Legal personhood for animals in New Zealand

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Table of Contents

Introduction

In the area of animal law, there is great debate as to what legal classification domestic animals should have, and how the human-domestic animal relationship should be regulated.

At present, the human-domestic animal relationship is defined as one of owner and property.[1] New Zealand takes a modern welfarist approach to animal legislation through the Animal Welfare Act 1999.[2] The welfarist approach accepts that domestic animals are property and so operates on the basis that using such animals is acceptable.[3] Welfarist provisions impose positive duties on individuals, primarily owners, to care for their animal property.[4] Typically, the positive duties under the modern welfarist approach aim to prohibit unnecessary suffering animals may otherwise experience.[5] New Zealand as a result of its approach to animal law is ranked first equal in the Animal Protection Index alongside Austria, Switzerland and the United Kingdom,[6] and is considered a world leader in animal welfare legislation.[7]

While legal welfarism represents a progressive approach to animal legislation, there are those who feel animals deserve greater recognition and protection of their interests. As a result, this leads to the central debate in animal law, which is how to further reform legislation pertaining to animals.

There are three primary schools of thought with respect to what animal legislative reform should look like. The first two schools of thought are classical welfarism and new welfarism. At a practical level, these both seek refinement of the status quo welfarist approach to legislation to further reduce unnecessary suffering that animals currently experience.[8] However, at a fundamental level, the two approaches conflict. This is because classical welfarists agree with animals being classified as property because they believe animals are inferior to humans.[9] They are therefore content to only acknowledge animal interests subject to their property status.[10] New welfarists on the other hand do not believe that animals are inferior to humans. On that basis they ultimately seek rights to protect animal interests.[11] New welfarists believe that incremental welfarist reform will lead to rights, and this is why, at a practical level, they seek the same type of reform as classical welfarists.[12]

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[1] Deborah Cao, Katrina Sharman and Steven White *Animal Law in Australia and New Zealand* (Thomson
[2] At 142.
[3] Gary L Francione *Rain without Thunder – The ideology of the Animal Rights movement* (Temple University Press, Philadelphia, 1996) at 8.
[4] Cao, Sharman and White, above n 1, at 142.
[5] Gary L. Francione *Animals, Property, and the Law* (Temple University Press, Philadelphia, 1995) at 18.
[6] "World Animal Protection Index Map" World Animal Protection < http://api.worldanimalprotection.org/>.
[7] Cao, Sharman and White, above n 1, at 109.
[8] Francione, above n 3, at 35.
[9] At 8.
[10] At 35.
[11] At 36.
[12] Francione, above n 3, at 34.

The last school of thought is abolitionism. Gary Francione is a well known proponent of this view. He seeks to remove the status quo welfarist approach to animal law by removing the property status of animals and giving them rights (in particular, the right not to be property).[13] This is on the basis that animals have equal moral value to humans, and so ought to be treated the same.[14] Francione does not believe that welfarist reform, which continues to accept that animals are property, will lead to rights for animals.[15]

A central theme arising from these three schools of thought is that they are primarily concerned with either accepting animals as property, or rejecting that classification. What is unclear is what the human-animal relationship would look like and how it would be regulated if animals become rights holders as Francione envisions. Francione's abolitionist theory presents compelling arguments in favour of recognising animal rights. However, he fails to clarify what the consequences of giving animals rights would be beyond stating that he believes it would ultimately result in only wild animals existing.[16]

This dissertation aims to contribute to this debate. It will do so by expanding on what the human-animal relationship could look like should abolitionist views take hold in the law, whereby animals are given legal rights. To do so, this dissertation is presented in two parts:

Part 1 will consider the history of animal law. This will involve explaining how it has led to the current system that is concerned with improving animal welfare whilst animals remain legal property. It will then explain in depth the three main schools of thought that represent the possible approaches to animal law reform as described above.

Part II will consider the further elements that may be involved in a theory of legal personhood for animals. Francione provides convincing arguments for giving animals legal rights, but he does not discuss whether legal duties would be required for animals to be legal persons. Therefore, whether legal personhood requires legal subjects to owe duties alongside rights must be considered. I propose that duties are not required. In the alternative, I propose that animals may still be legal persons even if this requires legal duties to be owed. This is supported by the fact that some animals as property are already held to owe legal duties in some respects. It would not be difficult to extend these duties to animals as legal persons. That discussion will then be followed by a recommendation of a mixed exclusionary/governance approach to oversee animals' classification as legal persons. Under

[13] Gary L. Francione "Animal Rights and Animal welfare" (1996) 48 Rutgers L. Rev 397 at 398.
[14] At 398.
[15] Gary L Francione "Reflections on "Animals, property and the law" and "Rain without Thunder"" (2007) 70 Law & Contemp Probs 9 at 47.
[16] Gary L Francione *Introduction to Animal Rights – your child or the dog?* (Temple University Press, Philadelphia, 2000) at 154.

this approach, I propose the human-companion animal relationship should be redefined from the status quo of owner and property, to become that of guardian and ward. This would properly respect animals' classification as legal subjects, yet allow interactions between humans and companion animals to be similar to what they are now. This strays from the future that Francione envisages where only wild animals will exist, but it shows the law's capacity to also accommodate a closer relationship between humans and animals when both are legal subjects. This part will conclude with examples of provisions that show what legal regulation of the guardian-ward relationship would look like. These will be compared to analogous provisions in other areas (such as family law), to show that there is capacity in the law to accommodate this type of relationship between humans and animals.

Part I

A Background context

1 The significance of animals as property

The common law has long accepted that domestic animals are property and subject to human ownership.[17] This is dependent upon a distinction between domestic and wild animals that originated in Ancient Rome, and which was retained by the common law system.[18] The distinction is that while domestic animals can be subject to ownership, animals in a wild state are "res nullius" or belong to no one.[19] There is an exception where temporary property in wild animals can exist if, for example, they are contained or have been tamed.[20]

Traditional property concepts mean that human owners can use their property for whatever purpose they wish, subject only to limitations in law.[21] Therefore when animals are subject to a property status, owners can use that animal property for purposes that are contrary to the animals' interests.[22] When animals meet the criteria for property status, they are by virtue of that status considered to be objects under the law. This means that they are incapable of holding rights,[23] which might otherwise prevent owners from exercising their ownership rights when they conflict with the animals' interests.[24]

It is important to note these implications of property categorisation because most animal legislation is primarily concerned with animals that are subject to the individual ownership rights that flow from their status as property.

2 The justifications for animals as property

Many arguments have been used in the past and in the present to justify the categorisation of animals as property.

The most common justification is the traditional Western view of the human-animal relationship, which is that man is superior to animals.[25] This has religious origins based on the belief that God gave humans dominion over all living creatures.[26] Other religious concepts were used in conjunction with that belief to justify claiming human superiority over

[17] Cao, Sharman and White, above n 1, at 70.
[18] At 67.
[19] At 67.
[20] Mike Radford *Animal Welfare Law in Britain* (Oxford University Press, New York, 2001) at 100.
[21] Cao, Sharman and White, above n 1, at 77.
[22] Francione, above n 5, at 46.
[23] At 92. See also, Wendy A Adams "Human Subjects and Animal Objects: Animals as Other in law" (2009) 3 J Animal L & Ethics 29 at 34.
[24] Gary L Francione "Animal Rights Theory and Utilitarianism: Relative Normative Guidance" (1997) 3 Animal L 84.
[25] Radford, above n 20, at 15.
[26] Genesis 1:26-28.

animals. These other concepts relating to humans include being made in His image, having an immortal soul, being able to speak, and possessing the capacity to reason.[27]

St Thomas Aquinas exemplified this view. He stated that "man, being made in the image of God is above other animals" who are therefore "rightly subjected to [man's] government" and "intended for his benefit".[28] The Thomist tradition is anthropocentric because it endorses the view that humans may use animals for whatever purpose they want. Aquinas noted one exception to this general rule, which is if any Bible passage appears to prohibit cruelty to animals. He justified this exception on the basis that cruelty to animals might encourage cruelty to humans, or that injury to an animal might lead to later harm to humans.[29] This duty still operates under an anthropocentric view because it is owed to other humans for the purpose of human social benefit as opposed to recognising animals have inherent interests against cruel conduct.[30]

Given the Church historically had a large amount of power, social attitudes were almost solely defined by its orthodox position.[31] The Church has continued to influence justifications for animals' property status, as shown by William Blackstone's writings in the 18th century, where he reiterated and endorsed the religious justification for the property status of animals.[32]

Another justification used for the property status of animals derives from John Locke. According to his liberal theory, only rational linguistic beings are capable of holding rights and being subject to obligations. Since he perceived animals as lacking reason or language skills, they were precluded from being part of the moral community and had no inherent moral worth.[33] It is this "supremacy of humans" thinking that underpinned Locke's labour theory of how property is attained, and its inclusion of animals.[34]
His labour theory holds that property comes about by exertion or labour upon natural resources.[35] Within it, Locke noted that animals in their original state "belong to Mankind in common, as they are produced by the spontaneous hand of nature; and nobody has originally a private dominion, exclusive of the rest of mankind, in any of them".[36] This was his way of

[27] Radford, above n 20, at 15.
[28] At 16.
[29] At 16.
[30] At 16.
[31] At 16.
[32] Cao, Sharman and White, above n 1, at 70.
[33] Gary Steiner "Cosmic Holism and Obligations toward Animals: A Challenge to Classical Liberalism" (2007) 2 J Animal L & Ethics 1 at 1.
[34] Radford, above n 20, at 100.
[35] John Locke and Ian Shapiro *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press, New York, 2003) at 112.
[36] At 111.

describing animals as a natural resource that are thus capable of becoming property if domesticated, and is still seen as a justification for animals' property status.

The crucial idea that underpins each of these justifications, and upon which the common law has developed, is that animals are inferior in some way or possess a "defect" that justifies their classification as property.[37]

Most modern debates concerning animal law relate to whether animals should continue to be classified as property, or have this status removed. These traditional justifications for the property status of animals are important to note because they give context to such debates and are still used today to validate the status quo's categorisation of animals as property.

3 The history of legislation pertaining to animals

The property status of animals has meant that their legal treatment has been anthropocentric. Early laws were primarily concerned with protection of the interests of the human owners of animals, not the animals themselves.[38] This is because animals were considered to be no different to inanimate property.[39] Ancient law in particular showed no legal regard for animals beyond their value as property; it did not prevent harm to animals, only the financial harm animal property might cause.[40]

Over time, legislation was enacted that appeared to protect animals from harm, but was still on the basis of an anthropocentric approach. Clear examples of this arose in England between 1671 and 1831. Fifty-three statutes were enacted that dealt with economic issues in relation to animals, such as poaching.[41] Beyond protecting economic interests at a wide scale level, the law operated only in limited situations such as trespass if a third party injured a domestic animal, or public nuisance.[42] These examples show an anthropocentric approach to animal law, as none were concerned with the intrinsic interests of the animal, but were instead motivated by economic concerns relevant to the owner or the maintenance of public order.[43]

A pivotal shift in approach to animal legislation began with Lord Erskine's Cruelty to Animal Bill that was presented to the House of Lords in 1809.[44] Its purpose was to prevent malicious and wilful cruelty to animals.[45] Lord Erskine's speech to the House of Lords, coupled with the broad scope of the Bill, shows the motivation behind the proposed legislation was to

[37] Francione, above n 5, at 42.
[38] Radford, above n 20, at 29.
[39] At 29.
[40] Thomas G Kelch "Short History of (Mostly) Western Animal Law Part 1*"* (2012) 19 Animal L 23 at 33.
[41] Radford, above n 20, at 29.
[42] At 29.
[43] At 29.
[44] At 29.
[45] At 35.

protect animals against ill treatment for their own sake.[46] Lord Erskine justified this on the basis that man owes animals a direct duty because of their similarities to humans, particularly with regards to sentience.[47]

In his speech he stated that "[animals] are created for our use, but not our abuse".[48] This quote illustrates that Lord Erskine did not question the property status of animals or their use for human purposes. The significance of his proposal lay in acknowledging that animals are different to traditional property, and deserve direct consideration rather than the traditional approach to property of none at all.[49]

While Lord Erskine's Bill was defeated in the House of Commons, it set a precedent for a more animal-centric approach that led to the enactment of the Cruel Treatment of Cattle Act 1822 (commonly known as Martin's Act).[50] This statute marked the beginning of the anti-cruelty legislative movement because it was the first piece of legislation aimed primarily at preventing cruelty to animals, specifically cattle.[51] While Martin's Act was limited to only one species, it was important in establishing "the principle that Parliament should legislate to prevent cruelty".[52]

Subsequent pieces of legislation broadened the scope of protection for animals and it is with this backdrop that New Zealand's legal approach to animals arose. The Protection of Animals Act 1835 (UK)[53] became law in New Zealand when this country became a colony of England.[54] Further legislation has been enacted in New Zealand, the most recent of which is the currently in force Animal Welfare Act 1999 (**AWA**).

The AWA takes a modern "welfarist" approach to animal legislation, compared to its anti-cruelty based predecessors. Legal welfarism is a relatively new way of approaching animal legislation, gaining traction in influencing policy in the United Kingdom in the late 1960s, and was first present in legislation here in 1999 through the AWA.[55]

It may be seen as an extension of the anti-cruelty movement because it also targets cruel conduct towards animals. However, the nature of welfare offences are distinguished from traditional anti-cruelty *per se* measures. Anti-cruelty offences target and criminalise specific behaviour. For example, an offence prohibiting the cruel beating of a cow (as was proscribed

[46] Radford, above n 20, at 35.
[47] At 36.
[48] (15 May 1809) 14 UKPD HL 554-556.
[49] Radford, above n 20, at 36.
[50] Cruel Treatment of Cattle Act 1822 (UK) 3 Geo IV c 71.
[51] Radford, above n 20, at 39.
[52] At 45.
[53] Cruelty to Animals Act 1835 (UK) 5 & 6 Will IV, c 59.
[54] Cao, Sharman and White, above n 1, at 107.
[55] Radford, above n 20, at 262.

in Martin's Act)[56] is an example of an anti-cruelty offence because it is aimed at prohibiting particular behaviour.[57]

In contrast, welfare provisions regulate general forms of conduct towards animals by imposing positive obligations.[58] Failure to comply with these obligations can constitute welfare offences.[59] For example, non-compliance with a duty to handle an animal in a manner that minimises the likelihood of unreasonable or unnecessary pain or distress is a welfare offence.[60]

Welfare offences provide more protection for animals because their scope is broader by focussing on general behaviour and imposing positive duties, rather than proscribing specific actions. I will now consider the significance of taking a welfare approach to animal regulation in the law.

4 Legal welfarism and its significance

Legal welfarism is predicated on two key assumptions. The first is that animals are sentient, which means they have interests that ought to be protected, and the second is that they are properly classified as property.[61] These two ideas are in conflict: to favour one is almost always at the expense of the other. For example, an offence for an owner using an animal in such a way that it causes the animal to suffer, such as denying it proper and sufficient water, favours recognising the animal's interest against such deprivation over the owner's right to use their property in whatever way he or she wishes. Legal welfarism in creating such offences operates as a compromise between these two conflicting ideas by deciding which to favour and to what extent.[62]

There are various pieces of legislation that regulate our relationship with animals in New Zealand.[63] The AWA is the most important because it establishes the framework for consideration and basic protection of animals' interests.

The AWA takes a legal welfarist approach to regulation of the human-animal relationship because it operates upon the two assumptions of welfarism. Firstly, it accepts animal

[56] Cruel Treatment of Cattle Act 1822 (UK) 3 Geo IV c 71.
[57] Peter Sankoff "Five years of the "new" animal welfare regime: lessons learned from New Zealand's decision to modernise its animal welfare legislation" (2005) 11 Animal L 7 at 11.
[58] At 11.
[59] Animal Welfare Act 1999, s 12.
[60] Section 12(a).
[61] Francione, above n 3, at 8.
[62] Francione, above n 5, at 7.
[63] Dog Control Act 1996; Impounding Act 1955; Wild Animal Control Act 1977; Marine Mammals Protection Act 1978; National Parks Act 1980; Conservation Act 1987; Biosecurity Act 1993; Agricultural Compounds and Veterinary Medicines Act 1997; Animal Products Act 1999; Animals Protection (Docking of Tails) Regulations 1972.

sentience. This is observable through the positive obligations under Part 1 of the Act for those in charge of animals to minimise animals' experiences of suffering.[64] Secondly, it also accepts that animals are property[65] because ownership rights allow those who possess animal property to use their animals for their own purposes.[66]

In reconciling these two conflicting ideas, the AWA does not seek to completely abolish every action that is contrary to an animal's interest against suffering, because it accepts this interest can be overridden in some circumstances by the interests of its owner.[67] Instead, the AWA only limits the rights of owners by creating offences for actions that are believed to be illegitimate (i.e. a socially unaccepted practice) on the basis they cause unnecessary suffering.[68] This approach aims to minimise an animal's experience of pain and suffering when it occurs outside of the scope of actions that are considered legitimate or valid for owners to take, because the pain is unnecessary for those purposes.[69] Suffering, even extreme suffering, that occurs within the scope of a valid action is not prohibited by the AWA because it is deemed necessary for carrying out the accepted action.[70]

There is a wide range in approaches for determining what constitutes necessary (and thus legitimate) pain and suffering.[71] For example, some welfare advocates determine what is legitimate on the basis of whether it is cost effective for the efficient use of animals, or whether it "maximises the value of animal "property" for animal owners."[72] This is an approach that strongly favours the property rights of animal owners as it can allow any range of conduct so long as it improves the animal's efficiency, such as castration and ear tagging. Others take a more animal-centric approach and seek improvements for animal treatment that are not cost effective. For example, some seek group housing for veal calves in locations where confinement units are allowed.[73] Confinement units are often so small that calves are unable to turn around or groom themselves. Group housing is considered likely to have a detrimental effect on the veal market because the costs involved cannot be completely passed onto consumers, and so advocating for them is illustrative of a greater concern for calf welfare than maximisation of property value.[74]

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[64] Cao, Sharman and White, above n 1, at 142. See also, Animal Welfare Act 1999, s 10 and s 11.
[65] Cao, Sharman and White, above n 1, at 98. Further, by reference to owners in various offence provisions e.g. s 10 and 11 of the Animal Welfare Act 1999 refer to the obligations of *owners* or persons in charge of animals.
[66] Francione, above n 3, at 8. An example in the AWA includes s 12(c), which makes it an offence to kill an animal such that it suffers unnecessary pain or distress. The implication is that the animal can otherwise be validly killed, despite its interest in living.
[67] Francione, above n 3, at 8.; See also, Cao, above n 1, at 96.
[68] Peter Sankoff and Steven White (eds) *Animal Law in Australasia* (The Federation Press, Sydney, 2009) at 22.
[69] At 14.
[70] At 26.
[71] Francione, above n 3, at 9.
[72] At 9.
[73] At 9.
[74] At 9.

Advocates of more animal-centric measures may not approve of more economically driven improvements that would justify harsher treatment of animals, like veal crates, but they are not necessarily opposed to the purposes harsher treatment is used for. For example, advocates of group housing for veal are not automatically opposed to eating veal or meat generally.[75]

In New Zealand, ownership rights are given a lot of weight in determining what is legitimate treatment of animals. For example, it is not an offence to kill an animal. In fact, owners can kill their animal property for whatever reason they like under s 12(c) of the AWA, so long as the animal is not killed in "such a manner that the animal suffers unreasonable or unnecessary pain or distress".[76] The implication is that an animal may otherwise be validly killed, so long as it does not breach s 12(c). The fact that there can be no greater loss to an animal other than its life - and the fact an owner of animal property has such a wide discretion with respect to when they can kill their animal property - show the emphasis placed on ownership rights in determining what is legitimate treatment in New Zealand.

Having considered the history of animal legislation that has led to the current welfare approach taken in the AWA, and its underpinnings, I will now consider the different approaches to further improving protection of animal interests. These range from those who accept the current system and work to achieve reform within it, to those who disagree with the property status of animals and seek more radical change for more complete protection of animal interests.

B Classical Welfarism

"Welfarists" are those who advocate for improvement of the protection of animal interests by advocating for reform within the current welfare legislative system to minimise an animal's experience of pain and suffering as much as possible.[77]

"Classical welfarists" do so on the basis that they simply wish to ensure legislation reflects good practice and scientific knowledge, and do not view animal rights as the end goal for their efforts in seeking reform.[78]

Classical welfarists thus fundamentally agree with the premise of welfare legislation that animals are property and that despite animals being sentient and capable of feeling pain and pleasure, they are inferior to humans.[79] The latter proposition regarding inferiority is due to beliefs that humans possess morally relevant qualities not possessed by animals that

[75] Francione, above n 3, at 9.
[76] Animal Welfare Act 1999, s 12(c).
[77] Francione, above n 3, at 35, 221.
[78] At 35.
[79] At 8.

distinguish them from one another.[80] The justifications for the belief in human superiority have different bases, including the theological supremacy of man and even certain cultural and scientific beliefs, as previously explained above.[81] Classical welfarists are therefore content for animals to be used for solely human benefit by virtue of their property status. This shows that classical welfarists accept animals are owed direct duties, but these can be traded away for a sufficiently compelling human interest.[82]

The treatment of layer hens provides a case study for the approach classical welfarists take to promoting legislative change. For context, the AWA has supplementary "Codes of Welfare" which specify how the general positive obligations under Part 1 apply to particular situations or particular animals.[83] Any breach of a minimum standard in a Code of Welfare is rebuttable evidence that obligations under Part 1 of the Act have not been met.[84] If the minimum standards have been met, it conversely acts as a complete defence to any claim that would suggest an accused acted in breach of his or her obligations under the AWA.[85]

The Layer Hen Code of Welfare in New Zealand has previously permitted battery cages.[86] These are well known for contravening layer hens' welfare needs by constraining a hen's ability to display normal patterns of behaviour such as dustbathing and extending its wings.[87] The interference with the welfare of hens was recognised, and the Minister of Primary Industries issued the Animal Welfare (Layer Hens) Code of Welfare 2012 for battery cages to be phased out by 2022, and replaced with colony cages.[88] The Code as amended accepts that the use of hens for egg laying is acceptable, but tries to reduce unnecessary suffering around that use.

It is not necessary for a hen to be able to express normal behaviour, such as stretching its wings, for it to lay eggs for economic purposes. Therefore, minimising the suffering caused by a small cage is a welfarist type of reform to reduce unnecessary suffering. Even suggestions of further reform such as free range farming initiatives are still welfarist because these approaches operate within the property paradigm and accept the validity of using hens for egg laying.[89]

I will now consider another welfarist model that disagrees with classical welfarism to an extent.

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[80] Neha Jadeja *People Property or Pets?* (Purdue University Press, United States, 2006) at 21.
[81] Francione, above n 3, at 8.
[82] At 8.
[83] Cao, Sharman and White, above n 1, at 110.
[84] Animal Welfare Act 1999, s 13(1A).
[85] Section 13(2)(c).
[86] Animal Welfare (Layer Hens) Code of Welfare 2005.
[87] At 18.
[88] Animal Welfare (Layer Hens) Code of Welfare 2012, at 4.
[89] Francione, above n 15, at 22. See also, Francione, above n 5, at 5,6.

C New Welfarism

'New welfarists' is a term coined by Gary Francione for those who believe the ultimate goal for protecting animal interests is to give animals rights, but who are content to promote reform within the welfare regime in order to do so.[90] They view the seeking of incremental improvements within the legal welfare system as a stepping stone to rights.[91] Some new welfarists seek rights that result in the complete abolition of animal exploitation or use, such as animals having the right not to be considered property.[92] Others advocate for equal consideration between animal and human interests, and so seek a less comprehensive right, as the right to equal consideration may still result in exploitation if the human interest trumps.[93] This lesser view can operate regardless of whether animals retain their property status, but both views are based on rejecting the premise that animals are inferior to humans.[94]

New welfarism differs to classical welfarism with respect to its long-term goals, because the former seeks to achieve greater moral recognition of animals, and the latter is content with the status quo.[95] Despite that difference, at a practical level the two types of welfarists are indistinguishable. This is because both advocate for incremental welfarist reform as the strategy for their respective goals.[96]

To illustrate this, in the example of layer hens, new welfarists would advocate for classical welfarist reform measures such as requiring layer hens to be moved from battery cages into colony cages, barns, or to become free range as previously discussed. At a practical level, the response of new welfarists is no different to that of classical welfarists because they see the incremental changes within the welfare paradigm as still acting towards achieving their goal of animal rights.[97]

Many of the individuals Francione would call new welfarists hold their position because while they disagree with classical welfarism, they also disagree with the animal rights approach Francione advocates for, known as abolitionism.[98]

Abolitionism, as the name suggests, calls for the immediate abolition of institutionalised exploitation of animals.[99] This call is on the basis that animals have a right not to be

[90] Francione, above n 3, at 36.
[91] At 110.
[92] At 36.
[93] At 36.
[94] Francione, above n 13, at 402.
[95] Francione, above n 3, at 35.
[96] At 45.
[97] At 35.
[98] Francione, above n 13, at 398-400.
[99] At 398.

considered property: they have moral value equal to humans, and treating them as property means they can be exploited and used for purposes that are against their interests.[100] Abolitionists therefore advocate for the immediate removal of welfare legislation that subjugates animals to property status, to prevent their institutionalised exploitation.[101]

Given they share the view that animals are equal in moral value, new welfarists disagree with abolitionism not on a philosophical basis, but rather on the basis that they see the goal of immediate removal of exploitation as utopian and unlikely to occur.[102] This is because such radical change in a system that is completely reliant on, and largely accepts, the exploitation of animals is highly unlikely to achieve sufficient social and political support.[103]

On the basis that abolitionism as a strategy will not work, new welfarists also reject the theory of abolitionism on the basis that they do not think it provides for any substitute to immediate action through incremental reform.[104] Such an alternative would be necessary as a replacement for immediate abolition and so without these, new welfarists believe abolitionism provides no feasible route to achieve rights for animals.[105] To reinforce their view, new welfarists believe that advocating for incremental change within the welfare paradigm *will* lead to rights for animals.[106]

On this basis, most new welfarists see their own approach as the otherwise missing link to achieving rights on account of it providing a strategy to enact change. As a result, they often consider welfarism and rights to be the same general approach because they see welfarist reform as a precursor to obtaining rights.[107]

The two strategies for legal improvement discussed so far operate within the current welfare paradigm, at least in the short term. I have briefly mentioned abolitionism with respect to new welfarism, but I will now consider it in further depth. It represents an idealised approach for animal consideration, because it aims to give them as much protection under the law as possible.

[100] Francione, above n 13, at 398.
[101] At 398.
[102] Francione, above n 15, at 40.
[103] Francione, above n 3, at 34.
[104] At 109.
[105] At 36.
[106] Francione, above n 15, at 40.
[107] Francione, above n 3, at 109.

D Abolitionism

As noted above, Gary Francione is a notable proponent of abolitionism. He seeks to abolish the current legal welfarist system that treats animals as property. This is because he believes animals have intrinsic value and interests that deserve greater legal recognition to better prevent their systemic exploitation.[108] That belief demands the abolition of current laws that condone and regulate exploitative conduct.[109] He specifically seeks rights-holder status for animals because he views it as the only mechanism that adequately recognises and protects their interests.[110]

In this part, I will discuss the various propositions Francione makes that contribute to his abolitionist theory and his reasons for disagreeing with classical and new welfarism.

1 Animals have intrinsic interests and these ought to be protected by rights

It is well-recognised that most animals are sentient.[111] It means such animals are perceptually aware with subjective needs, desires, and experiences[112] which gives rise to intrinsic interests. This makes sentient animals fundamentally different to non-sentient forms of property, which have no intrinsic interests of their own.[113] Animals can possess sentience to varying degrees, and so sentience as a concept operates on a spectrum.[114] However, Francione sees the impact of sentience as all or nothing, whereby as soon as an animal can subjectively experience, i.e. has some level of sentience at all, intrinsic interests attach.[115] Therefore so long as an animal can be said to be sentient, regardless of the extent, it has intrinsic interests.[116]

The commonly accepted interest arising from sentience is an interest against suffering,[117] although Francione also argues that it gives animals an interest in their continued existence.[118] This view is controversial because it means animals have an interest in not being killed, which is not an interest welfarism – the status quo approach to animal legislation – recognises. Francione believes that because sentient animals have an experiential existence, it

[108] Francione, above n 13, at 398.
[109] Gary L Francione "Equal Consideration and the Interest of Nonhuman Animals in Continued Existence: A Response to Professor Sunstein" (2006) U Chi Legal F 231 at 234.
[110] At 235.
[111] Donald Broom "Cognitive ability and awareness in domestic animals and decisions about obligations to animals" (2010) 126 Appl Anim Behav Sci 1 at 8; See also: DM Broom and KG Johnson *Stress and Animal Welfare* (Chapman & Hall, London, 1993) at 80; and Donald M Broom *The Evolution of Morality and Religion* (Cambridge University Press, Cambridge, 2003) at 228.
[112] Gary L Francione "Animal Welfare and the Moral Value of Nonhuman Animals" (2010) 6 Law Culture and Humanities 24 at 31.
[113] At 31.
[114] Mike Appleby *What should we do about animal welfare?* (Blackwell Science Ltd, Oxford, 1999) at 48.
[115] Francione, above n 16, at 99.
[116] At 99.
[117] Francione, above n 109, at 231.
[118] At 239.

is not just the quality of their life through reducing suffering that is of interest to them. It logically follows they have an interest in the quantity or length of their lives as well.[119]

Francione believes sentience also justifies animal inclusion in the moral community because it generates intrinsic interests.[120] As a consequence of animals' sentience granting them inclusion in the moral community, Francione believes animals should be granted legal personhood, with rights protecting their moral interests.[121] This is on the basis of the moral principle of equal consideration, where like cases should be treated alike. There are no factors that are morally relevant to distinguish humans and animals. Therefore, because humans are sentient and protected by rights, and thus so too should rights protect animals.[122]

Francione defines rights as:[123]

> … a way of protecting an interest … [t]o say that an interest is protected by a right means that we must protect that interest even if the consequences would weigh against that protection.

Such rights are not absolute. For example, human rights can, and are, overridden by competing interests or reasons in various circumstances.[124] The benefit is that the interests that rights protect cannot be defeated for consequential purposes alone.[125]

In seeking rights for animals, it is a separate matter to consider the scope of those rights. Legal personhood for animals does not mean that the scope of the rights provided should equal those of humans.[126] This avoids the argument that giving rights to animals will lead to absurd results, such as animals being given the right to vote.[127] It is the status of being a rights holder that is the crux of Francione's point, not the extent of those rights relative to humans.[128]

However, Francione does require as a bare minimum the right for animals not to be property.[129] If we accept that animals have intrinsic interests equal to that of humans, then we must no longer treat animals as property, which necessarily treats them as inferior. It is

[119] Francione, above n 109, at 240. See also, Francione, above n 112, at 32.
[120] Francione, above n 109, at 234 to 235.
[121] Francione, above n 112, at 34.
[122] At 35.
[123] At 34-35.
[124] At 35.
[125] At 35.
[126] Francione, above n 24, at 85.
[127] At 85.
[128] At 85.
[129] At 85.

logically inconsistent to do so given their interests have equal moral value to humans.[130] Therefore, animals must be protected against having a property status to properly acknowledge they have interests of such value.[131] This can subsequently allow for further animal interests to be protected by rights.[132] In this way, Francione sees the right not to be a chattel as a precursor to other rights for both humans and animals and thus the minimum right necessary for animals to possess.[133]

2 Classical legal welfarism is an inadequate approach to animal law

(a) The problem with the property paradigm

The fundamental problem Francione has with welfarism is its acceptance of the property paradigm. As previously discussed, classical welfarism identifies sentience as a sufficient justification to acknowledge that animals have interests deserving of protection (unlike historical approaches to animal law, which treated animals no differently to inanimate property). However, classical welfarism operates on the assumption that animal interests are inferior to that of humans, and so animals can and should remain as property.[134] Therefore, recognition of animal interests is subject to their status as property, which means human ownership rights may, in theory, override any and all interests animal property have.[135]

Classical welfarists must point to a morally relevant characteristic held exclusively by humans to justify treating other animals as inferior. Francione believes sentience is the only trait relevant for determining whether something should be treated as property and exploited, or be recognised in the moral community.[136] He has stated: [137]

> There is … no reason to conclude that being able to do calculus is better than being able to fly with only your wings or to breathe underwater with only your gills. These characteristics may be relevant for some purposes, but they are not relevant to whether we make a being suffer or kill that being.

Therefore, Francione disagrees with any attempt by classical welfarists to justify treating animals as property and disregarding their interests, because he believes any characteristic they point to is morally irrelevant. It also means he disagrees with the consequence of accepting the property paradigm which is – at least to some degree – that animals can, and

[130] Francione, above n 24, at 86-87.
[131] At 86.
[132] At 86.
[133] Francione, above n 112, at 35.
[134] At 27.
[135] Francione, above n 5, at 103.
[136] Francione, above n 109, at 234 to 235.
[137] Francione, above n 15, at 54.

should, be used as means to human ends and are primarily of instrumental value.[138] It is contrary to Francione's belief that animals are morally equal to humans.[139]

These problems cannot be resolved without abolishing the property status of animals and granting animals legal rights. Welfarism is predicated on accepting animals as property[140] and so welfarist legislation is incapable of modification that challenges and removes the property paradigm that underlies it.[141] This reinforces why Francione sees welfarism as unable to fix the problems created by classifying animals as property.[142]

(b) The problem with the "unnecessary suffering" test

Welfare legislation operates in a problematic way because an owner's rights against their animal property are fettered only by limitations in law.[143] It therefore can, and does, validate objectively cruel treatment by allowing animals to suffer.[144] This is because typically[145] the legal welfarist regime approaches limitations on ownership rights from the perspective of banning conduct that causes animals "unnecessary suffering".[146]

Whether the test of "unnecessary suffering" is satisfied requires a determination of whether the suffering was for a legitimate purpose or use, as discussed earlier in the context of the AWA. The harm must be considered necessary for such a use to avoid breaching welfarist regulations. Francione notes three problems with such an approach.

Firstly, there is an inherent balancing exercise involved when determining whether conduct causing suffering is necessary or not. This is because the legal right of the human owner to use the animal must be balanced against the animal property's interest in not suffering.[147] It is an exercise where the interests of human rights holders are compared with that of non-rights holder animals. Francione argues that the contrast in legal status, exacerbated by animals being subject to the exercise of the human owner's rights, means that animal interests against suffering rarely prevail over the human interest in subjecting the animal to that suffering.[148] This is because the owner's interest in using the animal is protected by legal rights of

[138] Francione, above n 5, at 103.
[139] At 103.
[140] Francione, above n 3, at 8.
[141] Darian M. Ibrahim "The anticruelty statute: A study in animal welfare" (2006) 1 J Animal L & Ethics 175 at 188.
[142] Francione, above n 5, at 102-103.
[143] At 43.
[144] Ibrahim, above n 141, at 188-189.
[145] Adams, above n 23, at 34.
[146] Francione, above n 5, at 18.
[147] Ibrahim, above n 141, at 178.
[148] Francione, above n 5, at 107.

ownership, whereas the animal has no rights protection whatsoever, allowing its interests to be traded away.[149]

The human owner's specific property rights also contribute to the unequal balancing in favour of the human interest because of the value placed on property rights in our society. Property rights are generally considered to be natural rights alongside being legal rights, which means they reflect a necessary way society must treat individuals (i.e. to have their ownership interests over property protected) in order to preserve and respect their humanity.[150] Therefore to detract from the scope of property rights requires a very strong justification, and the interests of animals as legal objects are unlikely to suffice.[151] Francione takes issue with this inherent balancing exercise because it is tilted in favour of supporting the human interest, and so prevents equal consideration of animal and human interests.[152]

The second problem relates to Francione's belief that there are no legitimate uses of animals because of their inherent moral worth. He disagrees with welfarism's acceptance that there *are* legitimate uses of animals (i.e. when they do not cause unnecessary suffering) because he does not believe there is any relevant moral basis on which welfarism can find actions that are legitimate.[153] He holds that "any suffering that we impose on animals … is "unnecessary" and "indefensible."[154]

Since Francione believes there is no moral foundation to justify the use of animals, he thinks the "unnecessary suffering" test is unprincipled. As a result, he believes it only reflects subjective social preferences, such as that of animal property owners, in determining what constitutes a necessary use.[155] Because property owner interests are used to measure what is legitimate, whether something is unnecessary becomes a question of whether it helps maximise the value of the animal property.[156] This means "unnecessary suffering" and "humane" treatment become "euphemistic indications of the success or failure of conduct in facilitating the exploitation of animal property".[157]

This also leads to false distinctions where an action towards an animal in one context can be deemed necessary, yet the same action can be deemed unnecessary in another.[158] For example, cutting into a live animal may be considered to cause necessary suffering in the context of vivisection (because it is part of why the animal property was obtained in the first

[149] Francione, above n 5, at 107.
[150] At 107.
[151] At 108.
[152] At 107.
[153] Francione, above n 15, at 37.
[154] At 35.
[155] At 37.
[156] Francione, above n 3, at 129-130.
[157] At 129.
[158] At 130.

place), but be deemed to cause unnecessary suffering in the context of an adolescent performing the same act for their own self interest (as it does not "facilitate the normative, "legitimate", institutionalized exploitation of the animal").[159] Francione believes there are no legitimate uses of animals, and thus these distinctions are arbitrary and further undermine the validity of the "unnecessary suffering" test.

The third problem is that when the test of "necessary suffering" is applied, it is not limited to only including animal treatment that causes the least amount of suffering in an absolute sense. It only requires that the treatment be *considered* necessary for an accepted practice.[160] Therefore the definition of "necessity" under the "unnecessary suffering" test does not automatically only accept as valid or necessary the method that causes the least amount of harm to the animal. Rather it can, and does, act to validate methods that cause more harm objectively to the animal than is needed to achieve the result the owner is seeking.[161]

For example, in the case of layer hens, the transition to colony cages over battery cages arguably only minimally reduces the suffering caused to hens. It shows that acceptable methods can cause more suffering than other available alternatives, such as free range layer hen housing, and that acceptable measures need not cause the least amount of suffering.

Overall, the central tenet of Francione's theory of animal law is clear; if we accept that animals have morally significant interests, as he does, then it is insufficient to simply regulate animal use, it must be abolished.[162]

3 New welfarism is an inadequate approach to animal law

As discussed above, the first proposition of new welfarism is that while animals should have rights, immediate abolition of exploitation and use of animals is unlikely to occur to achieve that goal.[163] This belief leads to new welfarism's second proposition, which is that incremental welfarist reform will not just yield immediate benefits to reduce the severity of animal suffering, but in the long term will lead to the abolition of animal use and exploitation.[164] It is on this basis new welfarists justify their advocacy for welfarist reform.[165]

Francione disagrees with both of these propositions. With respect to the first, he thinks new welfarists have misunderstood the rights position, because none suggest the immediate

[159] Francione, above n 3, at 130.
[160] Radford, above n 20, at 249.
[161] At 249.
[162] Francione, above n 15, at 11.
[163] At 40.
[164] At 40.
[165] Francione, above n 3, at 36-37.

abolition of all institutionalised exploitation, nor reject every form of incremental change.[166] Instead, the goal is to seek change that incrementally eradicates the property status of animals and recognises their inherent value, rather than simply seek to eradicate the current level of suffering that animals experience, which is the primary focus of welfarist reform.[167]

Francione explains that contrary to the new welfarist belief, there is normative guidance from individual through to social and legal levels to achieve rights.[168] Francione personally focuses on advocating for social change, such as adopting veganism at an individual level. He does not believe legal change will occur without a large enough social movement seeking abolition of animal exploitation, and so he sees advocating ideals that may give rise to such a movement as more effective in the interim.[169]

However, he does explain what incremental abolitionist legal reform would look like in isolation of any political or social calls for change. It would have to involve prohibitions of "significant" institutional activities (i.e. those that are "salient parts of the institution of exploitation"),[170] rather than advocating for their further regulation.[171] Advocacy for such incremental abolitionist reform would recognise animals have interests in respect of the particular activity being prohibited and that these interests should not be disregarded for purely consequential reasons.[172] Progressively recognising the intrinsic value of animals in legislation by such incremental reform will lead to further incremental measures that continue to chip away at the property status of animals.[173] Francione stresses that proponents of abolitionist legal reform must never promote alternative more "humane" forms (i.e. that which causes less unnecessary suffering) of legal regulation, or suggest substituting one animal for another, because these do not target the property status of animals and in fact reinforce it.[174]

Applied to the case study of layer hens, rather than advocating for improved living conditions that still accept the property paradigm (for example, free range housing over colony cages) Francione would advocate for reform that bans using hens for egg laying purposes at all. Such a position would have to be on the basis that it is recognises hens have an inherent and absolute interest in not being used to lay eggs simply because it benefits a human for them to do so. This would likely fit Francione's criteria because it prohibits an institutional activity

[166] Francione, above n 15, at 40.
[167] At 40.
[168] At 41.
[169] At 42.
[170] Francione, above n 3, at 198.
[171] At 190-210.
[172] Francione, above n 15, at 46.
[173] At 45.
[174] At 46.

that is significant with respect to treating hens as property, rather than as beings with interests.

With respect to the second claim by new welfarists, Francione disagrees that advocating for purely welfarist reform will lead to rights.[175] Francione does not believe the welfarist regime can develop incrementally to a point where it can give rights protection. His view is on the basis that the property paradigm inherently prevents recognition of animal rights. [176] He also notes that there is no empirical evidence that suggests welfarism can lead to rights, and in fact, the evidence that does exist shows welfarist reform leads to increased use of animals.[177]

Francione also thinks new welfarism's acceptance of welfarist reform may help prevent reform that will lead to animals becoming rights-holders. By promoting reform within the welfare system, they may lead to welfarism being further entrenched as an acceptable way to treat animals.[178] This is because it is encourages consumers to believe it is morally acceptable to consume the products of animals that have been raised more "humanely" due to welfarist reform.[179]

For these reasons, Francione would suggest the belief that purely welfarist reforms will lead to abolitionism has no grounding and it is on this basis that he disagrees with and rejects new welfarism.[180]

Overall, Francione believes that sentient animals have intrinsic interests that grant them inclusion in the moral community, and which also justify classifying animals as legal persons. In order to achieve this, Francione seeks the abolition of the current welfare regime because it is predicated on accepting animals as property. The property paradigm means that welfarist legislation and reform cannot adequately acknowledge and protect animal interests, because classifying animals as property allows for their exploitation. This is evident both conceptually - the implications of their property status meaning that animals' interests can be overridden and disregarded - but also in practice through the current test of unnecessary suffering.

These problems are inherent in the welfarist regime and that is why classical welfarism cannot fix the problems welfarist legislation creates. New welfarism cannot provide a solution either because there is no evidence to suggest that problematic welfarist reform can lead to rights for animals.

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[175] Francione, above n 15, at 47.
[176] At 47.
[177] At 47.
[178] At 16,18, 33.
[179] At 47.
[180] At 47.

E Part 1 conclusion

The history of the human-animal relationship has been dominated by the classification of animals as the property of human owners and having no interests of their own.[181] The regulation of animals subsequent to this classification has undergone change since the emergence of the anti-cruelty approach to animal regulation. The anti-cruelty approach recognises animals have intrinsic interests, specifically an interest in not being subject to cruel treatment.[182] On this basis it prohibits specific activities that are deemed to be cruel.[183]

Further development has occurred with respect to the creation of the status quo welfare approach, which imposes generalised positive obligations on owners that are broader in scope.[184] However, welfarism is still predicated on accepting that animals are appropriately categorised as property, and so limits the extent to which animal interests can be recognised and protected.

Welfarist improvements upon this approach range from classical welfarism to new welfarism. The former classical welfarist approach seeks only to refine what is considered to be unnecessary suffering because it accepts that animals are inferior and should remain as property.[185] The latter new welfarist approach pursues the same practical reform as classical welfarism, to assist animals that are otherwise being harmed now, but with the view that this will lead to animal rights for animals in future.[186] Therefore, new welfarists differ from classical welfarists as they see animals as morally equal and so ultimately seek rights for animals.[187]

Francione as an advocate of abolitionism explains that while welfarist reform may lead to some animals objectively suffering to a lesser degree, it will never lead to the end of all institutionalised suffering caused by humans.[188] This is because it embeds the legitimacy of using animals as property and so does not assist animals in having their moral value, which is equal to humans, recognised in the law.[189] In order to have it recognised, Francione holds that the property status of animals must be abolished and they should be given legal rights.[190] His abolitionist theory represents a more extreme approach to reforming animal law than classical or new welfarism. While Francione's theory is appealing, he does leave some questions

[181] Radford, above n 20, at 29.
[182] Thomas G Kelch "Short History of (Mostly) Western Animal Law Part 1I*"* (2012) 19 Animal L 347 at 350.
[183] Cao, Sharman and White, above n 1, at 168-169.
[184] Sankoff, above n 68, at 30.
[185] Francione, above n 3, at 8.
[186] At 110.
[187] At 35.
[188] Francione, above n 15, at 47.
[189] At 16,18, 33.
[190] Francione, above n 109, at 234. See also, Francione above n 13, at 398.

unanswered about the consequences of abolitionism and successfully giving legal rights to animals. I will explore these ideas further in part II.

Part II

A Introduction

In this part I will introduce a reconceptualisation of the current animal law debate. The present schools of thought – classical welfarism, new welfarism and abolitionism – illustrate that the terrain of the discussion concerning animal law reform is defined by the dichotomy of either accepting the property paradigm or rejecting it.

While this debate is worthwhile, it is also well trodden ground. There is a separate discussion worth investigating that goes beyond simply evaluating the property status of animals and whether that status is justified. It concerns how sentient animals should be governed if they are no longer classified as property.

Such a discussion is predicated on accepting Francione's basis for rejecting the property status of animals. That is, sentient animals have inherent interests granting them inclusion in the moral community. To give effect to that status, animals must no longer be treated as property because it can allow the interests that granted animals inclusion in the moral community in the first place to be traded away. Therefore, animals should have legal rights to protect their moral interests, and so legal personhood should be granted to animals on the basis of their moral status.

While based on the ideas Francione propounds, I am not simply engaging a retelling of his theory. Francione's focus on the current problem welfarism and the property paradigm presents means his discussion of the consequences of animals attaining legal rights is brief. He argues that if animals are no longer treated as property, we must then stop "bringing animals into existence for the purpose of human exploitation".[191] In other words, we must care for the domestic animals that currently exist, but we must cease causing more to join them. The ultimate state of affairs Francione wants is for only non-domesticated animals to exist, which reduces the number of interactions between animals and humans to a minimum.[192]

The problem is that beyond animals having rights, he does not explain in any depth what the legal oversight of animals will look like. When asked questions like whether animals should have standing in court as a result of no longer being property, Francione shies away from responding directly, and states that it: [193]

[191] Francione, above n 15, at 57.
[192] Francione, above n 16, at 154; See also, Francione, above n 15, at 57.
[193] At 154.

> … misses the point of according animals a basic right not to be a thing, which is to eliminate human/animal conflicts as much as possible, and not to continue those conflicts through formalizing them within the legal system.

This shows that Francione's focus is on the current problem created by classifying animals as property, and this focus is at the expense of explaining and reflecting on the consequences of categorising animals as legal rights-holders.

Francione does acknowledge that legal personhood for animals would not mean animals become legal persons in the exact way natural humans are because – as stated in Part 1 – he does not seek the same scope of rights for animals.[194] He is also aware that there are further categories of legal persons beyond natural persons such as corporations,[195] but he only notes these to reinforce that legal persons are those who have rights, rather than using it to explain what legal personhood means in greater depth.[196]

It is at this point where my discussion in this part becomes relevant; to fill the gaps that Francione's theory leaves and to realise the possible implications of legal personhood for animals in the law.

The first matter that I will discuss is what legal personhood requires, and whether animals are conceptually precluded from being classified as legal persons. Francione makes a convincing argument for animals having rights, but there is another hurdle that must be overcome. There could be an additional requirement of also owing duties that may prevent the classification of animals as legal persons.

Secondly, I will propose a mixed governance/exclusionary approach to animals as rights holders. Property law takes this approach with respect to overseeing the rights of human owners over their animal property, and so it will firstly be considered to illustrate the concept. How the mixed governance/exclusionary approach could be applied to oversee the legal protection of animals as rights holders will then be explained, followed by a consideration of what specific law could look like using such an approach. It need not result in the extreme scenario that Francione proposes, whereby only wild animals exist, and their interactions with humans are limited; it could also govern a relationship that is more interactive with humans.

[194] Francione, above n 24, at 85.
[195] At 84; See also, Francione, above n 5, at 35.
[196] Francione, above n 24, at 84; See also, Francione, above n 5, at 35.

B Legal Personhood – What Does it Require?

Sir John Salmond stated a basic definition of legal personhood, which is that it describes "any being whom the law regards as capable of rights or duties".[197] The classic example of a legal person is a natural one, i.e. a human being from when they are born until they die.[198] The law considers some entities that are not natural persons as legal persons; they are just persons solely in law, not in fact.[199] This is exemplified through the categories of legal persons including intangible entities such as corporations and bodies corporate.[200]

Salmond further noted that "[l]egal persons, being the arbitrary creations of the law, may be of as many kinds as the law pleases."[201] This idea is illustrated in New Zealand where the categories of tangible legal persons have extended to include non-human entities such as the Te Urewera. The Te Urewera Act 2014 reclassified the Te Urewera from being property as a national park to being a legal entity.[202] The purpose of doing this was to "establish and preserve in perpetuity a legal identity and protected status for Te Urewera for its intrinsic worth, [and] its distinctive natural and cultural value".[203]

The significance of the Te Urewera becoming a legal entity, beyond showing a concrete example of the expansion of the categories of legal persons, is that it shows New Zealand in particular is inclined to protect things with important "national value and intrinsic worth" by way of legal personhood.[204] Given animals are recognised to have intrinsic worth and are otherwise harmed by their property status, this would support classifying animals as legal persons in New Zealand.

However, the elements of legal personhood require further consideration. Francione's discussion of legal personhood is limited to advocating for animals to have legal rights. He does not touch on what legal duties animals might have to owe if any, and so this idea needs to be evaluated.

The classic example of a legal person is a fully functioning adult human being who possesses both rights and duties. With respect to duties, adult humans can be described as "moral agents", which means they have "a variety of sophisticated abilities, including in particular the ability to bring impartial moral principles to bear on the determination of what, all

[197] John Salmond *Jurisprudence* (7th ed, Sweet and Maxwell, London, 1924) at 329.
[198] David Bilchitz "Moving beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals" (2009) 25 S Afr J on Hum Rts 38 at 41.
[199] Salmond, above n 197, at 330.
[200] At 329.
[201] At 337.
[202] Te Urewera Act 2014, s 11.
[203] Section 4.
[204] Section 3(8).

considered, morally ought to be done".[205] Therefore when an adult human acts, because they can decide what are morally appropriate actions to take, they are accountable (i.e. owe duties) for their adherence or non-adherence to that action.[206]

This example would suggest that only those who are moral agents can be legal subjects (i.e. that they owe duties alongside rights). However, Salmond's definition indicates the law only needs to recognise that an entity possesses rights *or* duties for that entity to have legal personhood.[207] Because Francione provides clear moral arguments for the law to recognise legal rights for animals, it suggests that animals do not need to owe reciprocal legal duties for the rights they are recognised to have.

Further support for this idea that legal personhood does not require rights *and* duties can be seen from the perspective of certain individuals who have legal subject status already. For example, very young children are "moral patients" (as opposed to moral agents), which means they are unable to be morally responsible for their actions.[208] They "lack the prerequisites that would enable them to control their behaviour in ways that would make them morally accountable for what they do."[209] The consequence of this is that children as moral patients cannot be moral duty bearers. However, children do have rights (on the basis of having certain recognised interests), which moral agents must respect and so moral agents can still owe duties to children as moral patients.[210] The inability of children to morally bear duties is reflected in the law, whereby very young children do not owe legal duties in many respects (for example, children under the age of ten cannot be liable for committing any crime under the Crimes Act 1961[211]) yet they still have legal rights and personhood.[212]

This recognises that children, and moral patients generally, can be legal subjects by holding legal rights, despite not having the capacity to owe legal duties. Because animals are also moral patients, children as legal persons reinforce the idea that animals do not need to owe legal duties to have legal personhood.[213]

These arguments show that legal personhood is adaptable and there is no set list of duties or rights that legal persons must hold. Animals can still be legal persons and have legal rights even if they do not have corresponding legal duties. Ngaire Naffine reiterated this idea when

[205] Tom Regan *The Case of Animal Rights* (University of California Press, Los Angeles, 1983) at 151-152.
[206] Regan, above n 205, at 152; See also, Bilchitz, above n 198, at 42.
[207] Salmond, above n 197, at 329.
[208] Regan, above n 205, at 152.
[209] At 152.
[210] Bilchitz, above n 198, at 42.
[211] Crimes Act 1961, s 21.
[212] Bilchitz, above n 198, at 43.
[213] At 43.

she noted that legal personhood is a flexible concept that is capable of responding to new circumstances, and in theory could include animals.[214] She notes: [215]

> [T]here is no reason why animals cannot be persons in this formal sense. The endowment of even one right *or* duty would entail recognition of their ability to enter into legal relations and so be persons.

Even if a contrary view that suggests animals must owe legal duties to be legal persons prevails, this would not prevent legal personhood for animals. This is because some animals as property are already held to owe limited legal duties. For example, under the Dog Control Act 1996, a dog must be destroyed if found to have committed an attack against a person or other animals (specifically stock, poultry, domestic animals or protected wildlife)[216] unless the circumstances are extraordinary.[217] Given such animals already have duties imposed on them as property; it would not be difficult to impose duties on animals when they are classified as legal persons.

Overall, animals are not conceptually precluded from being granted legal personhood should the law decide to recognise their interests by granting rights protection, regardless of the duties that may or may not be imposed alongside it. All that is required is for the law to treat animals as rights holders and to allow them to enter legal relations (which will require human intervention to enforce any such right they are recognised to have).[218]

In the following section I will discuss what approach can be taken with respect to overseeing sentient animals as a separate category of legal persons.

C Proposed Legal Regulation of Animals – A Mixed Exclusionary/Governance Approach

To describe how the regulation of the human-animal relationship might be approached if animals are legal persons, it is easiest to explain by way of comparison to how animals are currently regulated as property. This is because a mixed governance/exclusionary approach is taken with respect to property, and it would also be a suitable approach to regulation should animals be reclassified as legal persons.

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[214] Ngaire Naffine *Law's Meaning of Life – Philosophy, Religion, Darwin and the legal Person* (Hart Publishing, Portland USA, 2009) at 49, 176-177.
[215] At 49 (emphasis added).
[216] Dog Control Act 1996, s 57(1)(b).
[217] Section 57(3).
[218] Naffine, above n 214, at 49. Also, it should be noted that representatives are also already needed to enforce the rights of human "moral patients".

1 Animals as property

Property law governs the relationship between legal subjects in relation to protecting the use of things (which as it stands, includes animals as property).[219] It does so by creating an exclusionary right for owners over their property.[220] This right operates in rem, or in other words, is "good against the world",[221] and so imposes a duty of non-interference with that property on most, if not all, other legal subjects.[222] It acts as a barrier surrounding a "protected sphere of indefinite and undefined activity, in which an owner may do anything with the things he owns."[223] Those outside the barrier are subject to the exclusionary duty not to interfere with the property, and so this right is illustrative of what I term the 'exclusionary approach'.[224]

This exclusionary right is not absolute in the sense that it controls all possible uses of the property.[225] The extent to which an owner's exclusionary right is recognised "is determined by the extent to which the law of wrongs will treat certain acts and omissions as causing a significant harm to the interest".[226] For example, when trespass to property can or cannot be applied is one way of recognising the extent to which the right to exclude others operates.[227] Trespass protects against physical interference with an owner's animal property, but it does not, for example, prohibit other legal subjects from looking at the animal property or listening to that animal property make noise.[228] The presence of trespass protection only to the extent of physical interaction with the property illustrates the extent to which trespass recognises the right of owners to exclude others.[229]

Furthermore, the exclusionary right does not simply act as a barrier casting all but the rights holder outside its boundary; it also operates as a gate.[230] This is because it allows the owner the right to selectively exclude others, and therefore as a result, allows those who are not excluded to use their property as well.[231] In this way, ownership exclusivity rights over property reflect that owners have a special status, whereby they control who has access to their property and to what degree.[232]

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[219] Jesse Wall *Being and Owning: The Body, Bodily Material, and the Law* (Oxford University Press, Oxford, 2015) at 114, 116.
[220] Larissa Katz "Exclusion and Exclusivity in Property Law" (2008) 58 UTLJ 275 at 277.
[221] Thomas W Merrill and Henry E Smith "The morality of property" (2007) 48 Wm and Mary L Rev 1849 at 1853.
[222] James Penner *The Idea of Property in Law* (Oxford University Press, Oxford, 1997) at 7.
[223] At 72.
[224] At 71-72.
[225] Henry Smith "Exclusion versus Governance: Two Strategies for Delineating Property Rights" (2002) 31(S2) J Legal Stud S453 at S469.
[226] Penner, above n 222, at 74.
[227] Smith, above n 225, at S455. See also, Penner, above n 222, at 72-73.
[228] Penner, above n 222, at 72-73.
[229] At 72, 74.
[230] At 74.
[231] At 74.
[232] At 76.

The benefit to taking an exclusionary approach is that it reduces information costs by focusing on the "thing" that is the property of the owner.[233] It creates a "simple message of 'keep out' so that an undefined set of activities is protected without 'officials needing to know what these activities may be.'"[234] This reduces the substantial information cost that would otherwise arise through having to specify each and every activity that is permitted.[235]

An alternative approach to regulation of property is what I term the 'governance approach', which focuses on activities (or specific use rights) rather than things.[236] It intrudes within the boundary set by the exclusionary approach to limit the ways owners can use their property, and also allows others the use of the property for specified activities.[237] As a consequence, it has a greater information cost: it must explain each activity it governs and who can carry them out.[238]

The exclusionary approach does not preclude the involvement of a governance approach in the area of property law.[239] In fact, the two approaches can work together on the basis that the exclusionary approach presumptively applies with respect to property, and the governance approach applies only with respect to explicitly targeted activities to refine certain areas.[240] This mixed approach ensures information costs are reduced by use of the exclusionary approach, but allows precise regulation by the governance approach where necessary.[241]

The mixed exclusionary/governance approach operates in New Zealand with respect to animals. Owners have exclusionary rights over their animal property. The boundaries (and existence) of the exclusionary approach is evident in the property law remedies owners can seek against others with respect to their animal property.

The AWA takes a governance approach to selectively intrude within the sphere of uses that owners can make of their animal property, and imposes duties on owners with respect to that animal property. For example, s 10 of the AWA imposes a duty on owners (or those in charge of an animal) to "ensure the physical, health, and behavioural needs of the animal are met."[242] This obligation is further explained in s 4 as requiring that animals be given proper and sufficient food and water.[243] The duty to provide these necessaries of life exemplifies a

[233] Penner, above n 222, at 71.
[234] Wall, above n 219, at 117.
[235] At 117.
[236] At 117.
[237] At 117.
[238] Katz, above n 220, at 280.
[239] Penner, above n 222, at 72; See also, Smith, above n 225, at S456.
[240] Smith, above n 225, at S456, S485-S486.
[241] At S456. See also, Wall, above n 219, at 17-18.
[242] Animal Welfare Act 1999, s 10.
[243] Section 4. Note also, s 4 definitions of physical, health, and behavioural needs also include the opportunity to display normal patterns of behaviour; physical handling in a manner which minimises the likelihood of

governance approach to property because it is targeted at specific activities, rather than the "thing" or animal specifically. It also operates to narrow the scope or sphere of activities an owner can take with respect to their animal. For example, under s 10, owners or those in charge of animal property must provide the animal with proper and sufficient food. They cannot, for example, deprive a herbivore of plant-based sustenance and only provide it with meat.

Overall, the significance of taking a mixed exclusionary/governance approach to property is that it creates clear obligations of "keep away" on duty bearers through the exclusionary approach.[244] It also allows those duties and rights to be modified by the governance approach, and through using both of these approaches, has far fewer information costs than would otherwise exist.[245]

Having demonstrated what the exclusionary and governance approaches mean and their operation in the area of property law and with specifically with respect to animals in New Zealand, I will now apply these approaches in the context of animals as legal persons.

2 Animals as legal persons

If animals are reclassified from property to legal persons, then they are no longer the "thing" subject to the rights of their owners. Instead, they are rights holders themselves by virtue of Francione's argument that sentience morally justifies giving them the right not to be considered property. Sentience as a moral justification can also extend to give animals an exclusionary right over their own bodies. This is because sentience means that both humans and animals can feel pain and suffer.[246] It logically follows that the capacity to subjectively experience generates an exclusive interest in one's own body. The same arguments Francione uses for the right not to be property can be applied to animals having exclusive bodily interests, i.e. that sentience is the only morally relevant characteristic to determine whether one should have rights to one's own body. Therefore, on the basis of the principle of equal consideration, because humans and animals are morally equal on the basis of sentience, since humans have exclusionary rights to their own bodies, so too should animals.

Given these arguments, I propose that animals as legal subjects would be recognised to have an exclusive right to their own bodies. This would create a presumption that others cannot interfere with them physically because they are the rights holder. This is in direct contrast to the status quo, where animals are property and the presumption is that they can be used and

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unreasonable or unnecessary pain or distress; protection from, and rapid diagnosis of, any significant injury or disease.

[244] Wall, above n 219, at 117.

[245] Smith, above n 225, at S456,

[246] Francione, above n 112, at 31.

have no right to exclude others from themselves; they are simply subject to the right of their owner.[247]

This exclusionary right will mean that animals have an open-ended set of activities they can do with their own bodies by virtue of the right to exclude others. As with property law, this approach to overseeing what rights animals have with respect to the use of their bodies will reduce the information costs that specifying every action an animal can do, or every action others cannot do, would create.

As outlined above, this right can be modified by a governance approach. Unlike human owners with exclusionary rights over their animal property, animals as holders of exclusionary rights over their own bodies cannot exercise their right like a gate; it would act solely as a boundary to humans out. This is because animals cannot authorise the exercise of activities by others in relation to their bodies (bar minor exceptions where an animal can permit a human to interact with it physically (e.g. think of the friendly cat that brushes itself against one's leg)). They do not have the ability to permit further intrusions. For example, if an animal is badly injured, it cannot authorise a veterinarian to administer pain relief or to fix the injury.

In this way, applying the governance approach would be particularly useful in the context of animals as legal persons. This is because it could provide the explicit authorisation needed to interact with animals physically for particular activities that benefit the animal. Any activity not explicitly condoned by this approach would presumptively be excluded if performed by anyone but the animal rights holder (i.e. human subjects) by virtue of the exclusionary approach. Legislation could give effect to this system and would be interpreted in light of animals' exclusionary rights. For example, legislation could create offences for humans that breach duties imposed upon them or engage in activities that are not expressly condoned.

Other areas of law could also adapt to help protect animals' exclusionary rights. For example, tort law protects human and their bodies through, e.g., battery and assault. These torts could be extended to recognise the rights animals also have over their bodies.[248] There is already support for the extension (and even the creation of new torts) to protect animal interests in this field.[249] The benefit of extending such torts to recognise animal exclusionary rights would be that animals could obtain tortious remedies for infringements of them. These include injunctions, to prevent future harm occurring, or even damages, which would be

[247] Cao, Sharman and White, above n 1, at 73, 76-77.
[248] David Favre "Living property: a new status for animals within the legal system" (2010) 93 Marq L Rev 1021 at 1053, 1070.
[249] At 1070. See also, David Favre "Judicial recognition of the interest of animals – A new tort" (2005) Mich St L Rev 333 at 355.

useful in certain circumstances, such as covering veterinarian bills if physical harm occurred that required it.[250]

On the basis of this mixed governance-exclusionary approach, I will now consider specific examples of governance measures that might exist if such a mixed governance-exclusionary approach is applied in New Zealand.

3 Examples of mixed approach provisions

The following examples illustrate what legal personhood could mean for the human-animal relationship. Their purpose is to show there is variability and flexibility with how legal personhood can be approached. It does not necessarily lead to the situation that Francione envisages, where animals exist solely in the wild to fend for themselves and humans have few interactions with them.

However, legal personhood will still likely result in radical change given it would mean animals could not be used for purely consequential purposes, as currently permitted by their property status. For example, owners can kill their animal property so long as the animal does not suffer unnecessarily (as noted above with respect to how welfarism operates in New Zealand).[251] That is justified on the basis that animals are property, but if animals become legal persons, the property justification will cease to exist. It is likely there will be very few sufficiently compelling reasons that justify authorising humans to kill animals that remain. Examples of the limited instances where humans are justified in hurting or even killing one another include forms of self-defence or defence of another.[252] The moral principle of equal consideration would suggest that because there are few recognised justifications for killing other humans, there are few for animals, and those that do exist would also apply to animals. The idea that these defensive justifications would apply in respect of animals as legal persons is reinforced by the Dog Control Act 1996. While the presumption under the law at present is that animals can be killed by their owners, as previously discussed above, the Dog Control Act 1996 includes a lawful excuse for killing (or "destroying") dogs.[253] It is permitted when that dog is either attacking the individual who seeks to destroy it, or other persons or specified animals.[254] This shows that the law already acknowledges justifications like self-defence or defence of another to validate the killing of dogs when it otherwise interferes with an owner's property right over that dog. It would not be radical reform to continue permitting defensive justifications to validate killing animals that attack other legal subjects. The

[250] Favre, above n 248, at 1053, 1060, 1070.
[251] Animal Welfare Act, s 12(c).
[252] Crimes Act 1961, s 48.
[253] Dog Control Act 1996, s 57.
[254] Section 57(1).

difference would be that these justifications override the animal's exclusive right to its own body, rather than an owner's exclusive right to their animal property.

The central idea is that if any legal subject kills an animal that is also a legal subject, it cannot be justified on the basis that animals are property. It would have to be on the basis of some other compelling reason, such as the defensive reasons discussed above.

As a result of animals no longer being able to be killed (unless limited exceptions as discussed above apply), a probable consequence of animals attaining legal personality is that the commercial use of animals will not survive. Much of it is predicated on the killing of animals, justified by their status as human property, and so it will no longer be a defensible practice.[255]

There are others areas that would require fewer modifications to adapt to animals' legal personhood, and they show that limiting interactions to only wild animals is not the only possibility for human-animal interactions. For example, the human relationship with domestic companion animals could in many ways continue in a similar fashion to how it does now because animals could live with humans as part of the domestic household. The crucial change is that these interactions would not be between an owner and his or her property, but between equal legal subjects. The owner-companion animal relationship could be reconceptualised as analogous to the relationship between a caregiver and a child, creating a relationship consisting of a human legal guardian and an animal ward.

This is not difficult to envision given there are already instances in the law where children and domestic animals have been treated very similarly. For example, the case *Sydney v Sydney* dealt with the division of relationship property between Mr and Mrs Sydney with respect to their dog Milo.[256] Mr and Mrs Sydney disagreed with whom Milo – as a family chattel – should vest. The Court held that the welfare of the pet was the primary consideration in resolving that dispute. Milo was described as an "outdoors dog" who "relishe[d] the freedom" [257] living with Mr Sydney gave, and so Mrs Sydney's non-permanent accommodation in an urban area led Judge Coyle to decide that Milo should remain with Mr Sydney.[258]

The paramount consideration given to Milo is analogous to how children's interests are considered in care of children disputes.[259] It shows that treating animals as the wards of human guardians is not far-fetched, as animals are already being treated in a similar way in

[255] Favre, above n 248, at 1058.
[256] *Sydney v Sydney* [2012] NZFC 2685.
[257] At [30].
[258] At [30].
[259] Care of Children Act 2004, s 4.

limited circumstances. It would not be difficult conceptually to translate this into a more comprehensive approach for overseeing the human-animal relationship. [260]

For example, a licencing scheme could regulate who is allowed to be a guardian of animals, and to whom transfers of guardianship could be made. The scheme would build on the approach taken in *Sydney v Sydney*,[261] whereby the interests of the animal are paramount in determining who would be granted a licence. On this basis, certain classes of legal persons, such as corporations, could be precluded from owning animals if they are held to be unable to have the ability or proper interest to care for animals as legal persons.[262] Further, only those who have shown themselves to be competent as a guardian for a particular species and number of animals would be given legal permission to be animal guardians. Requiring proof of suitability would be analogous to the current requirements for adoption of children, whereby only appropriate individuals with sufficient means and living circumstances are permitted to be legal guardians of adopted children.[263] Given the law already recognises the interests of the ward being paramount in adoption matters, this reinforces the suitability of this approach with respect to human guardians over animal wards.

Furthermore, any financial element in the transfer of animal guardianship would be removed so that one could not financially profit from the transfer.[264] This would mean that when animals change legal custody from one guardian to another, there could be no profiting from the exchange. [265] This would be consistent with no longer recognising animals as a commodity, and would emphasise recognising animals' inherent moral worth, not their monetary value.[266] Most importantly, transfers would be limited to circumstances analogous to *Sydney v Sydney*, where the animal's interests are taken into consideration and the transfer is only allowed if held to be in the best interests of the animal.

The State would also be involved with respect to ensuring that if human guardians are found to be unfit, affected animals are removed from the custody of the unfit guardian and fostered into another's care.[267] The provision would be similar to family law currently with respect to caregivers who are mistreating or unable to adequately care for their children. [268] In fact, regulations for the disqualification of carers of animals are already present in the law to a

[260] David Favre has proposed a similar relationship between humans and animals, albeit on the basis that humans are legal guardians of animals who are a special kind of property. This idea goes further than that because it is predicated on the idea that animals are legal persons, not a form of property. However, many of his proposals still work when applied to animals as legal persons, and so will be used to illustrate the possible provisions that could exist with this approach.
[261] *Sydney v Sydney [*2012] NZFC 2685.
[262] Favre, above n 248, at 1056.
[263] Adoption Act 1955, s 11.
[264] Favre, above n 248, at 1055.
[265] At 1055.
[266] At 1056.
[267] At 1056.
[268] Care of Children Act 2004, s 29. See also Favre, above n 248, at 1056.

certain degree. Under the AWA, individuals can be banned from owning or exercising authority with respect to particular named animals, specific species, or animals generally, for any period felt appropriate.[269] This shows that given the law already provides for disqualifying an individual from legally caring for animals, the law could, with little conceptual difficulty, extend to governing disqualification of human guardians of animal wards.[270]

The law would also need to clarify who can sue on an animal's behalf.[271] Alongside governmental representatives for animal wellbeing, the law could allow private individuals with an interest in the relevant claim to intercede on an animal's behalf.[272] This would help ensure that individuals who are tasked with caring for animals or acting as their guardian can sue on behalf of their animal wards, but if such guardians act contrary to their obligations or breach any animal's rights, other interested individuals could also make claims on the animal's behalf.

Lastly, the effect of treating certain humans as guardians and animals as their wards would set the bar for what intrusions the law would allow with respect to animals' exclusionary rights over their own bodies. Guardians could, like they do with children,[273] invade an animal's exclusionary right when it is for the purpose of acting in the animal's best interests. For example, the obligations imposed by s 10 of the AWA would continue largely unchanged. Human guardians and those temporarily charged with the care of animal wards, rather than owners in the present law, would owe duties to protect the physical, health, and behavioural needs of animals in the way s 10 currently provides. Specific regulations as to what that would look like for different species and breeds would be created, similar to the current codes of welfare, to provide specificity to the general obligations under s 10 in relation to particular circumstances and species. For instance, veterinarian care, flea treatment and general grooming among other things may be held to be acceptable specific activities to undertake in relation to animals beyond general obligations that do not physically interfere with the animal (such as providing sufficient and appropriate food and water). Those activities that interfere with an animal's right to exclude others from themselves that are not explicitly permitted would be presumed to be in breach of the animal's exclusionary right, potentially attracting liability.

However, like human exclusionary rights, breaches of animal exclusionary rights will not always lead to liability: because not every infringement of a right results in legal proceedings

[269] Animal Welfare Act 1999, s 169.
[270] It should be noted that s 169 of the AWA could also serve as a basis to found extending the law to govern guardianship over animals' qualification as well, not just disqualification.
[271] David Favre "Wildlife jurisprudence" (2010) 25 J Envtl L & Litig 459 at 488.
[272] At 489 - 490.
[273] Care of Children Act 2004, s 4.

or remedies. Often infringements are minor and are not reported or pursued. The important point to draw from this approach is that the presumption of a breach of an animal's right exists if the law does not explicitly permit an action that interferes with the animal's exclusionary right, regardless of whether it leads to legal consequences.

Overall, these ideas illustrate that a mixed exclusionary/governance approach could permit a closer relationship between humans and animals than simply minimising interactions as much as possible and treating all animals as wild. Taking a guardianship approach would specifically ensure animals are not treated as property and their rights are respected, but would also permit for a closer relationship between humans and animals than Francione advocates for. Humans and animals have lived in close quarters with one another for centuries, a situation which has resulted in many animals not only becoming domesticated but reliant on humans for continued survival. This close relationship between humans and animals does not have to be eliminated in its entirety simply because animals are no longer property. A guardian-ward relationship would allow it to remain while recognising that animals are legal subjects.

D Part II conclusion

While Francione's theory of abolitionism has merit, it is undermined by his lack of consideration of what legal personhood means and its consequences. In this part, I have sought to fill the gaps that he leaves. It has posited that animals are not precluded from being legal persons despite Francione only discussing legal rights for animals, and not considering legal duties. Adopting a mixed exclusionary/governance approach would respect animals' rights not to be property and their exclusionary rights over their own bodies. It would explicitly regulate the particular instances when an animal's rights can be interfered with, the presumption otherwise being that animals should be left alone. I have proposed that a guardian-ward relationship would work under a mixed exclusionary/governance approach, enabling animals and humans to cohabit while still respecting the status of animals as legal persons. It would also ensure that the interferences with an animal's rights are on a principled basis, such that it can only be when it is in the best interests of the animal. While this guardian relationship departs from the future that Francione envisages, the mixed approach is adaptable and could oversee the sort of relationship he seeks by relying more heavily on the exclusionary right of animals, and less on the governance approach.

Conclusion

This dissertation has sought to contribute to the discussion concerning the legal status of animals in the law. This was with respect to expanding on what the possible consequences of reclassifying animals from property to legal persons would be.

This began by firstly explaining the history of animal law. The legislative trend over the past two hundred years has shown that there is an increasing awareness and regard for animal interests, which has led to the current legal welfarist approach to animal law in New Zealand.

The welfarist approach is progressive when compared to previous approaches, such as the traditional approach of treating animals as property or the anti-cruelty approach. This is because the welfarist approach imposes generalised positive obligations on individuals to protect animal interests and so provides greater protection for animals than previous approaches have done.[274]

However, despite being an improvement on historical approaches to animal law, the legislative approach to animals can be further improved. Three approaches for reforming animal law – classical welfarism, new welfarism, and abolitionism – were then discussed to explain the different routes that could be taken to modify animal legislation in the future.

Of the three approaches discussed, abolitionism reflects the most ambitious for legislative reform. This is because it seeks to remove the current welfarist approach to animal law, which accepts the use of animals, by removing the property status of animals and giving them rights.[275] Francione seeks the abolition of the current approach to animal legislation because he believes animals are morally equal to humans and so deserve equal treatment.[276] Therefore because welfarism fails to adequately recognise the moral status animals have, Francione seeks its removal.[277]

Beyond the arguments Francione makes for animal rights, he does not discuss in any further depth what it would mean for animals to no longer be classified as property. I therefore sought to expand on what legal personhood requires to determine whether animals could have it, and if so, what that could mean for animals.

Firstly, I submitted that Francione's theory is sufficient to give animals' legal personhood on the basis of giving animals rights. This is because the concept of legal duties does not preclude animals from this status. I have defended this on the basis that there are currently

[274] Sankoff, above n 57, at 11.
[275] Francione, above n 13, at 398.
[276] At 398.
[277] Francione, above n 109, at 233-234.

legal persons who do not owe legal duties, which shows that owing them is not a necessary component of legal personhood. Should legal duties be considered necessary for legal personhood, given some animals already owe legal duties as property, animals could also do so as legal persons. Therefore, I concluded that if animals have legal rights, regardless of whether duties are required, they are not precluded from being legal persons.

Secondly, should animals become legal persons, I proposed they could be governed using a mixed exclusionary/governance approach. Animals would be granted exclusionary rights over their own bodies that impose on others duties of non-interference. This would be coupled with a governance approach to legislation that would permit intrusions within the boundaries created by the exclusionary right. This would allow other legal persons to physically interact with animals as far as the governance provisions permit.

Lastly, I proposed that under the mixed exclusionary/governance regime, the relationship between humans and animals could be redefined to be one of human guardian and animal ward. This would respect the equal moral standing of animals and humans, yet permit greater interaction between them than if only wild animals remained. This relationship would be suitable because the law shows through current family laws and how the law already treats animals in some instances that it has the capacity to adopt such an approach should animals become legal persons.

Overall, should New Zealand in the future decide to grant animals rights, it would signal the reclassification of animals from property to legal persons. While this would require redefining the human-animal relationship, there are many aspects of the relationship that could remain. Humans and animals could continue to have close relationships as guardians and wards. At a practical level this would resemble the relationship between owner and animal pet, but it would ensure that the status of animals as legal persons is respected.

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