

COULD EXISTING ANTICRUELTY LAWS BAN WHIP USE IN HORSE RACING?

ABSTRACT

In the face of new scientific evidence suggesting horses experience pain with the use of padded whips in racing, this article considers whether the continued use of whips in racing could offend the existing anticruelty laws. In Australia, it is an offence to inflict ‘unreasonable’, ‘unnecessary’ or ‘unjustifiable’ pain or suffering on an animal. How reasonable, necessary or justifiable is the pain caused by padded whips for the purpose of human entertainment?

Relying on the ‘modern’ approach to statutory interpretation and the application of the ‘always speaking’ approach, it is argued that a court could interpret ‘unreasonable’, ‘unnecessary’ or ‘unjustifiable’ to extend the anticruelty provision to new situations and developments, including new scientific knowledge. However, in respect of whip use in racing, other important constitutional and contextual considerations must also be taken into account when deciding if whipping inflicts ‘unreasonable’, ‘unnecessary’ or ‘unjustifiable’ pain. Namely, the potential consequences of a certain interpretation, the presumption against retrospective operation, and the doctrine of the separation of powers. In giving all considerations due weight, it is unlikely that any court would interpret whip use in racing as inflicting ‘unreasonable’, ‘unnecessary’ or ‘unjustifiable’ pain or suffering despite new scientific evidence suggesting the pain inflicted may be disproportionate.

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I INTRODUCTION

Whip use in thoroughbred and jumps racing¹ ('horse racing') continues to attract public and scholarly criticism.² This is despite the use of so-called 'padded' whips and the imposition of restrictions on the number of whip strikes during a race.³ Although the whip 'should not cause pain',⁴ recent research challenges this assertion. According to Lydia Tong et al, there is 'no significant

¹ Jumps racing is the collective term for steeplechasing and hurdle racing, which involves horses jumping obstacles at speed. South Australia and Victoria are the only two jurisdictions in Australia to hold jumps racing events: Aaron C Timoshanko, 'Democratising the Regulation of Horses Used in the Sport of Jumps Racing' (PhD Thesis, Monash University, 2018) 13.

² Bidida Jones and Paul D McGreevy, 'Ethical Equitation: Applying a Cost-Benefit Approach' (2010) 5(4) *Journal of Veterinary Behavior* 196, 197; David Evans and Paul McGreevy, 'An Investigation of Racing Performance and Whip Use by Jockeys in Thoroughbred Races' (2011) 6(1) *PLoS ONE* e15622:1–5; Raewyn Graham and Phil McManus, 'Changing Human-Animal Relationships in Sport: An Analysis of the UK and Australian Horse Racing Whips Debates' (2016) 6(5) *Animals* 32; 'Ban on Whip Use Would Be Positive for Racing, Suggests John Francome', *Horsetalk.co.nz* (Blog Post, 12 November 2015) <<https://www.horsetalk.co.nz/2015/11/12/ban-whip-use-positive-racing-francome/#axzz40UAtJE5b>>; Andrew N McLean and Paul D McGreevy, 'Ethical Equitation: Capping the Price Horses Pay for Human Glory' (2010) 5(4) *Journal of Veterinary Behavior* 203; Bidida Jones et al, 'A Critical Analysis of the British Horseracing Authority's Review of the Use of the Whip in Horseracing' (2015) 5(1) *Animals* 138; Paul D McGreevy et al, 'A Note on the Force of Whip Impacts Delivered by Jockeys Using Forehand and Backhand Strikes' (2013) 8(5) *Journal of Veterinary Behavior* 395; Jennifer Hood et al, 'Whip Rule Breaches in a Major Australian Racing Jurisdiction: Welfare and Regulatory Implications' (2017) 7(1) *Animals* 4:1–25; Phil McManus and Paul McGreevy, 'When the Pressure Is on, Some Riders Breach the Whip Rules in Horse Racing', *The Conversation* (online, 17 January 2017) <<http://theconversation.com/when-the-pressure-is-on-some-riders-breach-the-whip-rules-in-horse-racing-71157>>; Paul D McGreevy et al, 'Flogging Tired Horses: Who Wants Whipping and Who Would Walk away if Whipping Horses Were Withheld?' (2018) 13(2) *PLoS ONE* e0192843:1–10 ('Flogging Tired Horses'); Kirrilly Thompson et al, 'Is Whip Use Important to Thoroughbred Racing Integrity? What Stewards' Reports Reveal about Fairness to Punters, Jockeys and Horses' (2020) 10(11) *Animals* 1985:1–13; British Horseracing Authority, *Responsible Regulation: A Review of the Use of the Whip in Horseracing* (Report, September 2011). See the findings of Paul D McGreevy et al, 'Whip Use by Jockeys in a Sample of Australian Thoroughbred Races: An Observational Study' (2012) 7(3) *PLoS ONE* e33398:1–6 ('Whip Use by Jockeys in a Sample of Australian Thoroughbred Races'), which 'challenge the notion that padding the distal section of the whip completely safeguards horses from any possible whip-related pain': at 5. See generally Paul D McGreevy and Catherine Oddie, 'Holding the Whip Hand: A Note on the Distribution of Jockeys' Whip Hand Preferences in Australian Thoroughbred Racing' (2011) 6(5) *Journal of Veterinary Behavior* 287.

³ Racing Australia, *Australian Rules of Racing* (at 6 April 2022) r AR 132 ('Rules of Racing').

⁴ British Horseracing Authority (n 2) 16.

difference between humans and horses in either the concentration of nerve endings in the outer pain-detecting layer of skin (epidermis) or in the thickness of this layer'.⁵ The authors found that 'horse skin is virtually indistinguishable from human skin with respect to the basic anatomical structures relevant to cutaneous pain detection'.⁶ This discovery is significant because we know, thanks to the 'scientific' tradition of self-experimentation, that padded whips cause humans a significant degree of pain.⁷ This is not to suggest that 'the end-experience of pain' is necessarily the same between humans and horses; 'such a comparison is currently outside the capability of science'.⁸ Nevertheless, the indentations produced by whips in horse skin are 'likely to be detected by cutaneous nociceptors'.⁹ According to Mirko Bagaric, Jane Kotzmann, and Gabrielle Wolf,

[n]ociceptors receive a message of potential pain or noxious stimuli, and transmit this message through the spinal cord to the brain, whose sensory cortex processes it and in turn forwards the message to other parts of the body that exhibit pain symptoms, for instance, through vocalization or movement.¹⁰

This development in our scientific understanding of horse sentience raises an interesting legal question: could the existing statutory prohibitions on animal cruelty be interpreted and applied such that whip use which complies with the *Rules of Racing*¹¹ ('industry-compliant whip use') would be a form of animal cruelty under the law, due to our new understanding of horses' capacity to experience pain? This article seeks to answer this question by considering how the anticruelty laws could be interpreted and applied to industry-compliant whip use in horse racing. Finding that the anticruelty laws could be interpreted and applied in a way that finds industry-compliant whip use in horse racing to be cruel, this article then identifies constitutional and contextual considerations that would likely prevail

⁵ Lydia Tong et al, 'A Comparative Neuro-Histological Assessment of Gluteal Skin Thickness and Cutaneous Nociceptor Distribution in Horses and Humans' (2020) 10(11) *Animals* 2094:1–15, 1.

⁶ Ibid 11.

⁷ Paul McGreevy whipped his own thigh with a padded whip used in racing and recorded the thermographic changes over thirty minutes to show the degree of inflammation. Unfortunately, the recording is no longer publicly available. However, to the question of 'whether having my leg struck with a racing whip, as hard as jockeys whip horses, would cause me pain and distress' the author states 'the answer is a resounding "yes"': Paul McGreevy, 'Whips Hurt Horses: If My Leg's Anything To Go By', *The Conversation* (online, 29 October 2014) <<http://theconversation.com/whips-hurt-horses-if-my-legs-anything-to-go-by-33470>>.

⁸ Tong et al (n 5) 11.

⁹ Ibid 11–12. See generally McGreevy et al, 'Whip Use by Jockeys in a Sample of Australian Thoroughbred Races' (n 2) 3.

¹⁰ Mirko Bagaric, Jane Kotzmann and Gabrielle Wolf, 'A Rational Approach to Sentencing Offenders for Animal Cruelty: A Normative and Scientific Analysis Underpinning Proportionate Penalties for Animal Cruelty Offenders' (2019) 71(2) *South Carolina Law Review* 385, 420.

¹¹ *Rules of Racing* (n 3).

should the matter come before a court, preventing any finding of cruelty. Significantly, this article offers a new explanation as to why standard industry practices, such as whip use in horse racing, continue without legal challenge.¹²

To support this analysis, a national overview of the animal cruelty laws is provided in Part II. The perceived advantages of Parliaments using the words of qualification (ie, ‘unreasonable’, ‘unnecessary’ or ‘unjustifiable’) in prohibiting animal cruelty are also examined. Part III explores the *Rules of Racing* and how they regulate industry-compliant whip use in horse racing. Part III also examines the relationship between the *Rules of Racing* and animal welfare legislation across Australia. It is argued that while the *Rules of Racing* may be useful when interpreting the words of qualification where the whip use breaches the *Rules of Racing*, the rules offer little guidance when deciding whether industry-compliant whip use in horse racing inflicts ‘unreasonable’, ‘unnecessary’ or ‘unjustifiable’ pain.

Utilising principles of statutory interpretation and application, Part IV demonstrates how a court could interpret existing animal cruelty laws in light of new situations, technology, and scientific developments to find industry-compliant whip use in horse racing to be cruel. The national focus of this article requires a macro analysis of the animal cruelty laws in Australia. This may disappoint some scholars of statutory interpretation. However, the value of this approach is that it shows that the statutory text, context and purpose of the anticruelty laws in Australia support applying the ‘always speaking’ approach to the words of qualification. Applying the ‘always speaking’ approach, it is argued that the words of qualification could be extended to include industry-compliant whip use in horse racing based on new scientific information regarding horse sentience.

Having made the argument that the words of qualification could be interpreted and applied in a way that deems industry-compliant whip use in horse racing to be in breach of the anticruelty provisions, Part V explains why such a construction is unlikely to be adopted by courts. Other constitutional and contextual considerations are relevant and will likely prevail when deciding whether industry-compliant whip use in horse racing constitutes animal cruelty. Considerations that are examined include: the potentially serious inconvenience that would be caused if a court held that industry-compliant whip use is cruel; the retrospective operation of the animal cruelty offence through the application of the ‘always speaking’ approach and the common law presumption

¹² Other possible explanations include the lack of a body with standing to bring legal action, the limited resources and/or the ‘capture’ of animal welfare charities who are generally the prosecuting authority, and the potential for adverse costs orders. These considerations are beyond the scope of this article, but will, nevertheless, affect what practices involving animals are likely to be challenged in court. ‘Capture’, also referred to as ‘regulatory capture’, occurs when a regulator becomes ‘too close’ to a regulated entity such that their goals become aligned with the goals of the regulated entity: see Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford University Press, 2nd ed, 2012) 107.

against such retrospectivity; and the potential violation of the doctrine of the separation of powers. For these reasons, it is unlikely that any Australian court would ever interpret industry-compliant whip use in horse racing as animal cruelty, even in light of new scientific evidence that padded whips may cause disproportionate pain.

This article concludes, in Part VI, that animal advocates are likely better served directing their limited resources to the social and cultural sphere, rather than attempting to effect meaningful change through interpretation and application of the existing animal cruelty provisions.

For readers unfamiliar with animal law scholarship, the lack of case law to support some of the arguments in Part IV may be unsettling. The dearth of case law regarding animal cruelty prosecutions is well-known (and lamented) in the field of animal law.¹³ In particular, there is no formal authority stating that industry-compliant whip use in horse racing was legal prior to the scientific discovery regarding horse sentience discussed in the opening paragraphs. For the purposes of this article, it must be assumed that industry-compliant whip use in horse racing was legal. In common law jurisdictions, such as Australia, it is a fundamental presumption that ‘everything which is not forbidden is allowed’.¹⁴ Therefore, this is not an unreasonable assumption. This assumption is further supported by the common-sense observation that in the hundreds of years horse racing has existed in Australia, there has never been a reported prosecution for industry-compliant whip use in horse racing. Finally, it is generally accepted in society that horses are whipped during horse racing events. In fact, as will be discussed later, industry-compliant whip use in horse racing has been effectively legalised in Western Australia, where the incorporation of the *Rules of Racing* as a code of practice in its animal welfare legislation provides a defence from prosecution for animal cruelty. This article therefore assumes that industry-compliant whip use in horse racing was legal until, subsequent to Tong et al’s article being published in 2020, the state of scientific knowledge of horse sentience changed.

In this regard, this article is speculative. But, in venturing into previously uncharted territory, this article offers some potential explanations as to why such cases do not exist and why they are unlikely to be brought before the courts.

¹³ Steven White, ‘Regulation of Animal Welfare in Australia and the Emergent Commonwealth: Entrenching the Traditional Approach of the States and Territories or Laying the Ground for Reform?’ (2007) 35(3) *Federal Law Review* 347, 359; Peter Sankoff, ‘The Protection Paradigm: Making the World a Better Place for Animals?’ in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia: Continuing the Dialogue* (Federation Press, 2nd ed, 2013) 1, 14; Steven White, ‘Standards and Standard-Setting in Companion Animal Protection’ (2016) 38(4) *Sydney Law Review* 463, 475.

¹⁴ Sir John Laws, ‘The Rule of Law: The Presumption of Liberty and Justice’ (2017) 22(4) *Judicial Review* 365, 368. See also Glanville Williams, ‘The Concept of Legal Liberty’ (1956) 56(8) *Columbia Law Review* 1129, 1130.

This is timely in light of the apparent difficulties the political sphere faces when attempting to reconcile an seeming shift in public values regarding the appropriate use of animals in society and a well-resourced industry. The recent statutory ban and subsequent reinstatement of greyhound racing in New South Wales is a notable example.¹⁵ These difficulties are beyond the scope of the present article. Nevertheless, this article is unique in identifying the potential barriers animal advocates face in attempting to rely on the judiciary to restrict commercial uses of animals, such as whipping in horse racing, even when there are scientific developments which support the changing public values regarding animal use in society.

II ANIMAL CRUELTY OFFENCES IN AUSTRALIA

All Australian states and territories prohibit animal cruelty, although, in South Australia and Tasmania, the word ‘cruelty’ is not used (see Table 1 below). In South Australia, it is an offence to ill-treat an animal.¹⁶ In Tasmania, it is an offence to cause or likely cause an animal unreasonable and unjustifiable pain or suffering.¹⁷ Despite these differences, it is illegal to cause an animal ‘unreasonable’, ‘unnecessary’ or ‘unjustifiable’ pain or suffering in Australia. These are referred to as the ‘words of qualification’ and their role is, inter alia,¹⁸ to qualify the offence of cruelty.

¹⁵ Greyhound racing was banned by the *Greyhound Racing Prohibition Act 2016* (NSW). This ban was subsequently repealed by the *Greyhound Racing Act 2017* (NSW). Mike Baird and Troy Grant, ‘Greyhound Racing To Be Shut Down in NSW’ (Media Release, NSW Government, 7 July 2016) <<https://www.justice.nsw.gov.au/Documents/Media%20Releases/2016/Greyhound-Racing-to-be-Shut-Down-in-NSW.pdf>>. See generally: *Special Commission of Inquiry into the Greyhound Racing Industry in New South Wales* (Report, 16 June 2016) vol 1; ‘Making a Killing’, *ABC: Four Corners* (online, 16 February 2015) <<http://www.abc.net.au/4corners/stories/2015/02/16/4178920.htm>>.

¹⁶ *Animal Welfare Act 1985* (SA) s 13(1).

¹⁷ *Animal Welfare Act 1993* (Tas) s 8(1).

¹⁸ The words of qualification are also used to qualify other offences under the animal welfare legislation, however, the focus of this article will be on the offence of cruelty (‘anticruelty law’).

Table 1: The Definitions of Cruelty in Australia

Jurisdiction	Provision
Australian Capital Territory	Cruelty includes causing ‘injury, pain, stress or death to the animal that is <i>unjustifiable, unnecessary</i> or <i>unreasonable</i> in the circumstances’. ¹⁹
New South Wales	‘[A] reference to an act of cruelty committed upon an animal includes a reference to any act or omission as a consequence of which the animal is <i>unreasonably, unnecessarily</i> or <i>unjustifiably</i> ’ ²⁰ ‘inflicted with pain’. ²¹
Northern Territory	‘[A] person is cruel to an animal’ ²² if they ‘cause ... the animal <i>unnecessary</i> suffering’. ²³
Queensland	‘[A] person is taken to be cruel to an animal if the person’ ²⁴ ‘causes it pain that, in the circumstances, is <i>unjustifiable, unnecessary</i> or <i>unreasonable</i> ’. ²⁵
South Australia	‘[A] person ill-treats an animal if’ ²⁶ they ‘intentionally, <i>unreasonably</i> or recklessly causes the animal <i>unnecessary</i> harm’. ²⁷
Tasmania	‘A person must not do any act, or omit to do any duty, which causes or is likely to cause <i>unreasonable</i> and <i>unjustifiable</i> pain or suffering to an animal.’ ²⁸
Victoria	Cruelty occurs if a person ‘does or omits to do an act with the result that <i>unreasonable</i> pain or suffering is caused, or is likely to be caused, to an animal’. ²⁹
Western Australia	‘[A] person ... is cruel to an animal if the person’ ³⁰ ‘in any other way causes the animal <i>unnecessary</i> harm’. ³¹

What is unlawful animal pain or suffering would be impossible to define in every situation and would fail to include new situations not in existence at the time of enactment or advances in technology and science. For this reason, Parliaments use the words of qualification (ie ‘unnecessary’, ‘unreasonable’ and ‘unjustifiable’) to

¹⁹ *Animal Welfare Act 1992* (ACT) s 6A (definition of ‘cruelty’ para (a)) (emphasis added).

²⁰ *Prevention of Cruelty to Animals Act 1979* (NSW) s 4(2) (emphasis added).

²¹ *Ibid* s 4(2)(d).

²² *Animal Welfare Act 1999* (NT) s 9(3). The basic cruelty offence will become one of causing ‘suffering [which] is unjustifiable, unnecessary or unreasonable and the person is reckless in relation to that circumstance’ under the *Animal Protection Act 2018* (NT) s 24(1)(c) when that Act, which received assent in 2018, commences.

²³ *Animal Welfare Act 1999* (NT) s 9(3)(a) (emphasis added).

²⁴ *Animal Care and Protection Act 2001* (Qld) s 18(2).

²⁵ *Ibid* s 18(2)(a) (emphasis added).

²⁶ *Animal Welfare Act 1985* (SA) s 13(3).

²⁷ *Ibid* s 13(3)(a) (emphasis added).

²⁸ *Animal Welfare Act 1993* (Tas) s 8(1) (emphasis added).

²⁹ *Prevention of Cruelty to Animals Act 1986* (Vic) s 9(1)(c) (emphasis added).

³⁰ *Animal Welfare Act 2002* (WA) s 19(2).

³¹ *Ibid* s 19(2)(e) (emphasis added).

qualify the offence of animal cruelty. Rather than attempt to set a highly prescriptive standard, which would require frequent amendment and still fail to consider every situation,³² the use of undefined, open-ended and inherently flexible words indicates that the offence can extend to new situations and developments to protect animals.³³

Whether something constitutes ‘unreasonable’, ‘unnecessary’ or ‘unjustifiable’ pain or suffering requires the object or purpose of an act to be balanced against the degree of pain or suffering caused.³⁴ Where the means of achieving a legitimate object causes disproportionate pain or suffering, it will be ‘unreasonable’, ‘unnecessary’ or ‘unjustifiable’ pain or suffering, and therefore cruel. Where the means are proportionate to the object, the pain or suffering inflicted is not ‘unreasonable’, ‘unnecessary’ or ‘unjustifiable’. In this way, animals may lawfully endure high degrees of pain or suffering for human purposes, if the object is proportionate. In the key case *Ford v Wiley*,³⁵ the court held that making animals ‘more serviceable’³⁶ for human use was a legitimate object³⁷ but using ‘a common saw’³⁸ to dehorn cattle was disproportionate due to the high degree of pain and suffering this caused.³⁹

³² Dennis C Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019) notes that while it may be considered ‘desirable’ for legislation to be frequently updated ‘this is not or cannot in practical terms be done’: at 149. See also Jacinta Dharmananda, ‘The “Always Speaking” Principle: Not Always Needed?’ (2017) 28(3) *Public Law Review* 199, 199.

³³ See Dan Meagher, ‘Two Reflections on Retrospectivity in Statutory Interpretation’ (2018) 29(3) *Public Law Review* 224, 235 (‘Two Reflections on Retrospectivity’).

³⁴ *Ford v Wiley* (1889) 23 QBD 203, 220 (‘*Ford v Wiley*’). See: *Garrick v Silcock* [1968] NZLR 595, 601; Arnja Dale, ‘Animal Welfare Codes and Regulations: The Devil in Disguise?’ in Peter Sankoff and Steven White (eds), *Animal Law in Australasia: A New Dialogue* (Federation Press, 2009) 174, 174; Mike Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (Oxford University Press, 2001) 247–9 (‘*Animal Welfare Law in Britain*’); *Department of Local Government and Regional Development v Emanuel Exports Pty Ltd* (Magistrates Court of Western Australia, Magistrate Crawford, 8 February 2008) [98] (‘*Al Kuwait*’); *R v Menard* [1978] 43 CCC 458, 463; Mike Radford, ‘“Unnecessary Suffering”: The Cornerstone of Animal Protection Legislation Considered’ [1999] (September) *Criminal Law Review* 702, 705; Dominique Thiriet, ‘Out of the “Too Hard Basket”: Traditional Hunting and Animal Welfare’ (2007) 24(1) *Environmental and Planning Law Journal* 59, 66; Jerrold Tannenbaum, ‘Animals and the Law: Property, Cruelty, Rights’ (1995) 62(3) *Social Research* 539, 577. See generally Susan E McInnes, ‘The Law Relating to the Protection and Treatment of Animals in Victoria’ (LLM Thesis, University of Melbourne, 1984) 60.

³⁵ *Ford v Wiley* (n 34).

³⁶ *Ibid* 222.

³⁷ *Ibid*.

³⁸ *Ibid* 212.

³⁹ *Ibid* 215.

This case has been applied in various courts in Australia,⁴⁰ and in the Courts of Appeal in both New Zealand⁴¹ and Québec.⁴²

Some uses of animals are expressly excluded from this balancing exercise through their explicit regulation in the animal welfare legislation, but the use of whips in racing (except in Western Australia) is not one of these uses explicitly regulated. With the exception of Western Australia, the *Rules of Racing* have not been adopted as an authorised code of practice under the applicable animal welfare legislation.⁴³ Only in Western Australia can compliance with the *Rules of Racing* (which expressly regulate whip use⁴⁴) act as a defence against potential prosecution for animal cruelty.⁴⁵ In all other states and territories, the *Rules of Racing* are only legally enforceable under contract law,⁴⁶ which includes the rules relating to whip use and the industry prohibition on cruelty.⁴⁷ The fact that the *Rules of Racing* have not been incorporated in any state or territory (except Western Australia), and that whip use in horse racing has not been specifically regulated in the animal welfare legislation, means the flexible standard embodied in the words of qualification regulates industry-compliant whip use in horse racing in Australia.⁴⁸

⁴⁰ *Cunningham v Sparrow* [1924] SASR 17, 23; *Morgan v Masters* (1980) 25 SASR 128, 130–1; *Al Kuwait* (n 34) [97]–[98].

⁴¹ *Garrick v Silcock* [1968] NZLR 595, 601.

⁴² *R v Menard* [1978] 43 CCC 458, 462–3, 465.

⁴³ The *Rules of Racing* (n 3) are adopted as a code of practice in Western Australia by the *Animal Welfare (General) Amendment Regulations 2020* (WA) reg 4. See also Western Australia, *Government Gazette*, No 166, 2 October 2020, 3466.

⁴⁴ See below Part III.

⁴⁵ *Animal Welfare Act 2002* (WA) s 25.

⁴⁶ *Clements v Racing Victoria Ltd (Occupational and Business Regulation)* [2010] VCAT 1144, [72]; *Nikolic v Racing Victoria Ltd (Occupational and Business Regulation)* [2012] VCAT 1954, [3]; *Meyers v Casey* (1913) 17 CLR 90, 109; *Nikolic v Racing Victoria Ltd (Review and Regulation)* [2013] VCAT 1879, [78]. See generally *R v Disciplinary Committee of the Jockey Club*; *Ex parte Aga Khan* [1993] 1 WLR 909, 924. See, eg: *Authorised Betting Operations Act 2000* (SA) ss 13(6)–(7); *Racing Act 1958* (Vic) ss 3(1) (definition of ‘controlling body’), 5F.

⁴⁷ Under the *Rules of Racing* (n 3) rr AR 2 (definitions of ‘cruelty’, ‘person’), 231(1)(a), which apply to all horses competing in racing events held under the management or control of a principal racing authority under r AR 4(1)(a), a person is prohibited from committing an act of cruelty against a horse, or possessing an item that ‘is capable of inflicting cruelty to a horse’: at r AR 231(1)(a). Rule AR 132(5) prohibits a rider ‘[i]n a race, official trial, jump-out or trackwork, or elsewhere’ from using ‘his or her whip in an excessive, unnecessary or improper manner’. Rule AR 132(7)(a) restricts whip use ‘prior to the 100 metre mark in a race, official trial or jump-out’.

⁴⁸ For a detailed discussion regarding the regulatory situation in Western Australia, see below Part III.

The indefinite and flexible nature of the words of qualification is widely considered to be a strength of the animal welfare regime both in Australia and internationally. In respect of the animal welfare laws in United Kingdom, Mike Radford states that

[t]he concept of unnecessary suffering, which has been developed by the courts and widely adopted by the legislature, has two very considerable merits. First, it may be applied to a multitude of different situations. Secondly, it can be constantly reinterpreted by the courts in the light of greater understanding about animal suffering, and changing social attitudes regarding the proper treatment of animals. These valuable characteristics dispense with the need constantly to amend and update the legislation. The prohibition on causing unnecessary suffering has undoubtedly made a major contribution to improving the treatment of animals ...⁴⁹

Radford further notes that

although the legislative wording [of the offence of cruelty] has remained largely unchanged since prior to the First World War, the situations in which criminal liability may arise have widened considerably in the intervening years. The courts are able to take account of the fact that conduct and practices which were considered necessary and reasonable, and therefore acceptable, in the past may be regarded rather differently in the light of contemporary standards.⁵⁰

Remaining in the United Kingdom, Robert Garner states that ‘what constitutes “unnecessary” suffering is not an exact science’⁵¹ and that its interpretation has ‘changed markedly’ post-1945.⁵² However, not unlike the ultimate conclusion of this article, Garner acknowledges that any change in meaning will occur through changing cultural norms and the political sphere rather than the judiciary.⁵³ Bernard E Rollin similarly notes that the words of qualification, such as ‘necessary suffering’, permit the meaning of cruelty to adapt to reflect changing societal expectations.⁵⁴ Rollin argues that ‘unnecessary suffering’ previously excluded animal suffering that was inconvenient to alleviate. Highlighting the ambulatory nature of the term ‘unnecessary’, Rollin states that the concept of ‘unnecessary suffering’ is now ‘moving toward’ excluding suffering that is ‘impossible to alleviate’.⁵⁵

⁴⁹ Radford, *Animal Welfare Law in Britain* (n 34) 258.

⁵⁰ *Ibid* 196.

⁵¹ Robert Garner, ‘Animal Welfare: A Political Defense’ (2006) 1(1) *Journal of Animal Law and Ethics* 161, 163.

⁵² Gary L Francione and Robert Garner, *The Animal Rights Debate: Abolition or Regulation?* (Columbia University Press, 2010) 250.

⁵³ See Garner (n 51) 166–7.

⁵⁴ Bernard E Rollin, ‘Animal Welfare, Animal Rights and Agriculture’ (1990) 68(10) *Journal of Animal Science* 3456, 3460.

⁵⁵ *Ibid*.

Concerning the animal welfare laws in the United States of America, Jerrold Tannenbaum states:

Cruelty laws do not attempt to prohibit all kinds of behavior that ethical deliberation might demonstrate are inappropriate, but only the worst kinds of treatment of animals. And they do this by reflecting the general values and views of society — which ... are certainly capable of change and development. ... The ability of cruelty laws to expand their range of prohibited activities as society's views about appropriate treatment of animals changes allows for vigorous ethical debate about how animals should be treated. It also allows for the inclusion within the class of legally prohibited behavior activities that come, over time, to be generally seen as inappropriate.⁵⁶

In support, Tannenbaum cites a New York City Magistrate's decision in 1911 regarding 'the transportation of animals in a "cruel manner"',⁵⁷ where the Magistrate acknowledged the effect that changing public values can have on the words of qualification:

The question as to whether the pain caused to such creatures, often classed as dull nervous organisms, is 'justifiable' or not cannot be easily answered. Public opinion at different times among different races has swung from one extreme to another. The Emperor Augustus nearly exterminated peacocks to regale himself in Rome with their brains. To-day the world would hold their death unjustifiable. Then again, juries and magistrates of different localities, races, or education, with varying ideas of taste and opinion, may hold widely divergent ideas as to whether the improved flavor of lobster boiled alive makes such torture 'justifiable'.⁵⁸

In Australia, the flexibility inherent in the words of qualification has been echoed by scholars. Ian A Robertson states that animal welfare legislation reflects society's changing values towards animals based on advances in science and public knowledge about animals' lives.⁵⁹ Finally, Siobhan O'Sullivan's compelling exaltation for internal consistency in the legal protections afforded to animals is supported by the claim that what is lawful will be continually reinterpreted based on changing community standards.⁶⁰ Specifically, how the term 'necessary' in the concept of

⁵⁶ Tannenbaum (n 34) 588, but the author does acknowledge the concept of cruelty is a 'matter of statutory and not fundamental common law': at 568.

⁵⁷ Ibid 572.

⁵⁸ *People ex rel Freel v Downs*, 136 NYS 440, 445 (NY, Mag Ct, 1911), quoted in ibid 573–4.

⁵⁹ Ian A Robertson, *Animals, Welfare and the Law: Fundamental Principles for Critical Assessment* (Routledge, 2015) 9.

⁶⁰ Siobhan O'Sullivan, *Animals, Equality and Democracy* (Palgrave Macmillan, 2011) 41, 44.

‘unnecessary suffering’ is interpreted will change as more of the public ‘are exposed to the act under consideration’.⁶¹

The above scholarship clearly supports interpreting the words of qualification in the animal cruelty offences in a way that could find industry-compliant whip use in horse racing as unlawful based on a new scientific understanding of horse sentience. This scholarship does not mention any specific legal principle as its basis for this approach to interpretation but, as will be explored further, reflects the ‘always speaking’ approach. Before exploring this proposition further, the *Rules of Racing* are examined to determine their role (if any) in interpreting the words of qualification in the context of industry-compliant whip use in horse racing.

III INDUSTRY REGULATION OF WHIP USE

Racing Australia is the peak national racing body that is responsible for the *Rules of Racing*.⁶² Racing Australia and the *Rules of Racing* aim to promote uniformity across general practices, conditions and integrity of racing in all states and territories.⁶³ While the principal racing authorities in each state and territory are able to create and amend local rules of racing,⁶⁴ on the issue of whip use, all use the national rules (with only a minor amendment in Victoria regarding jumps racing).⁶⁵ This means that on every racetrack, in every state and territory in Australia, the use of whips is regulated by the *Rules of Racing*.

⁶¹ Ibid 44–5.

⁶² *Rules of Racing* (n 3) rr AR 11(1)(a)–(b).

⁶³ *Rules of Racing* (n 3) r AR 1(1) states in the event of any ‘conflict or inconsistency’ between the National and Local Rules of Racing, the National *Rules of Racing* will prevail. In this way, the *Rules of Racing*, with the Local Rules of Racing, promote uniformity in the regulation of horse racing in Australia.

⁶⁴ See, eg: Racing Victoria, *The Rules of Racing of Racing Victoria* (at 6 April 2022) r AR 2 (definition of ‘Local Rules’); Racing SA, *Racing SA Limited: Local Rules of Racing* (at 11 March 2022) r Local Rule 1 (definition of ‘Local Rules’); *Rules of Racing* (n 3) rr AR 2 (definition of ‘Local Rules’), AR 12(d).

⁶⁵ *Rules of Racing* (n 3) r AR 132; Racing Victoria (n 64) r AR 132; Racing NSW, *Rules of Racing of Racing NSW* (at 8 February 2022) r AR 132; Thoroughbred Park, *The Rules of Racing of the Canberra Racing Club Incorporated* (at 9 March 2022) r LR 1; Tasracing, *Tasmanian Local Rules of Racing* (at 17 March 2022) r LR 3.1; Racing SA (n 64) r Local Rule 1 (definition of ‘rules’); Racing Queensland, *The Rules of Racing of Racing Queensland* (at 1 May 2022) r AR 132; Thoroughbred Racing NT, *The Northern Territory Local Rules of Racing* (at 1 May 2022) r LR 1 (definition of ‘The Rules’); Racing and Wagering Western Australia, *RWWA Rules of Thoroughbred Racing* (at 1 March 2019) r AR 132. But see Racing Victoria (n 64) r LR 41A(1) (a)(ii) which prevents a rider from using the whip ‘on more than 10 occasions’ ‘[i]n a jumps race, official jumps trial or jump-out (including a jumps schooling event) prior to the 100 metre mark’: Racing Victoria (n 64) r LR 41A(1)(a).

There are two *Rules of Racing* that appear relevant to understanding the meaning of ‘unreasonable’, ‘unnecessary’ or ‘unjustifiable’ whip use in horse racing. Rule AR 132(5) prohibits a rider ‘[i]n a race, official trial, jump-out or trackwork, or elsewhere’ from using ‘his or her whip in an excessive, *unnecessary* or improper manner’.⁶⁶ In providing some guidance as to what constitutes ‘excessive, unnecessary or improper’⁶⁷ whip use, r AR 132(6) lists some (not all) conduct that is prohibited, specifically whip use:

- (a) forward of the rider’s horse’s shoulder or in the vicinity of its head;
- (b) using an action that raises the rider’s arm above shoulder height;
- (c) when the rider’s horse is out of contention;
- (d) when the rider’s horse is showing no response;
- (e) after passing the winning post;
- (f) causing injury to the rider’s horse;
- (g) when the rider’s horse is clearly winning;
- (h) when the rider’s horse has no reasonable prospect of improving or losing its position;
- (i) in a manner where the seam of the flap is the point of contact with the horse, unless the rider satisfies the Stewards that that was neither deliberate nor reckless.

In addition, there are rules relating to the number of times, and occasions on which, a whip may be used at certain stages of the race, and relating to the adoption of alternative riding techniques.⁶⁸

It is possible that a lack of compliance with the industry rules prohibiting ‘excessive, unnecessary or improper’ whip use may provide some guidance to a court in considering whether the same constitutes animal cruelty under the animal welfare legislation. However, it is beyond the scope of this article to consider whether, and the extent to which, a court may rely on the industry standard set in the *Rules of Racing* when the *Rules of Racing* have been breached. The present analysis is confined to the interpretation and application of the words of qualification to industry-compliant whip use; in effect, legally challenging the use of whips in horse racing entirely. In this scenario, what the industry considers to be ‘excessive, unnecessary or improper’ is unlikely to be determinative or influential in interpreting the words of qualification because industry self-regulation is not binding.

⁶⁶ *Rules of Racing* (n 3) r AR 132(5) (emphasis added).

⁶⁷ *Ibid.*

⁶⁸ *Ibid* r AR 132(7).

Self-regulation exists when a group regulates the behaviour of its members, and even non-members, through consent or acceptance of the group's authority.⁶⁹ Behaviour is regulated through the setting of standards, monitoring compliance and enforcing the standards through behaviour modification.⁷⁰ Applying this definition to the horse racing industries, the *Rules of Racing* are clearly a form of self-regulation. As industry self-regulation, the rules regulating whip use are not legally binding or relevant (with the exception of Western Australia, as discussed below) when interpreting 'unreasonable', 'unnecessary' or 'unjustifiable' pain or suffering under the animal welfare legislation — even in respect of whip use in racing. As noted above in Part II, except in Western Australia, the *Rules of Racing* are only legally enforceable under contract law.⁷¹ The prohibition against 'excessive, unnecessary or improper'⁷² whip use under the *Rules of Racing* exists in parallel with anticruelty laws. If a private company was able to pass its own self-regulation that binds or limits how the judiciary is to interpret a statutory term, this would offend the principle of parliamentary sovereignty. This is different from other types of regulation, such as co-regulation or enforced self-regulation, where the government provides legislative backing to support enforcement action.⁷³ As a result, it is very unlikely a court would exclusively rely on the *Rules of Racing* as the criteria for what constitutes cruelty under the animal welfare legislation.

This means there is no formal barrier to prosecution for animal cruelty for conduct that complies with the *Rules of Racing* (except Western Australia).⁷⁴ It is therefore possible that whip use could constitute an offence under the animal welfare legislation but not be in breach of the *Rules of Racing*. This is the focus of this article:

⁶⁹ See: Baldwin, Cave and Lodge (n 12) 137; Julia Black, 'Constitutionalising Self-Regulation' (1996) 59(1) *Modern Law Review* 24, 26–8; Rob Baggott, 'Regulatory Reform in Britain: The Changing Face of Self-Regulation' (1989) 67(4) *Public Administration* 435, 436; Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54(1) *Current Legal Problems* 103, 116.

⁷⁰ Colin Scott and Julia Black, *Cranston's Consumers and the Law* (Butterworths, 3rd ed, 2000) 39. See: Bridget M Hutter, 'The Role of Non-State Actors in Regulation' (Discussion Paper No 37, Centre for Analysis of Risk and Regulation, April 2006) 4 <<http://eprints.lse.ac.uk/36118/1/Disspaper37.pdf>>; 'The Australian Government Guide to Regulation' (March 2014) 28 <<https://apo.org.au/sites/default/files/resource-files/2014-03/apo-nid270966.pdf>>.

⁷¹ See (n 46).

⁷² *Rules of Racing* (n 3) r AR 132(5).

⁷³ Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010) 31.

⁷⁴ The author acknowledges that, as a practical matter, the existence and enforcement by the principal racing authorities of the rules governing whip use and prohibiting the infliction of cruelty, is likely to dissuade the prosecuting authorities, such as the RSPCA, from taking enforcement action. Therefore, in this regard, the effective monitoring and enforcement of the *Rules of Racing* by the principal racing authorities acts as an informal barrier to prosecution under the animal welfare legislation.

a challenge to the legality of whip use in racing because of a new scientific understanding of horse sentience.

We turn now to consider the principles a court could rely upon to find that industry-compliant whip use in horse racing constitutes unlawful animal cruelty.

IV INTERPRETING AND APPLYING THE WORDS OF QUALIFICATION

A *Common Law*

Before discussing the relevant principles of interpretation, it is necessary to make a few brief comments regarding the limited case law that has interpreted and applied the words of qualification in the animal welfare legislation. As explained in Part II, *Ford v Wiley* established that an act inflicting pain and/or suffering on an animal will be ‘unreasonable’, ‘unnecessary’ or ‘unjustifiable’ if the object of the act is disproportionate to the means of attaining this object. *Ford v Wiley* was applied in the Western Australian Magistrates Court decision of *Department of Local Government & Regional Development v Emanuel Exports Pty Ltd (‘Al Kuwait’)*.⁷⁵

Applying the proportionality test set out in *Ford v Wiley*, it is possible (even likely) that a court could find industry-compliant whip use in horse racing unlawful because it causes disproportionate pain, based on the new scientific understanding of horse sentience. Where it is alleged that a person inflicted ‘unreasonable’, ‘unnecessary’ or ‘unjustifiable’ pain or suffering on an animal, the requirement of proportionality from *Ford v Wiley* logically requires the prosecution to demonstrate:

1. the animal experienced a high degree of pain or prolonged suffering, which is not in proportion with the legitimate object; or
2. the object or purpose of the animal use is either not legitimate or it is trivial and, therefore, the degree of pain or suffering is disproportionate; or
3. both.

In any case, the prosecution attempts to establish that the level of animal pain or suffering is disproportionate to the object of the animal use, and therefore unlawful. Thus, scientific advances in understanding animal sentience play an essential role in establishing the degree of pain or suffering inflicted.

In applying the *Ford v Wiley* principle, the recent advance in our scientific understanding about horse sentience indicates that the use of padded whips in racing very likely causes horses a high degree of pain, as it does humans.⁷⁶ Therefore, the ‘means’ of horse racing, which currently includes whip use, ought to be weighted more heavily, as whip use is likely to cause a higher degree of pain and suffering to

⁷⁵ *Al Kuwait* (n 34).

⁷⁶ McGreevy (n 7).

horses than previously understood.⁷⁷ The purpose or object of horse racing is human entertainment, including gambling.⁷⁸

One of the industry arguments in support of the whip is that it is necessary for the safety of jockey and horse. If true, this would affect the balancing exercise — specifically by ameliorating the current ‘means’ (ie whip use). It is therefore noteworthy that whip use has no effect on safety or competitiveness in horse racing. In a recent analysis of 126 races involving 1178 starters in Great Britain, the authors’

comparison of whipping-free and whipping-permitted races found no statistically significant differences in movement on course, interference on course, incidents related to jockey behaviour or race finishing times.⁷⁹

In respect of finishing times of fatigued horses, an Australian study has also found that ‘increased whip use was not associated with significant maintenance of velocity as a predictor of superior race placing at the finish of the race’.⁸⁰ These findings undermine the *raison d’être* for whip use entirely and support the conclusion that any pain or suffering caused through whip use is ‘unreasonable’, ‘unnecessary’ or ‘unjustifiable’ under the anticruelty laws.

Even if a court did apply the proportionality principle, it is unlikely that it would rule that industry-compliant whip use in horse racing breaches the anticruelty laws, due to one or more of the considerations discussed in Part V. This is not as oxymoronic as it sounds. In fact, a not entirely dissimilar situation occurred in *Al Kuwait*.⁸¹ After Magistrate Crawford in *Al Kuwait* found that exporting A Class Wethers and Muscat Wethers (breeds of sheep) in the second half of the year constituted unnecessary harm in breach of the *Animal Welfare Act 2002* (WA),⁸² his Honour then considered the impact of the federal regulation of the live export industry. Having found that the federal regulation was ‘fairly detailed’ but not ‘comprehensive’,⁸³ Magistrate Crawford nevertheless applied s 109 of the *Constitution* to resolve the conflict between the state’s law prohibiting the infliction of unnecessary harm to an

⁷⁷ Tong et al (n 5) note the ‘old assumptions’ that horses are ‘thick-skinned’ and, therefore, experience less pain than humans: at 11.

⁷⁸ Jones and McGreevy (n 2) 197.

⁷⁹ Thompson et al (n 2) 11.

⁸⁰ Evans and McGreevy (n 2) 5.

⁸¹ As will be explored in Part V(C), the constitutional considerations are different; namely, a s 109 argument versus the division of powers under the *Constitution*. Furthermore, in *Al Kuwait* (n 34), the court ruled that the export of the sheep in the second half of the year breached the animal welfare legislation: at [6]–[7], [70], [97]–[99], before applying s 109 at [143]–[203]. In the present case a court may rely on one or more of the constitutional and contextual considerations before ever deciding whether industry-compliant whip use in horse racing inflicts ‘unreasonable’, ‘unnecessary’ or ‘unjustifiable’ pain based on a new scientific understanding of horse sentience.

⁸² *Al Kuwait* (n 34) [6]–[7], [70], [97]–[99].

⁸³ *Ibid* [202].

animal and the federal regulation permitting the live export of sheep in the second half of the year.⁸⁴ Thus,

whilst the elements of the offence of cruelty to sheep, in the way of transport were proven, the [*Animal Welfare Act 2002* (WA)] is invalid, that is inoperative, to the extent of its inconsistency with Commonwealth law due to operational inconsistency. On that basis the Accused [were] acquitted.⁸⁵

This serves as an example of how a particular act or procedure may otherwise constitute animal cruelty, but other constitutional and contextual considerations prevail.

B *Statutory Interpretation*

The task of statutory interpretation is not to be confused with application. Statutory interpretation, according to John Bell and George Engle, ‘is the process by which the courts determine the meaning of a statutory provision for the purpose of applying it to the situation before them’.⁸⁶ Statutory interpretation, therefore, only occurs ‘when there is a dispute about the meaning of [the statutory] words’.⁸⁷ Once the meaning of statutory words is identified, application can occur. Statutory application occurs when the undisputed meaning of words is applied either to the undisputed facts or after the facts of the case are no longer in dispute.⁸⁸ Both stages, interpretation and application, are necessary to establish that the words of qualification in the anti-cruelty laws could support the conclusion that industry-compliant whip use in horse racing is unlawful.

The principle which extends legislation to new situations or responds to technological or scientific developments is the ‘always speaking’ approach.⁸⁹ In Australia, statutes are generally ‘treated as ambulatory, speaking continuously in the present and conveying a contemporary meaning’.⁹⁰ This means that ‘if things not known

⁸⁴ Ibid [203].

⁸⁵ Ibid.

⁸⁶ John Bell and Sir George Engle, *Statutory Interpretation* (Oxford University Press, 3rd ed, 2005) 34.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ See *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, 638 [171] (Edelman J) (*‘BMW Australia’*). It could be argued that equity of the statute supports a dynamic interpretation of the words of qualification. However, this principle is considered to be outdated and its use controversial, and for this reason will not be examined further: see Justice James Edelman, ‘Uncommon Statutory Interpretation’ (2012) 11(1) *Judicial Review* 71, 75.

⁹⁰ *A-G (Tas) v CL* (2018) 28 Tas R 70, 87. The ‘always speaking’ approach is statutorily mandated in the *Legislation Interpretation Act 2021* (SA) s 17 and the *Interpretation Act 1984* (WA) s 8. See generally Jack Tsen-Ta Lee, ‘The Text through Time’ (2010) 31(3) *Statute Law Review* 217.

or understood at the time an Act came into force fall, on a fair construction, within its words, those things should be held to be included'.⁹¹ Parliament is understood to evince its willingness for the legislation to 'embrace ... future changes in the subject matter'⁹² by using 'language that is open-ended, embodies an inherently flexible standard or incorporates a common law rule or principle'.⁹³

A recent application of the 'always speaking' approach occurred in *Aubrey v The Queen* ('*Aubrey*').⁹⁴ In this case, the High Court found the defendant guilty of inflicting grievous bodily harm, in circumstances previously understood not to constitute grievous bodily harm, based on a new scientific understanding of symptomatology and aetiology of infection.⁹⁵ This case is not dissimilar to the present hypothetical, in that both consider whether an activity previously understood to be lawful (ie industry-compliant whip use in horse racing) could be unlawful under existing legislation based on a new scientific understanding (ie of horse sentience). For this reason, the 'always speaking' approach and how it applies to the animal cruelty offence will be examined in detail below.⁹⁶

In Australia, before relying on the 'always speaking' approach, the judiciary must be satisfied that the statutory words are amenable to new circumstances and developments.⁹⁷ Only when a court is convinced the text, context and purpose of the legislation (the consideration of these elements is referred to as the 'modern' approach) requires the 'always speaking' approach, will a court consider whether new circumstances and developments (such as a change in scientific understanding of horse sentience) fall within the essential meaning of the statutory

⁹¹ *Aubrey v The Queen* (2017) 260 CLR 305, 321 [29] ('*Aubrey*'), citing Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 156–7 [4.9]. See also *BMW Australia* (n 89) 638 [171] (Edelman J).

⁹² Dan Meagher, 'The "Always Speaking" Approach to Statutes (and the Significance of Its Misapplication in *Aubrey v The Queen*)' (2020) 43(1) *University of New South Wales Law Journal* 191, 195 ('The "Always Speaking" Approach'), quoting Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 156.

⁹³ Meagher, 'The "Always Speaking" Approach' (n 92) 195. See: *BMW Australia* (n 89) where Edelman J refers to 'the wide, open-textured words': at 638 [171]; *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333, 362–3 [81], 363–4 [83] ('*Bell Lawyers*'). See also: Dan Meagher, 'The Principle of Legality and Contemporanea Exposition Est Optima et Fortissima in Lege' (2017) 38(1) *Statute Law Review* 98, 102 ('The Principle of Legality'); Lee (n 90) 232, 236; Pearce (n 32) 149. In *R v Hutchinson* [2004] NZAR 303, the New Zealand Court of Appeal stated that '[i]n determining what "rules and principles of the common law" may give rise ... to a defence, the principle that the law is always speaking must be borne in mind': at 313 [44].

⁹⁴ *Aubrey* (n 91).

⁹⁵ *Ibid* 320 [24]. See also Meagher, 'Two Reflections on Retrospectivity' (n 33) 236.

⁹⁶ See below Part IV(B)(2).

⁹⁷ Meagher, 'The "Always Speaking" Approach' (n 92) 208.

words.⁹⁸ This highlights the multi-factorial nature of the interpretative task before courts, with the ‘always speaking’ approach being just one of the tools available to the court, and only in limited circumstances. For this reason, Part IV(B)(1) examines the ‘modern’ approach and whether the words of qualification require the ‘always speaking’ approach. Part IV(B)(2) then examines how the ‘always speaking’ approach can be used to interpret statute in a way that embraces future changes, such as new scientific developments in animal sentience.

1 *The ‘Modern’ Approach to Statutory Interpretation*

Extensive judicial authority⁹⁹ and academic analysis¹⁰⁰ support the ‘modern’ approach as the approach to interpreting statutes in Australia. According to the High Court in *CIC Insurance Ltd v Bankstown Football Club Ltd*,¹⁰¹

the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses ‘context’ in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as [reference to reports of law reform bodies], one may discern the statute was intended to remedy.¹⁰²

⁹⁸ *Australian Education Union v Department of Education and Children’s Services* (2012) 248 CLR 1, 13, 14 [28]. See also: Meagher, ‘The “Always Speaking” Approach’ (n 92) 206–8; Dharmananda (n 32) 204.

⁹⁹ An early use of the ‘modern’ approach to statutory interpretation was by Mason J (in dissent) in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309, 315 (*K & S Lake City Freighters*). See, eg, *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14] (*SZTAL*). See also *Minister for Immigration and Border Protection v WZAPN* (2015) 254 CLR 610, 630–58 [53]–[70]. In *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1, French CJ, Hayne, Kiefel and Nettle JJ referred to the ‘essential’ need for context: at 28 [57], quoting *K & S Lake City Freighters* (n 99) 315. In *Singh v Commonwealth* (2004) 222 CLR 322, Gleeson CJ stated that ‘[m]eaning is always influenced, and sometimes controlled, by context’: at 332 [12].

¹⁰⁰ JJ Spigelman, ‘From Text to Context: Contemporary Contractual Interpretation’ (2007) 81(5) *Australian Law Journal* 322, 322; Justice Kenneth Hayne, ‘Statutes, Intentions and the Courts: What Place Does the Notion of Intention (Legislative or Parliamentary) Have in Statutory Construction?’ (2013) 13(2) *Oxford University Commonwealth Law Journal* 271, 272; Michael Kirby, ‘Statutory Interpretation: The Meaning of Meaning’ (2011) 35(1) *Melbourne University Law Review* 113, 116. See: Jeffrey Barnes, ‘Contextualism: “The Modern Approach to Statutory Interpretation”’ (2018) 41(4) *University of New South Wales Law Journal* 1083, 1086; Pearce (n 32) 88–9; Dan Meagher, ‘The “Modern Approach” to Statutory Interpretation and the Principle of Legality: An Issue of Coherence?’ (2018) 46(3) *Federal Law Review* 397, 402, 405 (‘The “Modern Approach” to Statutory Interpretation’); Meagher, ‘The “Always Speaking” Approach’ (n 92) 205; Lisa Burton Crawford and Dan Meagher, ‘Statutory Precedents under the “Modern Approach” to Statutory Interpretation’ (2020) 42(2) *Sydney Law Review* 209, 210, 216.

¹⁰¹ (1997) 187 CLR 384.

¹⁰² *Ibid* 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

Although contextualism ‘lies at the heart’ of the ‘modern’ approach,¹⁰³ the starting point remains the ordinary grammatical meaning of the statutory words.¹⁰⁴ Courts cannot interpret a statute in a way that would otherwise be unsupported by the statutory text.¹⁰⁵ As explained by Gageler J in *SZTAL v Minister for Immigration and Border Protection*,¹⁰⁶

[t]he task of construction begins, as it ends, with the statutory text. But the statutory text from beginning to end is construed in context, and an understanding of context has utility ‘if, and in so far as, it assists in fixing the meaning of the statutory text’.¹⁰⁷

This is clearly an example of the court fulfilling its interpretative duty. Similarly, in *Project Blue Sky Inc v Australian Broadcasting Authority* (*Project Blue Sky*),¹⁰⁸ the High Court stated:

the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.¹⁰⁹

To help ascertain the ordinary meaning of the words of qualification, it may be useful to consider the dictionary definition of the terms:

¹⁰³ Meagher, ‘The “Always Speaking” Approach’ (n 92) 197, 217.

¹⁰⁴ *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531, 549 [39] (*Taylor*); *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 381–2 [70] (*Project Blue Sky*); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46–7 [47] (*Alcan*); *Treasurer of Victoria v Tabcorp Holdings Ltd* [2014] VSCA 143, [101]–[102]; *SZTAL* (n 99) 368 [14] (Kiefel CJ, Nettle and Gordon JJ), 374 [35]–[37] (Gageler J). See: Dharmananda (n 32) 204; Lisa Burton Crawford et al, *Public Law and Statutory Interpretation: Principles and Practice* (Federation Press, 2017) 230; Barnes (n 100) 1091, 1099–100; Meagher, ‘The “Modern Approach” to Statutory Interpretation’ (n 100) 404; Meagher, ‘The “Always Speaking” Approach’ (n 92) 205–6. See also: Susan Crennan, ‘Statutes and the Contemporary Search for Meaning’ (Speech, Statute Law Society Paper, 1 February 2010) 13–14 <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/crennanj/crennanj1feb10.pdf>>; Kirby (n 100) 128. See generally Hayne (n 100) 272. In respect of English law, see also Bell and Engle (n 86) 22.

¹⁰⁵ *Project Blue Sky* (n 104) 381–2 [70]; *Alcan* (n 104) 46–7 [47]. See also: Crawford et al (n 104) 228; Meagher, ‘The “Modern Approach” to Statutory Interpretation’ (n 100) 404; Crawford and Meagher (n 100) 216.

¹⁰⁶ *SZTAL* (n 99).

¹⁰⁷ *Ibid* 374 [37].

¹⁰⁸ *Project Blue Sky* (n 104).

¹⁰⁹ *Ibid* 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) (citations omitted).

- ‘unreasonable’: ‘not reasonable; not endowed with reason’; ‘not guided by reason or good sense’; ‘not agreeable to or willing to listen to reason’; ‘not based on or in accordance with reason or sound judgement’; ‘exceeding the bounds of reason; immoderate; exorbitant’.¹¹⁰
- ‘unnecessary’: ‘not necessary; superfluous; needless’.¹¹¹
- ‘unjustifiable’: ‘not justifiable’.¹¹²

Based on these definitions,¹¹³ prohibiting the infliction of ‘unreasonable’, ‘unnecessary’ or ‘unjustifiable’ pain or suffering on an animal appears to be an entirely sensible qualification to the offence. But, based on the dictionary definitions above, could it not be argued that industry-compliant whip use in horse racing is ‘unreasonable’, ‘unnecessary’ or ‘unjustifiable’? Other jurisdictions have moved to whip free (referred to as ‘hands and heels’) racing without any adverse effects, including to jockey safety or finishing times.¹¹⁴ If we accept the recent findings of Tong et al that horses and humans ‘have the equivalent key anatomical structures to detect cutaneous pain’,¹¹⁵ a strong argument can be made that industry-compliant whip use in horse racing causes is ‘unreasonable’, ‘unnecessary’ or ‘unjustifiable’ pain or suffering.¹¹⁶

However, whether statutory words take their ordinary grammatical meaning is determined by the legislation’s context and purpose.¹¹⁷ As stated by French CJ in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*,¹¹⁸ the ‘ordinary

¹¹⁰ *Macquarie Dictionary* (online at 9 May 2022) ‘unreasonable’ (defs 1–5).

¹¹¹ *Ibid* ‘unnecessary’.

¹¹² *Ibid* ‘unjustifiable’.

¹¹³ The author acknowledges that the use of dictionary definitions are used with caution by courts: see *NBN Co Ltd v Pipe Networks Pty Ltd* (2015) 295 FLR 256, 279 [91]. However, the dictionary definitions are provided here for the limited purpose of providing a general indication of the ordinary meaning of the words of qualification, rather than ascertaining their legal meaning.

¹¹⁴ Thompson et al (n 2) 2, 11. Since January 2009, the use of whips in racing has been forbidden in most races in Norway: Graham and McManus (n 2) 2. See: ‘What Is the RSPCA’s View on Whips in Thoroughbred Racing?’, *RSPCA Knowledgebase* (Blog Post, 7 December 2020) <<https://kb.rspca.org.au/knowledge-base/what-is-the-rspcas-view-on-whips-in-thoroughbred-racing/>> (‘View on Whips in Thoroughbred Racing’); Cristina Wilkins, ‘Whip-Free Race Finishes in UKs £1.8M Racing League’, *Horses and People* (Blog Post, 10 March 2020) <<https://horsesandpeople.com.au/whip-free-race-finishes-in-uks-1-8m-racing-league/>>.

¹¹⁵ Tong et al (n 5) 13.

¹¹⁶ *Ibid* state ‘[r]epeated strikes of the whip in horses that are fatigued as they end a race are likely to be distressing and cause suffering’: at 12 (citations omitted).

¹¹⁷ *Project Blue Sky* (n 104) 381–2 [70]; *Alcan* (n 104) 46–7 [47]; *SZTAL* (n 99) 368 [14] (Kiefel CJ, Nettle and Gordon JJ), 374 [37]–[39] (Gageler J). See also: Crawford et al (n 104) 241.

¹¹⁸ *Alcan* (n 104).

and grammatical sense of the statutory words' must be the starting point when interpreting a statute, 'having regard to their context and the legislative purpose'.¹¹⁹ This principle was recently reaffirmed by Bell and Gageler JJ in *R v A2*, also in the High Court.¹²⁰

The statutory context of a specific provision includes its 'parliamentary history, underlying purpose, role within the wider statutory scheme and the existing legal context into which was enacted'.¹²¹ Lisa Burton Crawford et al cite five sources of context: 'reading the statute as a whole'; 'legislative history and change'; 'using evidence of purpose'; 'potential drafting errors'; and 'the consequences of interpretation'.¹²² The purpose of the legislation 'must be found in the text and structure of an Act'.¹²³ According to Jeffrey Barnes, context 'extends to the immediate context of any critical word or phrase in the provision concerned, other internal context within the Act as a whole, and finally to the wider context beyond the Act in question'.¹²⁴ In the present case, the context and purpose of the animal welfare legislation is evident when the legislation is read as a whole within the existing legal context.

Most animal welfare legislation expressly states that its purpose or object is to prevent cruelty to animals,¹²⁵ however, these sections are not determinative. Any statement of statutory purpose has to be interpreted contextually, like any other statutory provision.¹²⁶ This is especially true for the animal welfare legislation where the object or purpose of the Act provides no explicit guidance as to the meaning of cruelty. One must turn to the offence of animal cruelty for such guidance, where the general prohibition on animal cruelty is based on the infliction of 'unreasonable', 'unnecessary' or 'unjustifiable' pain or suffering. Hereafter the interpretative task becomes circular — to understand the anticruelty provision one turns to the legislation's stated objects but this requires an understanding of the anticruelty provision. Clearly, we do not live in a society where animals will not experience pain and suffering at the hands of humans, which is reflected in the animal welfare legislation when considered in context. While the animal welfare legislation in each state and territory in Australia has its own idiosyncrasies, it is clear the purpose of the legislation is to balance the welfare of animals and the interests of the people using them by expressly prohibiting certain activities (which cause disproportionate

¹¹⁹ Ibid 31 [4]. See also: Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 95; Crawford et al (n 104) 241–2; Hayne (n 100) 278; Meagher, 'The "Modern Approach" to Statutory Interpretation' (n 100) 404; Barnes (n 100) 1100.

¹²⁰ (2019) 269 CLR 507 ('*R v A2*').

¹²¹ Meagher, 'The "Always Speaking" Approach' (n 92) 206. See also Crawford and Meagher (n 100) 222.

¹²² Crawford et al (n 104) 242.

¹²³ Dharmananda (n 32) 204.

¹²⁴ Barnes (n 100) 1084. Bell and Engle (n 86) also refer to 'internal' and 'external' context: at 50, 51. See also Kirby (n 100) 116.

¹²⁵ See below Appendix.

¹²⁶ Barnes (n 100) 1109.

pain or suffering or are otherwise socially unacceptable) while regulating others.¹²⁷ For example, in South Australia, organised animal fights are banned while rodeos are expressly permitted.¹²⁸ This means in states and territories where rodeos are regulated, rodeos are lawful, providing the event organisers and participants comply with the statutory provisions and licence conditions. It is, therefore, reasonable to conclude that the purpose of the animal welfare legislation is to permit some animal uses occasioning pain and suffering and prohibit others.

Whip use in horse racing is not expressly permitted via regulation under the animal welfare legislation (except, as previously discussed, in Western Australia),¹²⁹ unlike other controversial uses of animals (such as rodeos). However, despite the public controversy and sustained efforts to ban the whip in racing,¹³⁰ Parliaments have not done so. The fact that whip use in horse racing is not explicitly legislated and therefore not expressly permitted in the animal welfare legislation means that the legality of whip use in horse racing is open to judicial interpretation and application.¹³¹ In addition, the words of qualification are

of indeterminate scope and of a high level of generality, [indicating that] a court should interpret the provision on the basis that the intention of the original enactment was that the particular application of the provision may vary over time.¹³²

Parliaments have deliberately employed a flexible standard and common law principles (the words of qualification) to qualify the offence of cruelty.¹³³ These words of qualification embody ‘an inherently flexible standard’, which is not

¹²⁷ Although not determinative, it is notable that the *Animal Care and Protection Act 2001* (Qld) s 3 explicitly acknowledges the balancing of interests that the Act tries to achieve.

¹²⁸ The *Animal Welfare Act 1985* (SA) bans ‘organised animal fights’: at s 14(5)(a). This legislation requires a person to hold a permit to conduct a rodeo: at s 34.

¹²⁹ See above Part III.

¹³⁰ See, eg: ‘The Science Is in: Whips Hurt Horses’, *Animals Australia for a Kinder World* (Web Page, 25 March 2015) <<https://animalsaustralia.org/latest-news/science-reveals-whips-hurt/>>; ‘Animal Welfare in Horse Racing’, *RSPCA* (Web Page) <<https://www.rspca.org.au/take-action/animal-welfare-in-horse-racing>>; Calla Wahlquist, ‘Jockeys Get No Benefit from Using a Whip in Horse Racing, Landmark Study Finds’, *The Guardian* (online, 30 October 2020) <<http://www.theguardian.com/sport/2020/oct/30/jockeys-get-no-benefit-from-using-a-whip-in-horse-racing-landmark-study-finds>>; Tasmania, *Parliamentary Debates*, House of Assembly, 12 November 2020, 8 (Cassy O’Connor); Damien Ractliffe, ‘Surveys Reveal Aussies Want Whips Banned from Horse Racing’, *The Sydney Morning Herald* (online, 9 December 2020) <<https://www.smh.com.au/sport/racing/surveys-reveal-aussies-want-whips-banned-from-horse-racing-20201209-p56m4b.html>>.

¹³¹ Except in Western Australia. See above Part III.

¹³² *Deputy Commissioner of Taxation v Clark* (2003) 57 NSWLR 113, 145 [142].

¹³³ Meagher, ‘The Principle of Legality’ (n 93) refers to the use of ‘reckless’ in a criminal offence as representing a flexible standard and common law principle: at 103.

uncommon in criminal law statutes.¹³⁴ This flexible standard ensures that animal use activities not expressly permitted, including situations not in existence at the time of enactment or due to new technological or scientific developments, may still constitute animal cruelty in appropriate circumstances. This means a court could apply the ‘always speaking’ approach. How the ‘always speaking’ approach applies to the anticruelty law is discussed next.

2 *The ‘Always Speaking’ Approach*

The expression ‘always speaking’ refers to statutory text being ‘read as speaking continuously in the present’,¹³⁵ unless there is a clear intention to the contrary.¹³⁶ According to the ‘always speaking’ approach, the statute’s essential meaning does not change, but the ‘context or application’ of the statutory words does.¹³⁷ As such, the ‘always speaking’ approach is an interpretative approach that requires careful application.¹³⁸

The ‘always speaking’ approach was defined in the following recent statement of Edelman J of the High Court: ‘[w]here legislation does not expressly delimit the scope of its application then its scope is usually to be determined by the contemporary application of its essential meaning that will best give effect to the legislative purpose’.¹³⁹ That the essential meaning of a statute does not change is crucial and, according to Dan Meagher, is the ‘fulcrum of this approach’.¹⁴⁰ This feature allows existing statutory provisions to apply to new situations and developments without requiring parliamentary amendment.¹⁴¹

However, the ‘always speaking’ approach is not synonymous with ‘updating’ legislation, which would give the statutory words whatever meaning they would have in the future.¹⁴² Judicial updating of legislation is impermissible as it violates the

¹³⁴ Meagher, ‘Two Reflections on Retrospectivity’ (n 33) 235, citing *R v Gee* (2003) 212 CLR 230, 241; Lee (n 90) 232, 236.

¹³⁵ *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1, 32 [97]; *Bell Lawyers* (n 93) 363 [83].

¹³⁶ See Pearce and Geddes (n 119) 157. See also Meagher, ‘The “Always Speaking” Approach’ (n 92) 194.

¹³⁷ *R v G* [2003] 3 WLR 1060, 1078 [29]; *R v A2* (n 120) 563 [170]; *Bell Lawyers* (n 93) 363–4 [82]–[84]. See also: James Edelman, ‘2018 Winterton Lecture: Constitutional Interpretation’ (2019) 45(1) *University of Western Australia Law Review* 1, 17; Meagher, ‘Two Reflections on Retrospectivity’ (n 33) 235.

¹³⁸ Meagher, ‘The “Always Speaking” Approach’ (n 92) 191.

¹³⁹ *R v A2* (n 120) 562 [169].

¹⁴⁰ Meagher, ‘The “Always Speaking” Approach’ (n 92) 194.

¹⁴¹ See above Part II. See: *ibid*; Dharmananda (n 32) 199. See generally Pearce (n 32) 149.

¹⁴² Lee (n 90) 219–20; Meagher, ‘Two Reflections on Retrospectivity’ (n 33) 235; Dharmananda (n 32) 202.

separation of powers doctrine (discussed below); legislation can only be updated by Parliament through the introduction of amending legislation.¹⁴³

In interpreting legislation, courts traditionally distinguish between a word's connotation and denotation.¹⁴⁴ This was applied by Barwick CJ in *Lake Macquarie Shire Council v Aberdare County Council* ('*Lake Macquarie*'),¹⁴⁵ who found the connotation of the word 'gas' reflected a category or genus of gasses available for heating and lighting.¹⁴⁶ When the statute was passed, the term denoted coal gas as coal gas was the only gas commonly used for lighting and heating.¹⁴⁷ The fact that the word 'gas' was used, rather than 'coal gas' indicated to the High Court that 'the genus, and not any particular species of gas' was the meaning of the term. As such, the term 'gas' was extended to include liquified petroleum gas.¹⁴⁸

Lord Bingham colourfully illustrated the distinction between connotation and denotation in *R (Quintavalle) v Secretary of State for Health*.¹⁴⁹

There is, I think, no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking. If Parliament, however long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now.¹⁵⁰

In the New South Wales Court of Appeal decision *Chubb Insurance Co of Australia Ltd v Moore*,¹⁵¹ the connotation of a word was described as the

essential attributes, which are to be determined as at the time of enactment ... [whereas] [t]he denotation of a word or phrase is the class of things that, from time to time, may be seen to possess those essential attributes sufficiently to justify the application of the word or phrase to them.¹⁵²

¹⁴³ *Taylor* (n 104) 549 [40]; Meagher, 'Two Reflections on Retrospectivity' (n 33) 236; Barnes (n 100) 1101; Meagher, 'The "Always Speaking" Approach' (n 92) 197.

¹⁴⁴ *Lake Macquarie Shire Council v Aberdare County Council* (1970) 123 CLR 327, 331 ('*Lake Macquarie*'), cited in *Aubrey* (n 91) 321–2; Meagher, 'The Principle of Legality' (n 93) 102; Lee (n 90) 220. See Crawford and Meagher (n 100) on the meaning of 'always speaking', which '[I]east controversially, it is shorthand for conveying the results of applying the well-known distinction between connotation and denotation': at 220.

¹⁴⁵ *Lake Macquarie* (n 144).

¹⁴⁶ *Ibid* 331.

¹⁴⁷ *Ibid*. See generally Lee (n 90) 223.

¹⁴⁸ *Lake Macquarie* (n 144) 331. See also Pearce (n 32) 153.

¹⁴⁹ [2003] 2 AC 687.

¹⁵⁰ *Ibid* 695.

¹⁵¹ (2013) 302 ALR 101.

¹⁵² *Ibid* 119 [82]. See also: Dharmananda (n 32) 201; Lee (n 90) 220.

There are numerous examples where courts have applied the ‘always speaking’ approach to statutory words to reflect advances in technology and science. For example, a radio broadcast was interpreted as a public performance for the purposes of the *Copyright Act 1912* (Cth).¹⁵³ In *Muin v Refugee Review Tribunal*,¹⁵⁴ information stored on a computer or fax machine was a ‘document’ under the *Migration Act 1958* (Cth).¹⁵⁵ More recently, a ‘machine made copy’ was extended to include a printout of an email for the Federal Court scale of legal costs.¹⁵⁶ In each case, the statute’s essential attributes, which were fixed at the time of enactment, manifested in the specific technological advances, meaning the statute could be extended to include the new circumstances or developments in science and technology.

In *Aubrey*, the High Court interpreted ‘inflicts’ within the statutory phrase ‘inflicts grievous bodily harm’ as including the transmission of a sexually transmitted disease, namely human immunodeficiency virus (‘HIV’).¹⁵⁷ This interpretation reversed a precedent established in *R v Clarence* (‘*Clarence*’),¹⁵⁸ which found that ‘uncertain and delayed operation of the act by which infection is communicated’ did not fall within the meaning of ‘inflict’.¹⁵⁹

The High Court interpreted the phrase ‘inflicts grievous bodily harm’ using the ‘always speaking’ approach to find the phrase was ‘adaptable to new circumstances’.¹⁶⁰ The majority reasoned, *inter alia*, that society’s understanding of how infectious diseases spread was ‘rudimentary’ in 1888 when *Clarence* was decided.¹⁶¹ As scientific knowledge about the spread of infectious diseases has improved, the majority explained ‘the reckless transmission of sexual disease by sexual intercourse without disclosure of the risk of infection’ was capable of amounting to the infliction of grievous bodily harm under s 35(1)(b) of the *Crimes Act 1900* (NSW).¹⁶²

Assuming a court was to similarly apply the ‘always speaking’ approach to the words of qualification, because the words are amenable to being extended to a new situation according to the ‘modern’ interpretative approach, it appears *possible* that industry-compliant whip use in horse racing could be interpreted as ‘unreasonable’, ‘unnecessary’ or ‘unjustifiable’ based on a new scientific understanding of horse sentience. As in *Lake Macquarie*, where the word ‘gas’ represented a category for different types of gases used for lighting and heating, the words of qualification in

¹⁵³ *Chappell & Co Ltd v Associated Radio Co of Australia Ltd* [1925] VLR 350.

¹⁵⁴ (2002) 190 ALR 601.

¹⁵⁵ *Ibid* 626–7 [104]. See also Meagher, ‘The “Always Speaking” Approach’ (n 92) 195.

¹⁵⁶ *Re Treneski and Comcare* (2004) 80 ALD 760, 768 [36].

¹⁵⁷ *Aubrey* (n 91).

¹⁵⁸ (1888) 22 QBD 23 (‘*Clarence*’).

¹⁵⁹ *Ibid* 41–2; *Aubrey* (n 91) 315–6 [10], 332 [55]. See also: *R v A2* (n 120) 552–3; Meagher, ‘Two Reflections on Retrospectivity’ (n 33) 23–7.

¹⁶⁰ *Aubrey* (n 91) 343.

¹⁶¹ *Ibid* 320 [24].

¹⁶² *Ibid* 320 [24], 326 [40].

the anticruelty law are the category of all disproportionate animal uses.¹⁶³ One might seek to distinguish these cases arguing that in *Lake Macquarie*, the High Court was considering a specific descriptor ('gas') and, in the present case, only general descriptors are used (ie 'unreasonable', 'unnecessary' or 'unjustifiable'). However, the recent High Court case of *Aubrey* applied the 'always speaking' approach to the word 'inflicts', which is a general descriptor. Clearly, a prerequisite for applying the 'always speaking' approach is that the statutory terms are interpreted as ambulatory and embodying 'an inherently flexible standard'.¹⁶⁴ Thus, the connotation, or genus, of the words of qualification are animal uses that cause pain or suffering that are disproportionate to the object (or purpose) of the animal use. This is the essential meaning of the words of qualification, which was fixed at the time of enactment. However, what was not fixed was the denotation or specific animal uses or acts where the pain and suffering are disproportionate.

Part II explored how whip use could be disproportionate in light of new scientific evidence regarding horse sentience. To interpret whip use that complies with the *Rules of Racing* as cruel would not change the core or essential meaning of the anticruelty law, which is to protect animals from disproportionate pain or suffering. Parliament chose the words of qualification to invoke an 'inherently flexible standard'¹⁶⁵ so that as new situations arose, including developments in scientific understanding, the offence of cruelty may still apply. In applying this to the present case, new scientific research has improved our understanding of horse sentience and indicates that horses are likely to experience a greater degree of pain or suffering with padded whips than previously thought. Thus, a court could (after balancing the means and object of horse racing) find that industry-compliant whip use in horse racing causes disproportionate pain or suffering and is therefore unlawful.

The above analysis sets out the unstated legal basis of Radford, Garner, Tannenbaum, and the other animal law scholars' conclusions applicable to Australia.¹⁶⁶ If correct, it is argued that this analysis is incomplete. Other constitutional and contextual considerations exist which will very likely dissuade any court from applying the arguments canvassed in this Part. This may offer some insight as to why the authorised inspectors under the animal welfare legislation (generally, the Royal Society for Prevention of Cruelty to Animals) have not prosecuted a single jockey for whipping their mount in conformity with the *Rules of Racing*, despite their opposition to the practice.¹⁶⁷ We turn now to these considerations.

¹⁶³ See above Part II.

¹⁶⁴ Meagher, 'Two Reflections on Retrospectivity' (n 33) 235.

¹⁶⁵ *Ibid.*

¹⁶⁶ See above Part II.

¹⁶⁷ 'View on Whips in Thoroughbred Racing' (n 114).

V CONSTITUTIONAL AND CONTEXTUAL CONSIDERATIONS

In Part IV, this article made the argument that a court could interpret industry-compliant whip use in horse racing as violating existing anticruelty laws based on any new scientific understandings of horse sentience. So far, however, this analysis has ignored other principles that are also relevant to the courts' application of the words of qualification to industry-compliant whip use in horse racing.¹⁶⁸ Three specific constitutional and contextual considerations have been selected from other statutory aids and presumptions because in applying the law to the facts, these considerations are most likely to trump the arguments in Part IV for the reasons provided.

A Consequence of Interpretation

In Australia, courts may consider the consequences of a particular statutory interpretation before adopting a certain meaning. In *Project Blue Sky*, the majority of the High Court considered the consequences of interpreting an act to be in breach of the *Broadcasting Services Act 1992* (Cth).¹⁶⁹ In its application, the majority reasoned that if acts done in breach are invalid (and therefore void), this would likely result in '[e]xpense, inconvenience and loss of investor confidence'.¹⁷⁰ In light of these potential consequences, the majority decided that the best interpretation was that 'an act done in breach of [the Act's] provisions is not invalid' to avoid the adverse effects identified.¹⁷¹

Similarly, Windeyer J in *Lake Macquarie* was concerned that applying the 'always speaking' approach to the word 'gas' 'might have rather alarming consequences'.¹⁷² To recall, Barwick CJ and Menzies J interpreted 'gas' as representing a category or genus of gasses used for heating and lighting. Justice Windeyer expressed doubts about whether this was the correct interpretation of the term, but his Honour was cognisant that an alternate application would create an 'inconvenient situation'.¹⁷³ If the Court interpreted 'gas' narrowly as 'coal gas', this would mean 'that the existing activities of the county council in selling petroleum gas in containers has been unlawful, not within the powers conferred upon it and all its expenditure thereon was an improper use of its funds'.¹⁷⁴ So, in the interests of 'expediency', Windeyer J did not dissent.¹⁷⁵

¹⁶⁸ See generally Meagher, 'The "Always Speaking" Approach' (n 92) 205–16.

¹⁶⁹ *Project Blue Sky* (n 104) 391–3 (McHugh, Gummow, Kirby and Hayne JJ). See also Crawford et al (n 104) 250.

¹⁷⁰ *Project Blue Sky* (n 104) 392 [98].

¹⁷¹ *Ibid* 392–3 [99].

¹⁷² *Lake Macquarie* (n 144) 333.

¹⁷³ *Ibid*.

¹⁷⁴ *Ibid*.

¹⁷⁵ *Ibid*. Justice Windeyer was also concerned that the Court had 'not heard what the respondent's counsel would say about the matter, and the learned primary judge did not say anything about it': at 333.

More recently, the High Court in *Aubrey* also considered the consequences of deciding the case differently. Chief Justice Kiefel, Keane, Nettle and Edelman JJ stated, '[i]n light of contemporary ideas and understanding, any other result would be productive of *considerable inconvenience*'.¹⁷⁶

Interpreting industry-compliant whip use in horse racing as animal cruelty based on a new scientific understanding of horse pain could produce considerable 'inconvenience' if it leads to a shift to whip-free racing and this leads to a reduction in punters' interest and a consequent loss of taxation revenue.¹⁷⁷ A reduction in government revenue would cause significant inconvenience of the kind envisioned in *Project Blue Sky* and *Lake Macquarie*.

B *The Potential for the 'Always Speaking' Approach To Offend the Common Law Presumption against Retrospectivity*

Retrospectivity, in statutory construction, is notoriously difficult to define.¹⁷⁸ For this reason, it 'might be analytically clearer and more accurate as a factual matter to recognise that *whenever* laws fix new legal consequences to past events — even if only for the future — they still do operate retrospectively'.¹⁷⁹ The degree of retrospectivity can then determine whether the common law presumption against retrospectivity should be engaged — that is, only occasions of strong retrospectivity should attract the common law presumption.¹⁸⁰

It is presumed that legislation should not operate retrospectively unless it contains obvious words to that effect.¹⁸¹ This common law presumption applies to the interpretation of new statutes but also applies to new interpretations of existing statutes through the 'always speaking' approach.¹⁸² In both instances, the concern is that retrospectivity is unfair and, in the latter, that failure to observe the presumption in

¹⁷⁶ *Aubrey* (n 91) 326 [40] (emphasis added).

¹⁷⁷ Jones and McGreevy (n 2) 197. See also Russell Hoye, 'Public and Private Regulatory Issues Associated with Thoroughbred Racing Data' (2009) 1(2) *International Journal of Sport Policy and Politics* 145, 158.

¹⁷⁸ See Meagher, 'Two Reflections on Retrospectivity' (n 33) who canvasses some of the 'analytical, definitional and jurisprudential issues' in applying a statute to a given set of facts: at 224.

¹⁷⁹ *Ibid* 229 (emphasis in original).

¹⁸⁰ *Ibid* 225.

¹⁸¹ See: *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 on the common law presumption against retrospectivity being a fundamental right in Australia: at 134–5; *Potter v Minahan* (1908) 7 CLR 277 where the High Court refused to interpret a statute as 'overthrow[ing] fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness': at 304. See also: Pearce (n 32) 357–8; Meagher, 'The "Always Speaking" Approach' (n 92) 214; Meagher, 'Two Reflections on Retrospectivity' (n 33) 224–5, 229.

¹⁸² See Meagher, 'Two Reflections on Retrospectivity' (n 33) 224.

cases of strong retrospectivity could offend the principle of legality and the rule of law.¹⁸³ This concern is especially salient in criminal law statutes, such as the animal welfare legislation, where an alternative construction is open to the court that would avoid retrospective operation,¹⁸⁴ as in the present case.

The retrospective effect of applying the ‘always speaking’ approach to the facts was at the heart of Bell J’s dissent in *Aubrey*, who noted that it was ‘a large step to depart from a decision which has been understood to settle the construction of a provision, particularly where the effect of that departure is to extend the scope of criminal liability’.¹⁸⁵ While there was no suggestion that the defendant in *Aubrey* was acting on the belief that his actions were lawful,¹⁸⁶ the effect of the majority’s decision was to make the sexual transmission of disease a form of grievous bodily harm where it was not previously. This is a ‘strong form of retrospectivity’.¹⁸⁷ The ‘new construction changed the legal consequences of a prior event by attaching criminal liability to facts which had already occurred’.¹⁸⁸

For this reason, the decision in *Aubrey* has been questioned by some legal scholars because, inter alia, it extends ‘the scope of criminal liability to retrospectively proscribe a new species of criminal harm’.¹⁸⁹ This form of retrospectivity threatens ‘to undermine the core rule of law values of certainty, accessibility and prospectivity’.¹⁹⁰ ‘[T]he rule of law requires (among many other things) that people be able to find out and understand the law’ to avoid punishment.¹⁹¹ The High Court, in *Director of Public Prosecutions v Keating*,¹⁹² unanimously (including Kiefel, Bell and Keane JJ who also presided over *Aubrey*) concluded that it is fundamental that the ‘criminal law should be certain and its reach ascertainable by those who are

¹⁸³ Ibid 230, 234.

¹⁸⁴ Ibid 224, 229; Meagher, ‘The “Always Speaking” Approach’ (n 92) 216.

¹⁸⁵ *Aubrey* (n 91) 332 [55].

¹⁸⁶ Ibid 324. This is referred to as a ‘weak’ reliance argument, and may explain (in part) why the High Court did not apply the common law presumption against retrospective interpretation: see Meagher, ‘Two Reflections on Retrospectivity’ (n 33) 232–3, 237.

¹⁸⁷ Meagher, ‘The “Always Speaking” Approach’ (n 92) 214 (emphasis in original).

¹⁸⁸ Dan Meagher, ‘A Brief Word on the “Always Speaking” Approach to Statutory Interpretation: *Aubrey v The Queen*’, *Opinions on High* (Blog Post, 4 July 2017) <<https://blogs.unimelb.edu.au/opinionsonhigh/2017/07/04/meagher-aubrey/>>.

¹⁸⁹ Meagher, ‘Two Reflections on Retrospectivity’ (n 33) 238 (emphasis in original). See also: Meagher, ‘The “Always Speaking” Approach’ (n 92) 214; Dharmananda (n 32) 200–3; Crawford and Meagher (n 100) 221.

¹⁹⁰ Meagher, ‘Two Reflections on Retrospectivity’ (n 33) 237; Meagher, ‘The “Always Speaking” Approach’ (n 92) 214. See also *Aubrey* (n 91) where Bell J (in dissent) noted that the majority’s decision to extend the meaning of ‘inflicts grievous bodily harm’ reduces certainty, which is ‘an important value in the criminal law’: at 338 [73].

¹⁹¹ Crawford et al (n 104) 230. See also Crawford and Meagher (n 100) 234.

¹⁹² (2013) 248 CLR 459.

subject to it. This idea underpins the strength of the presumption against retrospectivity in the interpretation of statutes that impose criminal liability.¹⁹³

This concern was recently reiterated by Bell and Gageler JJ in the High Court in *R v A2*, where their Honours stated:

It is one thing to recognise that the application of a statutory word or phrase may change over time, particularly in light of advances in science and technology. It is another thing to contemplate that the meaning of statutory language creating an offence can expand etymologically such that conduct that is not proscribed at the date of the enactment of the offence may come to fall within the proscription at some undefined time thereafter. That is because, accepting that the fixity or variability through time of the content of any statutory language is a question of interpretation, statutory language which creates a criminal offence is to be interpreted in light of the fundamental principle that a criminal norm should be certain and its reach ascertainable by those who are subject to it.¹⁹⁴

If a court decided that industry-compliant whip use in horse racing is animal cruelty based on a new scientific understanding of horse sentience, then one of the consequences of such an application is that jockeys would not have had an opportunity to change their recent behaviour to avoid breaching the anticruelty law. If the ‘always speaking’ approach is applied in the way discussed in Part IV(B)(2), a jockey could be prosecuted for whipping their mount during a race in 2021 because the scientific understanding of horse sentience changed in 2020. This is possible, in part, because mens rea is not required to establish the offence of animal cruelty; only the act that caused pain or suffering (the act of whipping) must be intended.¹⁹⁵ Such an outcome is analogous to that in *Aubrey*, where the application of the ‘always speaking’ approach caused the *Crimes Act 1900* (NSW) to operate retrospectively by criminalising conduct that was not previously understood to amount to the ‘infliction of grievous bodily harm’.¹⁹⁶ Similarly, in the common law abolition of martial immunity for rape cases, *R v R*¹⁹⁷ and *R v L*,¹⁹⁸ the respective courts convicted the defendants for a crime ‘which at the time of commission [of the offence] he had a complete defence’.¹⁹⁹ In all three cases — *Aubrey*, *R v R* and *R v L* — the judgments are examples of strong

¹⁹³ Ibid 479 [48]. See also *Aubrey* (n 91) where Bell J (in dissent) stated ‘[c]ertainty is an important value in the criminal law’: at 338 [73].

¹⁹⁴ *R v A2* (n 120) 552.

¹⁹⁵ *Pearson v Janlin Circuses Pty Ltd* [2002] NSWSC 1118, [7]–[9]; *Morgan v Masters* [1980] 25 SASR 128, 132; *William Holyman & Sons Pty Ltd v Eyles* [1947] Tas SR 11, 17. See generally Philip Jamieson, ‘A Question of Criminal Guilt: Mens Rea under Animal Protection Law’ (1988) 15(1) *University of Queensland Law Journal* 75.

¹⁹⁶ Meagher, ‘Two Reflections on Retrospectivity’ (n 33) 236.

¹⁹⁷ [1991] 2 All ER 257.

¹⁹⁸ (1991) 174 CLR 379.

¹⁹⁹ Andrew Palmer and Charles Sampford, ‘Judicial Retrospectivity in Australia’ (1995) 4(2) *Griffith Law Review* 170, 179. See also Meagher, ‘Two Reflections on Retrospectivity’ (n 33) 237.

retrospectivity.²⁰⁰ The application of the ‘always speaking’ approach to industry-compliant whip use in horse racing would similarly occasion a strong form of retrospectivity by ‘proscrib[ing] a *new* species of criminal harm’.²⁰¹ Such a situation violates the common law presumption against retrospectivity, undermines the rule of law, and is destructive of fundamental common law rights.²⁰²

Where one interpretation of a statute erodes fundamental rights, courts will, where a constructional choice is available, choose another interpretation that avoids or minimises the erosion.²⁰³ Deciding that industry-compliant whip use in horse racing does not inflict ‘unreasonable’, ‘unnecessary’ or ‘unjustifiable’ pain or suffering avoids giving the anticruelty law retrospective effect. It also avoids the unfairness that follows from prosecuting someone for an act that was assumed to be lawful at the time. Arguably, it may be better for society in the long run that perceived injustices in statutes are left untouched by the judiciary, to promote legal certainty.²⁰⁴

In sum, interpreting industry-compliant whip use in horse racing as inflicting ‘unreasonable’, ‘unnecessary’ or ‘unjustifiable’ pain or suffering based on new scientific information would criminalise behaviour that was not previously criminal. This is not necessarily fatal to the claim, as seen in *Aubrey*.²⁰⁵ However, unlike in *Aubrey*, the reliance argument here is much stronger. Jockeys continue to whip their mounts in compliance with the *Rules of Racing* without any expectation that they could be prosecuted for animal cruelty. In the present case, the application of the ‘always speaking’ approach occasions a form of strong retrospectivity; the form of retrospectivity that the common law is presumptively hostile towards because it erodes fundamental notions of fairness underpinning the rule of law. Because of the foundational principles at stake, and the fact that another construction of the words of

²⁰⁰ Meagher, ‘Two Reflections on Retrospectivity’ (n 33) 237.

²⁰¹ *Ibid* 238 (emphasis in original).

²⁰² See: *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 on the common law presumption against retrospectivity being a fundamental right in Australia: at 134–5; Meagher, ‘Two Reflections on Retrospectivity’ (n 33) 234.

²⁰³ *Momcilovic v The Queen* (2011) 245 CLR 1, 46 [43]; Meagher, ‘The “Always Speaking” Approach’ (n 92) 213, citing Robert French, ‘The Principle of Legality and Legislative Intention’ (2019) 40(1) *Statute Law Review* 40, 40. This is due to the operation of the principle of legality: see Meagher, ‘The Principle of Legality’ (n 93) 98–9. See also Meagher, ‘Two Reflections on Retrospectivity’ (n 33) 234.

²⁰⁴ Bell and Engle (n 86) 31.

²⁰⁵ But see Edelman (n 89) 91 where his Honour, in expressing concerns about the House of Lords decision in *Yemshaw v Hounslow London Borough Council* (2011) 1 WLR 433, noted that

it might be possible for a court to hold that a person would rightly have been acquitted of a crime based on a construction of a criminal statute in 1977, but that the words of the same unamended statute could acquire a new meaning so that in 2012 the person could now be convicted of the offence in exactly the same circumstances.

qualification is open to the court (that is, industry-compliant whip use in horse racing is not ‘unreasonable’, ‘unnecessary’ or ‘unjustifiable’) a court is unlikely to interpret the anticruelty provision in the way outlined in Part IV(B)(2).

C *Separation of Powers*

While the common law is an important and valuable source of law, deciding on the lawfulness of an activity is the proper responsibility of democratically accountable Parliaments in a pluralistic society such as Australia. As Latham CJ stated in *Bank of New South Wales v Commonwealth*,²⁰⁶ ‘[t]he Court cannot re-write a statute and so assume the functions of the legislature’.²⁰⁷ To do otherwise offends the separation of powers doctrine,²⁰⁸ especially in Australia, which has a strong constitutional separation of powers.²⁰⁹ Justice Bell expressed similar concerns in *Aubrey*, stating if a ‘settled understanding [of a legislative provision] is ill-suited to the needs of modern society, the solution lies in the legislature addressing the deficiency’.²¹⁰

Although the majority of the High Court disagreed with Bell J in *Aubrey* and interpreted ‘inflicts’ as extending to the transmission of a sexually transmitted disease, a similar outcome is unlikely in respect of the anticruelty law. In this regard, the cases can be distinguished because extending the meaning of ‘unreasonable’, ‘unnecessary’ or ‘unjustifiable’ in the anticruelty law amounts to a ‘controversial change in social or economic policy upon which the political arms of government and/or wider public would resist or take exception’.²¹¹ Many participants in horse racing industries support the continued use of whips, which is why, in part, their use continues despite calls from the public to ban their use. If the ‘always speaking’ approach were applied, such that industry-compliant whip use in horse racing was held to be unlawfully cruel, this would decide the public controversy. However, where ‘the application of the “always speaking” approach would, in effect, amount to the judicial determination of [a contested] issue then a court might reasonably refrain from doing so’.²¹²

No such controversy existed in *Aubrey*. The political arm of government and the wider public did not, and would not, take exception to punishing an individual who, knowing they had HIV, had unprotected sex without disclosing the risk to their partner.²¹³ This was what the majority in *Aubrey* might be alluding to when it stated that

²⁰⁶ (1948) 76 CLR 1.

²⁰⁷ *Ibid* 164.

²⁰⁸ *Taylor* (n 104) 549 [40]. See also *Barnes* (n 100) 1101.

²⁰⁹ Meagher, ‘The “Always Speaking” Approach’ (n 92) 197, 201.

²¹⁰ *Aubrey* (n 91) 332 [55].

²¹¹ Meagher, ‘The Principle of Legality’ (n 93) 105.

²¹² Meagher, ‘The “Always Speaking” Approach’ (n 92) 213.

²¹³ This is true even where, as was the case in *Aubrey* (n 91), the defendant was found not guilty of ‘maliciously causing the complainant to contract a grievous bodily disease with intent to cause the complainant to contract that disease’, contrary to s 36 of the

subsequent developments in knowledge of the aetiology and symptomology of infection have been such that it *now accords with ordinary understanding* to conceive of the reckless transmission of sexual disease by sexual intercourse without disclosure of the risk of infection as the infliction of grievous bodily injury.²¹⁴

This conclusion does not undermine the ‘always speaking’ approach. The general proposition that the words of qualification can be interpreted to accommodate new situations not in existence at the time of enactment or in response to changing technology and scientific knowledge is correct. However, it is not an appropriate exercise of the judiciary’s powers to interpret an existing statute in a way that decides controversial social or economic policy issues.²¹⁵ This is the role of the legislature. The separation of powers doctrine is an important constitutional consideration a court must consider in deciding whether the arguments in Part IV apply.

For the forgoing reasons, the arguments in support of finding that industry-compliant whip use in horse racing inflicts ‘unreasonable’, ‘unnecessary’ or ‘unjustifiable’ pain are unlikely to be applied.²¹⁶ Although the words of qualification can and should apply to new situations and developments, other important constitutional and contextual considerations are relevant, including considering the consequences of the decision, the presumption against retrospectivity, and the separation of powers doctrine. Given the significance of the values at stake, including the rule of law, common law protections against unfairness and constitutional divisions of power, a court is unlikely to interpret the words of qualification in the anticruelty law as suggested in Part IV.

VI CONCLUSION

This article has identified hard limits in what the words of qualification in anti-cruelty laws can do for the future protection of animals. In the present case, an Australian court is very unlikely to interpret industry-compliant whip use in horse racing as inflicting ‘unreasonable’, ‘unnecessary’ or ‘unjustifiable’ pain. This conclusion persists even in the face of new scientific evidence that padded whips cause a higher degree of pain than previously thought, raising questions about the proportionality between the object and means of horse racing.

Crimes Act 1900 (NSW): at 312 [5]. Many members of the general public might be unsympathetic to the defendant’s argument that it is unfair to extend the meaning of ‘inflicts’ to include the transmission of a grievous bodily disease in the less specific offence of ‘grievous bodily harm’ in circumstances where they were acquitted of the more specific and directly relevant offence relating to the deliberate infliction of a grievous bodily disease.

²¹⁴ *Aubrey* (n 91) 320 [24] (emphasis added).

²¹⁵ Meagher, ‘The Principle of Legality’ (n 93) 105.

²¹⁶ See above Part IV.

It would be ‘put[ting] the cart before the horse’²¹⁷ to use the ‘always speaking’ approach before considering the text, context and purpose of the legislation, and so this article began by examining the meaning of the words of qualification under the ‘modern’ approach to statutory interpretation. The words of qualification are clearly ambulatory. The context and purpose of the anticruelty legislation is to permit some animal uses and prohibit others where the means are disproportionate to the objects of the Acts. Based on new scientific evidence, it could be argued that because horses have a greater capacity to feel pain than previously believed, industry-compliant whip use in horse racing is disproportionate to the object of horse racing. Industry-compliant whip use in horse racing could then constitute animal cruelty in violation of anticruelty laws. However, this ignores important constitutional and contextual considerations that are also relevant and applicable to industry-compliant whip use in horse racing.

The consequences of interpreting industry-compliant whip use in horse racing as inflicting ‘unreasonable’, ‘unnecessary’ or ‘unjustifiable’ pain would likely produce industry- and society-wide ‘inconvenience’ as the ramifications of a sudden and unplanned transition to whip free racing could have far reaching economic consequences. Applying the ‘always speaking’ approach along the lines proposed in Part IV(B)(2) would also occasion a strong form of retrospectivity, towards which the common law is presumptively hostile due to its deleterious effect on the rule of law. If a court was persuaded by the arguments in Part IV, this would effectively ban whip use in horse racing by ‘judicial fiat’.²¹⁸ To do so offends the separation of powers doctrine because contentious policy issues are to be decided by a democratically accountable Parliament in a pluralistic liberal democracy.

The conclusion that the words of qualification in the anticruelty laws should not be interpreted and applied in a way that finds industry-compliant whip use in horse racing unlawful, is not inconsistent with the need to apply the legislation to new advancements in technology and scientific knowledge. Nothing in this article should be interpreted as undermining this important principle. The words of qualification in the anticruelty laws remain ambulatory and responsive to changing social conditions, technology and scientific knowledge. However, whether a provision will be interpreted in light of new situations and developments depends on the text, context and purpose of the legislation. In the present case, important constitutional and contextual considerations will likely prevail over the paradigm-shifting decision to interpret industry-compliant whip use in horse racing as unlawful.

This finding has potential implications beyond Australia. Specifically, the concerns regarding the separation of powers, retrospectivity, and the rule of law are relevant to any strategic litigation in other common law countries that seeks to achieve

²¹⁷ Meagher, ‘The “Always Speaking” Approach’ (n 92) 208.

²¹⁸ Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012) 265. See also Meagher, ‘Two Reflections on Retrospectivity’ (n 33) 236.

greater protections for animals under existing anticruelty laws.²¹⁹ For the reasons articulated in this article, such strategic animal cruelty prosecutions may be doomed to fail before they commence. The precise details will differ between jurisdictions, but the underlying principles (and the concerns they address) remain. Contentious policy questions regarding the appropriate use of animals in society must be resolved by an accountable Parliament in a pluralistic democracy.

Given these issues, animal law activists are likely to face significant challenges should they try to change how society uses animals by arguing certain practices are cruel under the animal welfare legislation. In the present case, those hoping to ban whip use in horse racing (or any other animal use or practice which reflects current industry standards) through the use of existing anticruelty laws are unlikely to succeed for the reasons outlined. This article has identified some of the jurisprudence maintaining the status quo of animal use in the legal system. Where time and financial resources are constraining factors, limited resources may be better directed to raising greater public awareness about the ethics of animal use to effect grassroots change, which will eventually translate into legislative change.

²¹⁹ See generally: Jonathan R Lovvorn, 'Animal Law in Action: The Law, Public Perception, and the Limits of Animal Rights Theory as a Basis for Legal Reform' (2006) 12(2) *Animal Law* 133, 145–7; Matthew Liebman, 'Who the Judge Ate for Breakfast: On the Limits of Creativity in Animal Law and the Redeeming Power of Powerlessness' (2011) 18(1) *Animal Law* 133, 137.

VII APPENDIX: OBJECT AND PURPOSE PROVISIONS OF ANIMAL WELFARE LEGISLATION

Section 4A of the *Animal Welfare Act 1992* (ACT) states:

4A Objects of Act

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

Section 3 of the *Prevention of Cruelty to Animals Act 1979* (NSW) states:

3 Objects of Act

The objects of this Act are—

- (a) to prevent cruelty to animals, and
- (b) to promote the welfare of animals by requiring a person in charge of an animal—
 - (i) to provide care for the animal, and
 - (ii) to treat the animal in a humane manner, and
 - (iii) to ensure the welfare of the animal, and
- (b) to promote the welfare of dogs and cats by requiring information about them to be provided when they are advertised for sale.

Section 3 of the *Animal Welfare Act 1999* (NT) states:

3 Objectives

The objectives of this Act are:

- (a) to ensure that animals are treated humanely;
- (b) to prevent cruelty to animals; and
- (c) to promote community awareness about the welfare of animals.

Section 3 of the *Animal Care and Protection Act 2001* (Qld) states:

3 Purposes of Act

The purposes of this Act are to do the following—

- (a) promote the responsible care and use of animals;
- (b) provide standards for the care and use of animals that—
 - (i) achieve a reasonable balance between the welfare of animals and the interests of persons whose livelihood is dependent on animals; and
 - (ii) allow for the effect of advancements in scientific knowledge about animal biology and changes in community expectations about practices involving animals;
- (c) protect animals from unjustifiable, unnecessary or unreasonable pain;
- (d) ensure the use of animals for scientific purposes is accountable, open and responsible.

Section 1 of the *Prevention of Cruelty to Animals Act 1986* (Vic) states:

1 Purpose

The purpose of this Act is to—

- (a) prevent cruelty to animals; and
- (b) to encourage the considerate treatment of animals; and
- (c) to improve the level of community awareness about the prevention of cruelty to animals.

Section 3 of the *Animal Welfare Act 2002* (WA) states:

3 Content and Intent

- (1) This Act provides for the protection of animals by —
 - (aa) regulating the conduct of people in relation to animals, including the manner in which animals are treated, cared for and managed; and
 - (a) regulating the people who may use animals for scientific purposes, and the manner in which they may be used; and
 - (b) prohibiting cruelty to, and other inhumane or improper treatment of, animals.
- (2) This Act intends to —
 - (a) promote and protect the welfare, safety and health of animals; and
 - (b) ensure the proper and humane care and management of all animals in accordance with generally accepted standards; and

- (c) reflect the community's expectation that people who are in charge of animals will ensure that they are properly treated and cared for.

No similar provision exists in the South Australian or Tasmanian animal welfare legislation.