n 34) art 38(1).

204 Broom, 'Animal Welfare in the European Union' (n 41) 26, 53.

205 'The Common Agricultural Policy at a Glance', *European Commission* (Web Page) <https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/cap-glance_en#title>; Diane Ryland, 'Animal Welfare in the Reformed Common Agricultural Policy: Wherefore Art Thou?' (2015) 17(1) *Environmental Law Review* 22.

206 See, eg, Geeta Shyam, 'The Legal Status of Animals: The World Rethinks Its Position' (2015) 40(4) *Alternative Law Journal* 266; Taimie L Bryant, 'Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans' (2008) 39(2) *Rutgers Law Journal* 247, 254–5; Steven Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Perseus Books, 2000); Tom Regan, *The Case for Animal Rights* (University of California Press, 1983) 347–9.

207 Francione (n 25). See also Gary L Francione, *Animals, Property and the Law* (Temple University Press, 1995).

208 Voiceless, *The Animal Law Toolkit* (Report, December 2009) 3.

2 *Legal Representation and Standing for Animals*

Relatedly, expressly recognising animal sentience does not give rise to additional avenues for challenging decisions concerning animals via legal means. In order to bring an action in court, most jurisdictions require that the claimant have legal personality and standing to bring an action. However, property does not have legal personality or standing. *Durand v Attorney General of Quebec*, which concerned an attempt to bring a class action relating to electromagnetic field pollution, highlights this issue.[209] The plaintiffs sought to bring a class action, including 'flora, fauna, pets and animals' as class members.[210] The Court stated that s 898.1 of the *Civil Code of Quebec* 'does not grant status as class members to flora, fauna, pets or animals'.[211] It explained that while the *Civil Code* provides that 'animals are not things', they can still be property.[212] This, the Court said, was 'not indicative of being qualified to be a class member'.[213]

This issue extends beyond the capacity of animals themselves to bring legal action, to both the capacity of animals to have their interests represented by people, and the capacity of people with an interest in animals to have standing in a particular case. For example, in the EU, it is clear that *TFEU* art 13 does not introduce any entitlement for legal representation of animals' interests. *European Coalition*, decided in 2015, concerned a challenge to a decision made to retest a particular chemical on rabbits.[214] The key issue for the Court was whether the European Coalition to End Animal Experiments, an animal welfare group, had standing to bring the proceeding. The Court decided that the applicant did not meet any of the relevant standing requirements and, in particular, that the contested decision did not directly affect the applicant's legal position.[215] While the applicant argued that a refusal to grant standing would mean that the interests of the laboratory animals would be unrepresented, this was insufficient to grant standing. Thus, while the *TFEU* recognises animals as sentient beings, such recognition does not create new or additional rights to have animals' interests legally represented.

In Australia, there is limited scope for animals to have their interests represented before the law. Following the case of *Australian Conservation Foundation Inc v Commonwealth*,[216] a person or organisation wishing to challenge a decision must have a 'special interest' in the matter, which is more than a 'mere intellectual or emotional concern'.[217] Unfortunately, an interest in the protection of animals and prevention of cruelty alone 'does not constitute a special interest'.[218] Nevertheless, a court may grant standing to an animal protection group that is able

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209 *Durand v Attorney General of Quebec* [2018] QCCS 2817, [1] (Superior Court).
210 Ibid [42].
211 Ibid [48]–[49].
212 Ibid [50].
213 Ibid.
214 *European Coalition* (n 150) [3].
215 Ibid [60].
216 *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 ('*ACF v Cth*').
217 Ibid 530 (Gibbs J).
218 *Animal Liberation Ltd v Department of Environment and Conservation* [2007] NSWSC 221, [7], quoting *ACF v Cth* (n 216) 530–1 (Gibbs J).

to show some of the features that can indicate a special interest.[219] This was the case in *Animals' Angels eV v Secretary, Department of Agriculture*,[220] where a variety of factors, including recognition by the Government, led to the Court granting the animal protection group Animals' Angels standing to challenge governmental decisions in relation to a live export voyage. While this limited scope for the legal representation of animal interests exists, however, there is no indication that the legal recognition of animal sentience in legislation will give rise to expanded or additional avenues for challenging decisions concerning animals via legal means.

3 *Human Cultural and Religious Rights*

Further, acknowledging animal sentience in the law does not mean that decisions that have consequences for animals will always seek to minimise animal pain and suffering. In particular, where there is a conflict between human cultural and religious rights and the welfare interests of animals, it is likely that human interests will prevail. Reference to *TFEU* art 13 demonstrates this point. Pursuant to that provision, the recognition of animal sentience and the associated legal obligation to 'pay full regard to the welfare requirements of animals' must be balanced with respect for other legislative provisions, and for customs, including religious rites, cultural traditions and regional heritage.[221] While animals may suffer less, for example, if they are stunned before slaughter, respect for religious rites that require slaughter by cutting through the jugular, carotid artery and windpipe while the animal is alive and healthy may take precedence.[222] In *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen VZW v Vlaams Gewest*, Advocate General Wahl noted the EU's 'wish to reconcile protection of the freedom to practise a religion with the protection of animal welfare' and that the EU rules 'strike a balance between the right to freedom of religion, on the one hand, and the requirements which flow from the protection of human health, animal welfare and food safety, on the other'.[223] Similarly, *Inuit Tapiriit Kanatami v Parliament and Council*, *Regulation No 1007/2009* permitted 'seal products' to be sold where they were obtained from 'hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence'.[224] The preferencing of human cultural and religious interests over animal interests is also evident in Australia. For example, the *Native Title Act 1993* (Cth) recognises traditional Indigenous hunting rights and exempts native title holders from federal and state/territory laws that prohibit hunting or fishing in certain areas or of certain animals.[225]

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219 See *North Coast Environment Council Inc v Minister for Resources (No 2)* (1994) 55 FCR 492.
220 *Animals' Angels eV v Secretary, Department of Agriculture* (2014) 228 FCR 35, 72 [120]–[121].
221 *TFEU* (n 34) art 13.
222 See Bruce (n 5) 211, 226–8.
223 *Liga* (n 153) [1], [5].
224 *Inuit Tapiriit Kanatami v Parliament and Council* (T-18/10) [2011] ECR-SC II-5604, II-5625 [74].
225 *Native Title Act 1993* (Cth) ss 211, 223(1)–(2).

4 *Influence of Human Use on Human–Animal Relationships*

Legally acknowledging animal sentience may suggest that the value ascribed to animals, and treatment of animals, will be influenced primarily by the understanding that animals are sentient. In other words, given that the law accepts that animals are sentient, human interactions with animals may be expected to be governed by an intention to minimise unnecessary animal pain and suffering. Experience in New Zealand, however, indicates that the ways in which humans use animals, as opposed to legally acknowledged animal sentience, remains a significant influence on human-animal relationships.

The New Zealand case of *Erickson* demonstrates the influence of human use of animals. In that case, the Court noted that, following the 2015 amendments, although the *AWANZ* drew a distinction between wild and domesticated animals, it did not distinguish between farm herd, working or companion animals.[226] Nevertheless, the Court stated that 'it is inevitable' that such distinction be made, particularly because '[t]he objects they are kept for are different'.[227] Thus, it seems that while the *AWANZ* acknowledges that *all* animals are sentient, that sentience does not prevent distinctions being made between different types of animals, or the same type of animal in different contexts, based on their value to humans, rather than the degree to which they have feelings, perceptions and experiences.

Comparison of the sentences in the cases of *Witehira* and *Erickson* may also support this conclusion. *Witehira* concerned sentencing the defendant for brutally bashing to death his son's dog, while *Erickson* related to the violent conduct of a slaughterman towards 115 bobby calves.[228] In *Witehira*, the sentence attached to the animal cruelty charges was 30 months' imprisonment (prior to mitigating factors being applied), in comparison with 39 months' imprisonment in *Erickson*.[229] While various aggravating factors applied in each case, the broadly comparable starting points may be seen as indicative of the value that humans attach to a single family pet, as opposed to a significant number of livestock intended for slaughter.

5 *Exemptions from Animal Welfare Legislation*

One of the most significant failings of animal welfare laws, even in jurisdictions where sentience is expressly recognised, is that anti-cruelty legislation routinely excludes animals used in specified contexts.[230] For example, under the *AWA*, the anti-cruelty provisions do not apply if the relevant conduct was in accordance with a code of practice.[231] Codes of practice may deal with a variety of matters including, for example, animal welfare in intensive farming, trapping and snaring of animals, and animal welfare in the racing industry.[232] Thus, conduct that is in accordance with

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226 *Erickson* (n 166) 34.
227 Ibid 1026 [34].
228 Note that in *Erickson* a number of the charges were brought on a representative basis: *Erickson* (n 166) 4.
229 *Witehira* (n 172) 644 [26]; *Erickson* (n 166) 1033 [64].
230 See Ellis (n 157) 8.
231 *AWA* (n 10) s 20.
232 Ibid ss 21(j), (r), (y).

a code in relation to animal welfare in intensive farming will not breach the anti-cruelty provisions set out in ss 7 and 7A *even if* it satisfies the definition of cruelty in s 6A.

Codes of practice provide helpful guidance to people that work with animals by defining clearly what practices are acceptable and what are unacceptable.[233] However, the bodies that develop codes of practice may be perceived as biased given industry influence over them and a view that government agriculture departments have a conflict of interest.[234] Further, there has been a failure to incorporate independent scientific research and research on community views in relation to animal welfare into the codes.[235] As a result, the codes of practice and their incorporation into animal welfare legislation effectively permit 'institutionalised cruelty to millions of animals' in Australia each year.[236]

V Reform Proposal for ACT and Other Australian Jurisdictions

Explicitly acknowledging that animals are sentient is a positive step to improve legal protection for animals in the ACT. This is because it generates public awareness of the situation of animals, is likely to have an impact on the interpretation of other provisions within the *AWA* and may generate further legislative changes in this area. Accordingly, this article argues that the other states and territories within Australia should adopt amendments to their respective animal welfare laws to recognise animal sentience.

Nevertheless, recognising animal sentience is only a very small step toward sufficiently protecting animals from human harm. Significant legal issues in the ACT and in other Australian jurisdictions remain, with the result being that animals continue to be vulnerable to human abuse. While this means that quite extensive legal reforms in this area are desirable, the reality is that meaningful change generally proceeds on an incremental basis. It was not until 1965, for example, that Indigenous Australians had the right to vote in all states and territories of Australia,[237] and they continue to suffer from significant levels of discrimination.[238]

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233 Jed Goodfellow, 'Animal Welfare Regulation in the Australian Agricultural Sector: A Legitimacy Maximising Analysis' (PhD Thesis, Macquarie University, 2015) 127–8.

234 Ibid ch 7; Productivity Commission (Cth), *Regulation of Australian Agriculture* (Inquiry Report No 79, November 2016) 21; Ellis (n 157) 14–15.

235 Productivity Commission (n 234) 22.

236 Goodfellow (n 233) 125; Ellis (n 157) 9.

237 'Electoral Milestones for Indigenous Australians', *Australian Electoral Commission* (Web Page, 22 August 2019) <https://www.aec.gov.au/indigenous/milestones.htm>.

238 Alison Markwick et al, 'Experiences of Racism among Aboriginal and Torres Strait Islander Adults Living in the Australian State of Victoria: A Cross-Sectional Population-Based Study' (2019) 19(309) *BMC Public Health* 1, 1; Shelley Bielefeld and Jon Altman, 'Australia's First Peoples — Still Struggling for Protection Against Racial Discrimination' (Conference Paper, Australian Human Rights Commission, Papers from the 40 Years of the *Racial Discrimination Act 1975* (Cth) Conference, August 2015); Naomi Priest et al, 'Bullying Victimization and Racial Discrimination among Australian Children' (2016) 106(10) *American Journal of Public Health* 1882.

Given that this is the case, this article advocates only for the most pressing reforms to bring animal welfare law into line with recognition of animal sentience.[239]

While all states and territories in Australia should recognise animal sentience in their laws, they should also explicitly link this recognition to obligations on humans to care for animals, as well as prohibitions on certain conduct towards animals. This is important because it clarifies why animal welfare is important and will make it more likely that the recognition of animal sentience will influence the statutory interpretation of other provisions. Further, it should be clarified that provisions within animal welfare legislation, such as prohibitions on causing unnecessary pain, should not be interpreted from the perspective of human interest, but from the perspective of the animal in question.

This article advocates two further, more significant, changes. First, a national independent statutory agency, including animal welfare science and community ethics advisory committees, should be established, with responsibility for developing national animal welfare standards. This would address concerns about conflicts of interest in current code-setting arrangements and enable codes to better reflect community views regarding the ways in which animals should be treated.[240] Second, in order to ensure that animal interests are sufficiently represented in decisions that affect them, people should have the capacity to legally represent animals. Further research is required to elaborate on the details of this proposed change to standing rules.[241] However, the change should fundamentally enable people and organisations to bring legal actions on behalf of animals and to represent animals in existing proceedings where the relevant decision would affect those animals.

VI Conclusion

Legal recognition of animal sentience in the ACT is primarily of symbolic value. Commentary in relation to analogous legislation supports this conclusion. For example, Cupp asserts that '[d]escribing an animal as "sentient" does not in itself create new legal obligations'.[242] Similarly, when discussing the legal recognition of animal sentience in France, Neumann states that 'it can be considered as a highly "symbolic move" which should be warmly welcomed'.[243]

Yet, legally recognising that animals are sentient still constitutes a significant step towards improving protections for animals in the ACT. The legal recognition of animal sentience does have very real potential to influence the interpretation of other

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239 To the extent that this might be possible; see Sowery (n 116) 97.

240 This proposal is not new: see Productivity Commission (n 234) 21–2; Goodfellow (n 233) 284–8.

241 Academic research provides guidance here: see, eg, Christopher D Stone, 'Should Trees Have Standing? Toward Legal Rights for Natural Objects' (1972) 45(2) *Southern California Law Review* 450, 464; Marguerite Hogan, 'Standing for Nonhuman Animals: Developing a Guardianship Model from the Dissents in *Sierra Club v Morton*' (2007) 95(2) *California Law Review* 513; Cass R Sunstein, 'Standing for Animals (With Notes on Animal Rights)' (2000) 47(5) *UCLA Law Review* 1333.

242 Cupp (n 63) 1049.

243 Jean-Marc Neumann, 'The Legal Status of Animals in the French Civil Code' (2015) 1 *Global Journal of Animal Law* 1, 13.

substantive provisions affecting animals.[244] When interpreting legislation, courts in the ACT are required to interpret legislation in light of its purpose.[245] Recognising animal sentience in the legislation, particularly as an expressed purpose of the legislation, is therefore likely to influence the interpretation of other provisions within the legislation.

The legal recognition of animal sentience in the ACT will also have a broader impact. First, it is likely that the change will generate an increase in public awareness of the issues facing animals. In this respect, Gacek and Jochelson's assertions that the '[l]aw can perform a symbolic function by identifying normative social values from which legal subjects are formed' and that '[e]ven minor legal advances have the potential to bring into cultural consciousness new conceptions of ways to think of and discuss animal life and regulation'[246] highlight the importance of such public awareness. As Cupp argues, 'framing is a powerful tool',[247] and the language of sentience can help the public to think about animals in a more sophisticated, and hopefully more compassionate, way. Second, the legislative change is also likely to generate further legal changes in this space. In particular, other Australian jurisdictions are likely to adopt similar legislative changes.

While acknowledging animal sentience is commendable, it nevertheless fails to address the significant ways in which the law renders animals vulnerable to human cruelty. In this respect, this article has suggested reforms to the law that stem directly from a genuine appreciation of animal sentience, and advocates that they be adopted in all Australian jurisdictions. First, the legal obligations that humans have vis-à-vis animals and the recognition of animal sentience should be expressly linked, and sentience should be the primary consideration taken into account when interpreting those obligations. Second, the Federal Government should establish a national independent statutory agency, including animal welfare science and community ethics advisory committees, to develop national animal welfare standards. Finally, humans and organisations should be empowered to legally represent animal interests, to ensure that their interests in avoiding pain and suffering, and in experiencing happiness and pleasure, are adequately represented and taken into account.

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244 Annie Perkins, 'Animal Sentience Workshop Report' (Research Paper, Groundwork Associates Ltd, 15 November 2017) 12.

245 See *Acts Interpretation Act* (n 14) s 15AA.

246 Gacek and Jochelson (n 63) 344−5.

247 Cupp (n 63) 1046.