The relationship of the legal and political systems in shaping what is animal law in Australia

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Animal law is created and shaped by a variety of different forces. Politicians can introduce and enact laws. Alternatively, various committees draft laws which then may follow a process of public consultation and endorsement. For example, the Primary Industries Standing Committee, a producer based committee, drafted the Codes of Practice which regulate the fate and welfare of most animals. These Codes were then endorsed by the Primary Industries Ministerial Council. Lawyers and Courts shape and redefine laws through legal challenges.

This process of animal law making is neither finite nor linear and animal laws are continuously being amended, revised and repealed.

So what exactly is the relationship between the political and legal systems in shaping animal law?

Lawyers and politicians *can* work together to strengthen legal protection for animals.

For example, lawyers and barristers can provide advice on how to best achieve an animal welfare outcome through legislation. They can also review draft bills for politicians to ensure that they are tightly worded. Voiceless for example was instrumental in helping draft the bill introduced into the NSW Parliament which provided for the compulsory introduction of CCTV cameras into abattoirs.

Another example of relationship between the legal and political systems, is where politicians wish to clarify what exactly an animal law means.

This might occur if an industry body argues that a law should be interpreted in a self-serving way which would defeat the interests of animals.

To adopt the example of free range hens, the main industry body for eggs, the Australian Egg Corporation Limited, has recently argued that the laws relating to lawer hens, that is the Code of Practice Poultry 4th edition permits an unlimited outdoor stocking density for free range hens. In line with this interpretation of the law, the AECL has publicly advocated an outdoor free-range stocking density of 20,000 birds per hectare. This equates to in effect two birds per square metre or, two birds to an area equivalent to a typical front door mat.

The Panel has advised in submissions to the ACCC and otherwise that this Poultry Code 4th edition plainly prescribes a maximum (rather than an unlimited) outdoor free range stocking density, and that this maximum outdoor stocking density is no more than 1,500 hens per hectare.

In examples such as this, by clarifying what a law means, lawyers can provide politicians and others with the ammunition to publicly challenge these industry bodies and their assertions with confidence.

However, these examples of the political and legal systems working together to achieve strong animal welfare reform is not the norm.

When a law is enacted hastily, without proper research, and which adopts a short-term political fix

to allay public hysteria, the result can be a law which harms animals.

A key example is breed specific legislation in Victoria. Breed specific legislation falls within the wider debate of how to manage 'dangerous dogs.' In Victoria, there is legislation to deal with dogs who attack. In addition, there is legislation which outlaws 5 breeds of dogs. In practice, there is only one restricted breed that is known to exist in Victoria, the American Pitbull Terrier.

There is no exemption from this law for a dog that is not aggressive. This differs from the situation in the United Kingdom, where law makers have introduced an exemption to the law if a dog is found to have a good temperament.

As you may be aware, on 30 August 2011, following a very tragic and fatal attack on a young girl, the existing legislation regarding restricted breed dogs was extended to give Council officers more power, including the power to seize and declare a dog to be a restricted breed dog.

So how is a Council officer to make a decision that a dog is an American Pitbull Terrier?

The Minister at the time introduced what he called a 'Standard' which is basically a detailed picture of what an American Pitbull Terrier is supposed to look-like; it includes various measurements.

Here is where the difficulty lies. Because of cross breeding, it is difficult to accurately visually identify any breed. Studies in the US and the UK have warned of the inaccuracy of visual breed identification. This is particularly important in the Victorian situation, as the law is intended to apply to cross breeds as well as pure bred dogs. An additional difficulty, is that uniquely in relation to the

American Pitbull Terriers, there is no DNA test which can identify the breed. Because of these difficulties, the Standard has been difficult to enforce. I have been told by a Council officer that the general view is that over-caution, erring on the side of declaring a dog a restricted breed, is the preferred approach. This, it was said, stems from fears of Council exposure to liability, and also personal guilt, should that dog ever attack.

What is interesting is, that despite these difficulties with enforcement, not one politician voted against these laws in Victoria.

The Standard and the legislation itself give no direction on how to apply the Standard. Must a dog satisfy 100% of these characteristics, or only 10%? Are some characteristics more important than others?

It fell to Justice Kaye of the Supreme Court of Victoria late last year in the *Dudas* and *Tara-Shearer* cases to answer these questions. He held that "there must be a substantial, or high, level of correspondence between the material characteristics of the dog and the criteria specified in the Standard". The decision was arguably a win for dogs, as this higher hurdle meant that less dogs including cross breeds will fall within this law.

Prior to this, VCAT being the primary tribunal appeared in different cases to adopt a lower threshold.

In this example, the Courts were relied upon to clarify an otherwise confusing law. However, even with this clarification, the law is one which will be difficult to enforce, as acknowledged in Justice Kaye's observation that "It is clear that the assessment of a dog by an authorised officer will often

be open to debate ..." [89].

Herein lies one of the problems of animal law – laws are introduced based on a short-term political imperative of needing to be seen to be doing something. Here the Minister introduced a law targeting an entire breed and then dumped responsibility for its enforcement upon local Councils whose role traditionally is animal management rather than animal welfare.

Interestingly, a newspaper story covering the case was accompanied by a cartoon with the words "beware of our lawyer" - a caption which shows just how much clout legal challenges can have.

A well-researched alternative to this law would have been the Calgary Model in Alberta, Canada. It emphasises, for example, the early socialisation of pups, and proper owner responsibility. The Calgary Model over now some 25 years has been effective in very substantially reducing dog bites and attacks.

Another example of the relationship between the political and legal systems in forming animal law is the word free range and what it means in relation to egg laying hens.

At a national level, the Code of Practice for Poultry 4th edition sets standards for what is free range. For example – hens are to be housed in sheds; those sheds are to be ventilated; hens are to have access to an outdoor area for a minimum of 8 hours a day; and the maximum outdoor stocking density is 1,500 hens per hectare. For those of you who aren't familiar with the terminology of animal law, a Code of Practice differs in nature from legislation. It does not have the same legal force and it does not provide a basis for prosecution. For example, if a farmer keeps 2,000 birds per hectare outdoors in his free range farm, he or she cannot be sued for 'breaching'

the Code.

The Poultry Code 4th Edition has been introduced into each State's legal regime.

So what is the legal power of this Code? The answer differs depending on the State you're in.

In Victoria for example, our *Prevention of Cruelty to Animals Act* 1986 is the corner stone of animal protection legislation.

Section 6(1)(c) provides that the Act does not apply to:

> *(c) any act or practice with respect to the farming, transport, sale or killing of any farm animal which is carried out in accordance with a Code of Practice;*

Thus a Code of Practice merely provides a defence to existing legislation. For example, various Codes state that practices such as de-beaking or tail docking are acceptable methods of animal husbandry. Although these acts may have been considered 'animal cruelty' under a local animal weflare statute such as the *Prevention of Cruelty to Animals Act* in Victoria, because a Code allows them, they are permitted.

Thus the Code acts as a shield for producers, rather than a sword for enforcers of the law.

In contrast to Victoria, Queensland in clause 14 of its *Animal Care and Protection Regulation* 2002 prohibits a free range farmer from keeping more than 1,500 birds per hectare. Being a regulation,

rather than a Code, the result is stronger legal protection for animals. Any farmer who breaches this regulation, can be prosecuted.

I will add that while I have focused on stocking density, it is only one measure of what 'free range' means. There are various other measures including for example, whether hens are de-beaked.

In relation to egg laying hens, yet again, the legal system plays the role of enforcer of the law, in this instance through the Australian Competition and Consumer Commission, the ACCC.

As to enforcement, the ACCC has intervened in different ways.

For example, the ACCC has intervened on grounds of misleading and deceptive conduct to obtain Court orders against a producer marketing eggs as free range which were produced by caged hens.

The ACCC discharged a different role in the case of AECL's application for Certification of a Trademark. The AECL applied for such certification to IP Australia where the standards provided for free range eggs produced by layer hens kept in an outdoor stocking density of 20,000 birds per hectare. An ACCC sign off that a public interest test was satisfied, was declined. The trademark application was withdrawn.

ACCC commissioner Sarah Court, in a general observation, has recently said: "the ACCC is concerned about the redefinition of what is meant by free range by industry to suit itself, and the fact that the redefinition has the very potential of misleading consumers".

The ACCC has thus assumed a major role in protecting animal welfare and acting as a watch dog. The ACCC has access to the Courts, as they have legal standing to sue and intervene in instances of consumer protection. The provisions of the *Competition and Consumer Act* (Cth) 2010, have thus enabled whole industries to be challenged in their marketing claims.

What we have seen recently, is a discernible shift on behalf of the legal profession aided by a powerful Commonwealth agency like the ACCC to undertake strategic public interest litigation to challenge a whole industry. This is in comparison to traditional prosecutions which have usually been in respect of a few animals under a local animal protection statute such as the *Prevention of Cruelty to Animals Act* in Victoria. What the Codes may allow, can be challenged in respect of marketing claims under the auspices of the *Competition and Consumer Act* (Cth) 2010.

However, as powerful and incisive as these challenges are, they are reactionary. Any legal action taken by the ACCC happens after hens have been kept as battery hens and their eggs marketed as free range. In addition, these challenges must be based on the laws as they exist. Herein lies the conundrum of 'animal law'.

Lawyers and the legal system act as a check and balance to ensure that these laws are maintained, however the laws themselves are often inherently weak. The laws that govern animals are often the ones that allow their suffering.. Any legal challenge, can only be based on these laws.

This goes to the essence of what is animal law – the struggle by legal activists to ensure that those weak laws are adhered to; these laws that are introduced by Governments and Departments of Agriculture who are continuously lobbied by producers.

Before I conclude, the last example that I will touch upon is again another example of factory farming – sow stalls. As you can see from this photo, sow stalls are one of the extreme cruelties of factory farming – they are metal pens used to house female pigs that are big enough only to stand and sit, and not turn around.

This example differs from the previous two, because while sow stalls have been the subject of heated political debate particularly in Tasmania, these laws have not been the subject of significant or really any legal action. The reasons for this may be varied – there may have been no significant opportunity for strategic litigation; or producers may not have adopted misleading advertising.

So what is the law governing pig production? There is the Code of Practice Pigs 3rd Edition. In Victoria it has been introduced as the *Victorian Standards and Guidelines for the Welfare of Pigs*, with the intention to adopt it into Victorian law as regulations under the *Livestock Management Act 2010*. This Code permits the use of sow stalls. At a State level, the Tasmanian Government has announced that it would ban sow stalls, in other words, that they would break with the Code and introduce laws which allow for better animal welfare. No other State has to date announced a ban. More recently in November 2012, the Tasmanian government has reneged on it's promise announcing that producers could hold sows in stalls, but for up to 10 days only.

This leaves open the question of compliance. How are we going to enforce such a law? What right of inspection will exist for an inspector to check the period a sow is confined in a stall? How will an inspector accurately judge the length of time a sow has been confined? This may again be an example of an unworkable law.

This example evidences the typical relationship between the political and legal systems in the

formation animal law – politicians and Departments of Agriculture introduce laws which favour producer interests and entrench cruel practices. The legal system acts as enforcer of these laws – however only when the opportunity arises; with sow stalls, it has not arisen.

To conclude, the relationship of law and politics in the realm of animal law, is one of check and balance. When it comes to animals, the tragic reality is that politicians and Departments of Agriculture have abdicated their responsibility to honour the public interest by introducing a system of Codes or Guidelines that sanction factory farming and animal cruelty in producer interest over even basic animal welfare.

Legal action, particularly by Commonwealth Agents such as the ACCC, can be incisive. It can hit industry where it hurts – reputation and credibility.

In the end however, lawyers and Courts can only work with the laws that exist.

Strong legal protection for animals relies not only on the efforts of an active legal community. Such protections also need courageous politicians who see the laws governing animals for what they are: legalised animal cruelty. And importantly, a legal system that genuinely protects and promotes an animal's interests needs an engaged and active public that pressures politicians to act for animals.