

ACHIEVING LEGAL STANDING FOR FACTORY FARMED ANIMALS

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Introduction

For factory farmed animals in Australia, the justice system is locked behind a door. Current legal doctrine stipulates they have no legal standing and are all but exempt from State animal welfare laws. This paper seeks to examine the doctrine of standing and how it can be reconsidered to include advocates attempting to enforce animal welfare and anti cruelty laws. In many cases a personal or 'special' interest of some kind is required in the subject matter of the action.¹ Under the test in *Onus v Alcoa of Australia Ltd*, a plaintiff must possess a private right or have an interest in the subject matter of the action which is more than a mere intellectual or emotional concern and which is beyond that of any other member of the public (that is, a 'special interest').² The courts have applied the "special interest test by looking for a nexus between the plaintiff's interest and the subject matter of the action."³

It is the phrase "special interest" that holds the most potential in developing a standing doctrine that can include standing for animal welfare actions. A broader application of the test enunciated in the United States Court of Appeals case *Animal Legal Defense Fund Inc. v. Glickman*, held that "aesthetic injury" could suffice for the purposes of standing, based upon subjective considerations of a plaintiff in viewing animals kept subject to inhumane conditions.⁴

Animals as Property and Issues of Standing – Overcoming an Ideological Conflict

At the core of human and animal relationships is the prevailing legal status of animals as property. Francione argues that "to label something property is, for all intents and purposes, to conclude that the entity so labeled possesses no interests that merit protection and that the entity is solely a means to an end determined by the property

¹ "Beyond the door-keeper Standing to sue for public remedies" ALRC Report No 78

² *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 42 (per Stephen J)

³ "Beyond the door-keeper Standing to sue for public remedies" ALRC Report No 78 para 4.9

⁴ *Animal Legal Defense Fund Inc. v. Glickman* 154 F.3d 426 (1998)

owner.”⁵ To expand legal protection and remedy available to factory farmed animals, a uniform and settled approach on standing must be established upon the principle that animals are not merely a means to human ends but have by virtue of themselves, basic moral rights.⁶ The status of animals as property translates into a fundamental barrier to gaining standing to sue on their behalf. As Cassuto argues, animals lack legal protections because they are commodified property whose worth emanates from their market value.”⁷ In other words, systematic abuse arises is sanctioned in the discourse of property because such animals are not considered as individual, sentient beings but a mere commodity.⁸ Granting standing to a plaintiff to sue to enforce an animal welfare statute therefore can serve to interfere in another individual's property right.⁹

The Exemptions of Farmed Animals from Legislative Protection

The legislative framework governing the lives of animals on factory farms is indicative of the dichotomy drawn between farm animals on one hand and companion animals or endangered species on the other. In New South Wales, the key piece of legislation is the *Prevention of Cruelty to Animals Act 1979* (“POCTAA”). Provisions in the Act establish stringent definitions of cruelty contained in sections 4(2) and 5 in which the following is an act of cruelty whereby an animal is unreasonably, unnecessarily or unjustifiably beaten, kicked, killed, wounded, pinioned, mutilated, maimed, abused, tormented, tortured, terrified or infuriated, over-loaded, over-worked, over-driven, over-ridden or over-used, exposed to excessive heat or excessive cold, or inflicted with pain. In section 4 of the *POCTA Act*, animals used for the production of food and industry are defined as “stock animals” comprising cattle, horses, sheep, goats, deer, pigs and poultry. By virtue of this definition they are exempt from numerous acts that would come under the definition of cruelty if these acts were committed against an animal not defined as a “stock animal”.

⁵ Francione G *Animals, Property and the Law* 49 Temple University Press 1995

⁶ Kyle Ash “International Animal Rights: “Speciesism and Exclusionary Human Dignity” *Animal Law* 2005 Vol 11:195 pg 204

⁷ Cassuto D et al “Legal Standing for Animals and Advocates” 13 *Animal L* 61 2006-2007

⁸ Webster J “Background Briefing”, Radio National's current affairs radio documentary program, on Sunday 7 February 2004 ABC Radio. Transcript available: <http://www.vnv.org.au/Articles/EnoughIsEnough.htm>

⁹ Garner R “Political Ideology and the Legal Status of Animals” *Animal Law* 2002

Such exemptions are facilitated by the establishment of a legal defense to an alleged cruel practice through section 24 of the *POCTA Act* whereby a person is not guilty of the offence if the court is satisfied that the act or omission in respect of which the proceedings are being taken was done to a “stock animal” in the course of various industry practices. Such practices sustaining the defense include ear-tagging or branding and all acts if an animal is less than two to six months of age depending of the species of animal. Stock animals are also exempted from section 9 of the *POCTA Act* which stipulates that confined animals are to be exercised. Under 34A the *POCTA Act*, Industry Codes of Practice can be adopted as guidelines, relating to the welfare of farm animals meaning that it is the Industries themselves regulating animal welfare in factory farms, rather than an independent bodies or legislative frameworks, removed from subjective bias such as monetary concerns.

A More Liberal Approach to Standing – Opportunities for Factory Farmed Animals

The absence of legislative protection for factory farmed animals gives rise to considerations of alternative means of representing their interests so that farmed animals are no longer “invisible to the law.”¹⁰ In this respect, new avenues for redressing animal welfare on factory farms need to be explored for the purposes of lifting the veil on practices which are largely unaccountable to legislation or public scrutiny.

In the matter of *Animal Legal Defense Fund Inc. v. Glickman*, the court granted the Plaintiff (Michael Jurnove of the ALDF) legal standing to sue the Government to try to force it to issue regulations assuring captive chimpanzees were provided with group living arrangements and appropriate amenities.¹¹ The successful application was brought in the context of owned animals which were kept in conditions subject to the 1985 amendments to the Animal Welfare Act (“AWA”). The AWA provided the direction to the Secretary of Agriculture to “promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and

¹⁰ Wise S “Review Essay: Animals and the Law: A New Legal Frontier?” [2005] MULR 9

¹¹ *Animal Legal Defense Fund Inc. v. Glickman* 154 F.3d 426 (1998)

exhibitors."¹² The court held that with regard to standing the plaintiff had "alleged far more than an abstract, and uncognisable, interest in seeing the law enforced."¹³

The decision in *Animal Legal Defense Fund Inc. v. Glickman* is an important step forward for two reasons in obtaining standing for animals in factory farms. The first of these reasons is that the 'interest' that the Plaintiff successfully upheld was that of "aesthetic injury" which the allowed for the purposes of standing, "an injury in fact."¹⁴ The reasoning was thus: as the plaintiff made clear that he has an "aesthetic interest in seeing exotic animals living in a nurturing habitat, and that he has attempted to exercise this interest by repeatedly visiting a particular animal exhibition to observe particular animals there", the alleged injury occurred when Mr. Jurnove in pursuing his recreational and educational interest "witnessed the actual living conditions of the primates," and their enduring of inhumane treatment.

The application of *Glickman* to industrialised farming lies in the court's acceptance of the proposition that an interest by virtue of it being an aesthetic does not make it less "distinct and palpable,"¹⁵ taking the required interest beyond traditional concepts of standing derived from property interests¹⁶, and towards a more open definition of harm or injury arising outside an individual's propriety ownership and within moral or ethical concerns. This raises a unique possibility in acquiring standing for factory farmed animals and overcoming a mere "ideological interest in the dispute".¹⁷ Whereas cases like *Lujan v. Defenders of Wildlife*¹⁸ and *Animal Lovers Volunteer Association v. Weinberger* held that in absence of any concrete intentions on behalf of the plaintiffs to engage in some way with the animals allegedly the subject of the impugned act or omission, standing is unavailable as the injury or interest is merely "speculative."¹⁹

¹² Pub.L. No. 99-198, § 1752, 99 Stat. 1354, 1645 (1985)

¹³ 332 U.S.App.D.C. 104, 154 F.3d 426 (D.C.Cir. 09/01/1998) Circuit Judge Wald at para 37

¹⁴ *Animal Legal Defense Fund Inc. v. Glickman* 154 F.3d 426 (1998)

¹⁵ *Allen v. Wright* 468 U.S. at 751

¹⁶ Cassuto D "The Law of Words: Standing, Environment and Other Contested Terms"

¹⁷ Sunstein C "Standing for Animals" Chicago Public Law and Legal Theory Working Paper No.6

¹⁸ *Lujan v. Defenders of Wildlife*, 504 US 555 (1992) (199)

¹⁹ *Animal Lovers Volunteer Association v. Weinberger* 765 F.2d 937 (9th Cir. 1985) See also *Ogle v Strickland*

As doctrines of standing traditionally evolve around a person's interest in litigation,²⁰ the case of *Glickman* departed from the traditional utilitarian view that a "person" refers to a single concept instead of a range of characteristics."²¹ This therefore enabled the acceptance by the Court that a person in asserting an interest for the purposes of standing "does not stand for a single concept but rather for a cluster of ideas," which may include biological humanity, rational agency, and unity of consciousness".²²

The second reason for which *Glickman* is an important step forward in obtaining standing for factory farmed animals is that of causation and redress. Initially, *Glickman* is likely distinguishable on the basis that in contrast to a factory farming case, the animals were in public view and therefore allowed an "aesthetic" and public component to come into consideration on whether the plaintiff's interests were within the requisite area protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.²³ The case however additionally showed a judicial willingness to entertain subjective factors when considering whether the alleged injury could be demonstrated to be caused by, or at least be fairly traceable to the defendant's alleged unlawful conduct which was based on the government's failure to adequately regulate a third party."²⁴ In addition, the injury would be redressed by a decree in the Plaintiff's favour, in that "more stringent regulations would necessarily alleviate aesthetic injury" during the planned, future interactions of the Plaintiff with the animals concerned.²⁵

In cases involving factory farming, the recognition of a broader category of injury and causation, gives rise to a further ground for standing. This ground is founded upon the notion of the public interest. Regarding the public interest and its general relation to the law, Sir Anthony Mason stated that "courts have a responsibility to develop the law in a way that will lead to decisions that are humane, practical and just. Judges do not carry out

²⁰ *Gouriet v. Union of Post Office Workers* [1977] UKHL 5; (1978) AC 435

²¹ Ohlin J, "Is the Concept of Personhood Necessary for Human Rights?" 105 Colum L. Rev. 209, 228–30 (2005)

²² Cassuto D "Bred Meat: The Cultural Foundation of the Factory Farm" Law and Contemporary Problems Winter 2007 <http://law.duke.edu/journals/lcp>

²³ *Bennett v. Spear*, 520 U.S. 154, 117 S.Ct. 1154 at 1161

²⁴ *Animal Legal Defense Fund Inc. v. Glickman* at 440

²⁵ *ibid* at 443

this responsibility in a vacuum, by shutting their eyes to contemporary conditions. They must have an eye to the justice of the rule, to the fairness and practical efficacy of its operation in the circumstances of contemporary society. A rule that is anchored in conditions which have changed radically with the passage of time may have no place in the law of today.”²⁶

An example that could potentially succeed in gaining standing for factory farmed animals arises from the increasing evidence of links between animal welfare abuses on factory farms and the human health implications for the food produced from intensively reared animals.²⁷ As stated in the *Australian Law Reform Commission Report 78* standing should be available where there is “a benefit to the public at large in allowing persons other than those whose immediate rights and interests are at stake to bring the matter to court.”²⁸ This view is clearly borne out in that scientific evidence has increasingly demonstrated high levels of unsafe farming practices leading to significant health problems in humans, including bacterial outbreaks, food poisoning and the misuse of antibiotic and hormone compounds in animal feed.²⁹

Though this approach is fundamentally human centric, it is nevertheless what is required by the approach in *Glickman* and in *Australian Conservation Foundation v Commonwealth*,³⁰ in that a plaintiff must have a recognisable special interest or injury arising from an impugned act or omission, for example, an adverse health problem traced to the use of a particular chemical agent in production. By extension, for the purposes of standing, a plaintiff could then argue a potential causal link between the interest or injury and the practices carried out in factory farms. As in *Glickman*, the plaintiff gains standing to sue for the inadequate regulation of a third party that is factory farms, and further seeks

²⁶ “Beyond the door-keeper Standing to sue for public remedies” ALRC Report No 78

²⁷ Dr Tim O’Brian “Factory Farming and Human Health: A Compassion in World Farming Trust” August 1997 Compassion in World Farming Trust Charles House, 5A Charles Street, Petersfield, Hants

²⁸ at para 3.12

²⁹ For example Clemmer, D. I. et al. 'Bacteriological studies of experimental air-borne salmonellosis in chicks'; *Journal of Infectious Diseases* 106: 197-210. 1960; Advisory Committee on the Microbiological Safety of Food. 'Report on Poultry Meat'; HMSO, London: p 92. 1996; World Health Report: Fighting Disease, Fostering Development'. World Health Organisation, Geneva: pp 20,107. 1996.

³⁰ [1979] HCA 1; (1980) 146 CLR 493

redress in the provision for more stringent regulation with higher standards of care and duties to eliminate animal welfare abuses in relation to the alleged injury.

The related basis for standing for factory farmed animals is that of informational standing, or the public's right to information. According to Sunstein, informational standing will be available to a plaintiff whereupon the legislation grants standing to "any person" to contest violations of a duty of disclosure.³¹ However, under the *POCTA Act*, no such grant is made or intention envisaged for public disclosure on animal welfare. This therefore means that a plaintiff would need to revert to satisfying the test in *Australian Conservation Foundation v Commonwealth* for standing. When based around a subjective desire for information, it would seem unlikely a plaintiff could meet even the most liberal test for an interest or injury as held in *Glickman*, given that a plaintiff would have to distinguish themselves from any other citizen complaints of unlawful deprivation of information involving treatment of animals.³² This would entail showing an "injury in fact" arising from non disclosure where although no private right is interfered with, the plaintiff, in respect of a public right, suffers special damage from the interference with the public right.³³

Barriers to standing are effectively overcome when statutes grant open standing to citizens to sue for the enforcement of provisions. Informational standing may be available under the *Trade Practices Act 1974 Cth* with regard to lifting the veil on factory farming practices through the enforcement of provisions dealing with misleading and deceptive representations made to the public in advertising. Section 53 states that a "corporation shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services or in connexion with the promotion by any means of the supply or use of goods or services, falsely represent that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use." Under section 80 of the *TP Act*, "any person" has standing to sue for alleged contraventions enabling a plaintiff to potentially sue on the frequently used utopian

³¹ Op cit. Sunstein C pg 12 – 13

³² ibid

³³ *Boyce v. Paddington Borough Council* (1903) 1 Ch 109, at p 114 per Buckley J

imagery in the advertising and labeling of products originating from factory farms.³⁴ For the Court to consider the merits of such an application, its inquiry would necessarily involve scrutiny of actual practices taking place in factory farms and the extent to which such advertising constituted a false representation.

The Future – Open Standing for Animal Welfare

Cassuto has argued that open standing is a necessary factor to effectively enforce animal welfare laws.³⁵ This argument is premised by virtue of the nature of legislation itself, whereby if enforcement bodies exist to regulate and monitor a type of act or practice, this means that Parliament has decreed that where the law is violated, there is for the purposes of standing, an injury.³⁶ This however would involve an exceptionally broad view on what would satisfy any special interest test in the particular subject matter needed for standing.

A potential doctrine for future concepts of standing could be based upon principles espoused in the notion of “public interest litigation”. The determination of public interest is essentially non-justiciable and depends on the application of a subjective rather than an ascertainable criterion.³⁷ However, greater flexibility in legal doctrine is what allowed the court in *Glickman* to grant standing to the plaintiff, taking into effect the potential injury to the public if anti-cruelty regulations were not properly enforced. As legal rights are a judged outcome of the legal process, the public has an interest in ensuring compliance with legislation that impacts not solely upon the legal sphere but society as well.

³⁴ See generally “From Label to Liable: Scams, Scandals and Secrecy.” A Report by Voiceless May 2007

³⁵ Cassuto D et al “Legal Standing for Animals and Advocates” 13 Animal L. 61 2006-2007

³⁶ *ibid*

³⁷ “Open Government: A review of the federal FOI Act 1982” ALRC Report No 77 para 8.13