



Précis Paper

In Pursuit of Legal Personhood for Animals

Abstract – K & R Animal Law partners Mike Rosalky and Naaman Kranz discuss the growing legal area of Animal Law and key cases internationally which have found animals have natural legal rights.

Discussion Includes

- Why we set up K & R Animal Law
- What Animal Law is
- Australian Consumer Law - Nala's case
- Admissibility of improperly obtained evidence - Kadir
- Ag-gag laws – Delforce
- Standing - Animals' Angels
- Animal Law reform
- Statutory agencies of animal welfare

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In Pursuit of Legal Personhood for Animals

1. In this edition of BenchTV, Mike Rosalky (Partner) and Naaman Kranz (Partner) discuss the business which is their passion, protecting animal rights through legal expertise.

Why we set up K & R Animal Law

2. Mike Rosalky and Naaman Kranz met in 2015 as volunteer lawyers with the Animal Defenders Office. In 2018 the two decided to start a private animal law firm. In May 2019 they incorporated K & R Animal Law. Their goal is to use their legal skills to help animals and their human defenders. Types of matters taken on include commercial law advice to animal charities, drafting submissions in relation to proposed government legislation on behalf of clients interested in animal welfare matters, providing legal advice to animal activists, representing clients in tribunals in relation to government decisions that affect animals, assisting clients in property disputes relating to animals and assisting animal loving clients in various legal matters. They are motivated by a deep concern about the poor treatment of animals and the failure of Australian laws to protect them from suffering.
3. The empirical evidence is that the higher order animals experience physical pain in an almost identical manner to humans and have high capacity to experience complex emotions.

What Animal Law is

4. Animal Law is the body of law that relates to or has an impact on non-human animals. This includes companion animals, wildlife, animals used for scientific research, animals used for entertainment and animals used for food, fibre or other products.
5. Conceptually, it is useful to think of five broad categories of Animal Law: 1. Laws designed to protect animals from cruelty, ref – *Prevention of Cruelty to Animals Act 1979* (NSW). 2. Laws that regulate use of domestic animals, ref – *Companion Animals Act 1998* (NSW). 3. Laws that affect people who advocate for animals, ref – criminal law and Ag-gag laws including *Surveillance Devices Act 2007* (NSW) and the *Criminal Code Amendment (Agricultural Protection) Act 2019* (Cth). 4. Laws that incidentally interact with animals – an extremely broad category that can involve property law, consumer law, family law, tort law, commercial law, administrative law and environmental law. A key feature of Animal Law is that animals are generally considered to be property, or things, under the law. 5. Strategic litigation – including litigation around the world to obtain legal personhood for animals.

Australian Consumer Law - Nala's case

6. This case, run in VCAT in 2018 by the Animal Law Institute, used the Australian Consumer Law (ACL) to gain compensation from a dog breeder for negligent dog breeding. Nala had a

severe worm infestation as a puppy. The breeders were ordered to compensate the owners for Nala's purchase price and for treatment and ongoing care, special foods and damages to the owners for distress and disappointment.

7. This case provides a precedent for customers of animal breeding services by illustrating that the consumer guarantees of the ACL can be used to hold animal breeding services to account.

Admissibility of improperly obtained evidence - Kadir

8. *Kadir v The Queen* [2020] HCA 1 contains some useful guidance about the admissibility of unlawfully obtained evidence and the application of the *Evidence Act 1995* (NSW) s 138.
9. Mr Kadir and Mr Grech ran a greyhound business. It was alleged that in running this business Mr Kadir used live rabbits as bait to train the greyhounds. They were charged with several counts of serious animal cruelty under s 530 of the *Crimes Act 1900* (NSW).
10. The prosecution sought to rely on the evidence of seven surveillance videos which had been obtained by an individual who trespassed on to Mr Kadir's property and installed a video camera near where the greyhounds were trained.
11. It was accepted that this evidence was obtained in contravention of s 8(1) of the *Surveillance Devices Act 2007* (NSW).
12. In addition to surveillance evidence there was evidence obtained by the RSPCA with a search warrant.
13. Mr Kadir and Mr Grech sought to have both types of evidence rejected under s 138 (1) of the *Evidence Act 1995* (NSW). Refs – *R v Grech; R v Kadir* (unreported, 28 June 2017, District Court of New South Wales, Buscombe DCJ); *R v Grech; R v Kadir* [2017] NSWCCA 288.
14. Ultimately, the High Court allowed an appeal in part, finding that the entirety of the surveillance evidence was inadmissible and the entirety of the search warrant evidence was admissible.
15. This judgment is important as it provides clarity around the application of s 138 of the Evidence Act and the consequences for persons, including animal activist groups, which attempt to rely on evidence unlawfully or improperly obtained. This judgment applies to both criminal and civil cases.

Ag-gag laws – Delforce

16. There are various reasons why it can be difficult to lawfully obtain evidence of animal cruelty. One reason is there are laws in Australia that prevent people obtaining or publishing footage of what occurs in commercial agricultural facilities – commonly referred to as Ag-gag laws.
17. Mr Delforce was charged under s 8 and s 11 of the NSW Surveillance Devices Act. Section 8 of the Act makes it an offence with a maximum penalty of five years imprisonment to among other things, "install, use or maintain an optical surveillance device on or within premises or

a vehicle or on any other object, to record visually or observe the carrying on of an activity if the installation, use or maintenance of the device involves — (a) entry onto or into the premises or vehicle without the express or implied consent of the owner or occupier of the premises or vehicle ... "

18. Section 11 says "(1) A person must not publish, or communicate to any person, a private conversation or a record of the carrying on of an activity, or a report of a private conversation or carrying on of an activity, that has come to the person's knowledge as a direct or indirect result of the use of a listening device, an optical surveillance device or a tracking device in contravention of a provision of this Part."
19. The charges were dismissed at the trial and Mr Delforce awarded costs.
20. The NSW Act does not contain a public interest defence to the offense of publishing material obtained by the use of an optical surveillance device where it was obtained in contravention of the Act.
21. An application has been made to the High Court seeking to strike down provisions of the NSW Surveillance Devices Act: *Farm Transparency International Ltd & Anor v State of New South Wales* [2021] HCATrans 151 (27 September 2021).

Standing - Animals' Angels

22. In *Animals' Angels eV v Secretary, Department of Agriculture* [2014] FCA 398, Animals' Angels sought judicial review of a live export voyage in 2008 from Australia to Malaysia. The Court found Animals' Angels lacked standing. On appeal, *Animals' Angels eV v Secretary, Department of Agriculture* [2014] FCAFC 173, the Court held that Animals' Angels did have standing but that otherwise the appeal should be dismissed.

Animal Law reform

23. The Nonhuman Rights Project objective is "to change the common law status of great apes, elephants, dolphins and whales from mere things ... to legal persons with fundamental rights of bodily liberty and bodily integrity."
24. In the first case the Nonhuman Rights Project ran, they represented a chimpanzee named Tommy: *The Nonhuman Rights Project Inc ex rel Tommy v Lavery (In re proceeding under Article 70)* 2016 NY Slip Op 96084 (NY App Div 2016).
25. Although they have been unsuccessful to date, they have continued to pursue this type of strategic litigation and have ongoing matters before US courts.
26. There are, however, other foreign jurisdictions that have expressly granted personhood to animals. AFADA filed a writ of habeas corpus before the Third Court of Guarantees of the city of Mendoza in Argentina on behalf of Cecilia, a 30-year-old chimpanzee. The Court granted a petition for a writ of habeas corpus on behalf of Cecilia.

27. In 2019, *Karnail Singh and others v State of Haryana* CRR-533-2013 High Court of Punjab & Haryana At Chandigarh the Court declared the citizens of Haryana to be persons in loco parentis, that is, they were persons in place of a parent.
28. In March 2021, the Islamabad High Court expressly noted that animals have natural legal rights and are entitled to protection under the Constitution: *Islamabad Wildlife Management Board v Metropolitan Corporation Islamabad* WP No.1155/2019. This is the case of the elephant Kaavan "the loneliest elephant in the world".

Statutory agencies of animal welfare

29. One law reform idea which is realistic is for some, hopefully all, jurisdictions in Australia to establish independent statutory agencies of animal welfare. These are necessary to avoid the inherent conflict of interest that currently exists whereby the agencies that are responsible for administering laws about animal protection matters are also responsible for promoting industries that often cause significant suffering to animals. Their primary focus would be on preventing cruelty to animals.
30. They should also enforce breaches of animal protection laws. These are currently protected by a charity, the RSPCA. This is a regulatory deficiency.

BIOGRAPHY

Mike Rosalky

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Mr Rosalky has provided legal advice to clients on a range of topics including criminal law, defamation, contracts, animal regulation, freedom of information and incorporated associations. He has also worked as a government lawyer and currently works as a Senior Associate for a private law firm and as the Legal Counsel for an IT firm.

Naaman Kranz

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Mr Kranz specialises in administrative law, civil law, environmental law, privacy law and litigation. He has previously worked as a senior lawyer for the federal government and as a solicitor for a native title service provider.

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