



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 11 – Part II

**Liability for Stock Straying
on to the Highway**

REPORT

JUNE 1981

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

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To: The Hon. I.G. Medcalf, QC, MLC

ATTORNEY GENERAL

In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972*, I am pleased to present the Commission's report on liability for stock straying onto the highway.

(Signed) D.K. Malcolm, QC
Chairman

23 June 1981

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CHAPTER 1

INTRODUCTION

1. THE COMMISSION'S TERMS OF REFERENCE

1.1 The Commission was asked to consider and report on whether there should be any change to the law relating to liability for loss¹ caused by stock straying on to the highway. These terms of reference were interpreted as requiring the Commission to report on whether the rule developed by courts in England and known as "the rule in *Searle v Wallbank*"² ("the Rule") should apply in Western Australia.

1.2 This reference was originally given to the Law Reform Committee (the predecessor of the Law Reform Commission) in 1969. In 1970 that committee submitted a report to the Minister for Justice recommending the abolition of the Rule but no legislative action was taken to implement the report. However, in 1976 the Full Court of the Supreme Court of Western Australia decided that the Rule did not apply in Western Australia; this decision made it unnecessary to implement by statute the principal recommendations of the Law Reform Committee. Subsequent decisions by courts in other Australian jurisdictions, however, cast doubt upon the correctness of the Full Court's decision and therefore, in November 1978 the Attorney General asked the Law Reform Commission again to review this area of law. In August 1980 the Commission issued a working paper reviewing the law in Western Australia and elsewhere and inviting comment from members of the public and interested organisations.³

1.3 According to the Rule, the owners and occupiers of land adjoining a highway are under no duty to take reasonable care to prevent their animals straying on to the highway and thereby causing persons using it foreseeable loss.⁴ Although as traditionally formulated the

¹ When used in this report "loss " includes loss associated with personal injury (such as diminished earning capacity, pain and suffering, loss of enjoyment of life and medical and related expenses), property damage and economic loss.

² This rule is named after the decision of the House of Lords in *Searle v Wallbank* [1947] 1 All ER 12 in which it was authoritatively stated. The reasons for its development are discussed in para 1.7 below.

³ Referred to in this report as "the Working Paper". Copies can be obtained from the Commission without charge. The paper is discussed further in para 1.12 below.

⁴ The traditional formulation of the Rule is that the owners and occupiers of land adjoining a highway owe no duty to the users thereof (i) to fence or maintain the fences along the boundary between their land and the highway so as to prevent their animals straying on to the highway or, (ii) subject to certain exceptions

Rule will protect only the owners and occupiers of land; adjoining a highway, there is authority to the effect that it will also protect anyone who keeps an animal which strays on to a highway.⁵

1.4 As the Rule is not limited to livestock, the position pertaining to all the animals covered by it is considered in this report.

2. THE EFFECT OF THE RULE

1.5 In addition to a number of duties which apply only to them,⁶ persons who keep⁷ an animal are required by the law of negligence to take reasonable care to prevent it causing foreseeable loss to other persons or their property.⁸ If this duty of care is broken, the person suffering loss can recover damages for the tort of negligence as compensation for that loss.⁹

1.6 The effect of the Rule is to create an exception to this duty of care by relieving persons who keep an animal of the duty they would otherwise be under of taking reasonable care to prevent the animal causing foreseeable loss to another person by straying on to the highway. When this exception applies persons who suffer loss due to the presence on the highway of a straying animal will, in most cases,¹⁰ have no remedy against the person who kept the animal, even though the latter had not taken reasonable steps to prevent the loss being suffered.¹¹ Consequently, unless they are privately insured, these accident victims will have to bear the loss suffered themselves.

considered in para 4.8 below, to take reasonable care to prevent their animals from straying on to the highway: *Searle v Wallbank* [1947] 1 All ER 12; *Brisbane v Cross* [1978] VR 49; *State Government Insurance Commission v Trigwell* [1979] 26 ALR 67 (henceforth *SGIC v Trigwell*). Although in this formulation there are two limbs to the Rule, the second limb in practice incorporates all that is significant in the first.

⁵ *Brock v Richards* [1951] 1 All ER 261, 264.

⁶ To prevent cattle trespassing on to another person's land ("cattle trespass") and to keep a dangerous animal under control. These duties are described in paras 2.1 and 2.2 of the Working Paper. One aspect of the latter duty is discussed in para 2.5 below.

⁷ Unlike liability for dangerous animals (discussed in paras 2.5 and 2.6 below) liability for negligence will only be imposed upon the owner of an animal if, when the accident happened, it was in his control or in the control of a person for whom he is vicariously responsible: *Milligan v Wedge* [1840] 12 A & E 737.

⁸ *Fardon v Harcourt-Rivington* [1932] All ER Rep 81; *Draper v Hodder* [1972] 2 All ER 210; *Dorman v Horscroft* [1980] 24 SASR 154, 160.

⁹ *Ibid.*

¹⁰ The cases in which persons who suffer loss due to the presence on the highway of a straying animal may have a remedy are described in paras 2.15, 2.18 and 4.8 below.

¹¹ *Brisbane v Cross* [1978] VR 49; *Bagshaw v Taylor* [1978] 18 SASR 564; *Fitzgerald v E D & A D Cooke Bourne (Farms) Ltd* [1963] 3 All ER 36; *SCIG v Trigwell* [1979] 26 ALR 67.

3. THE ORIGINS OF THE RULE

1.7 Although the Rule takes its name from a case decided in 1947, it is of ancient origin.¹² It developed in England in response to conditions existing in the English countryside before the enclosure movement gained momentum in the eighteenth century. At that time, fences were rare and roads were laid out over unenclosed land largely for the benefit of farmers to drive their livestock to and from market. In those conditions, because users of the highways expected to meet straying animals, and because modes of travel at the time were relatively slow, the risk of accidents being caused by such animals was slight.

4. THE SCOPE OF THE RULE

1.8 The Rule is not limited in operation to those roads popularly known as highways but applies to all roads, streets, lanes, bridges and thoroughfares or places open to or used by the public for passage. It applies equally to rural, urban and suburban areas¹³ and is not restricted to farm animals such as cattle, sheep and horses but applies as well to domestic dogs¹⁴ and probably cats.¹⁵ As a result of the wide scope of its operation the Rule protects not only farmers and graziers in the relatively sparsely populated agricultural and pastoral areas of the State but also persons keeping animals adjacent to busy highways in the metropolitan area.

5. THE RULE IN WESTERN AUSTRALIA

1.9 In 1976 the Full Court of the Supreme Court of Western Australia in *Thomson v Nix*,¹⁶ after reviewing the history of legislation in Western Australia concerned with fencing land in farming areas and the establishment and maintenance of roads, concluded that almost since the foundation of Western Australia conditions in the State had been very different from those which in England had given rise to the Rule. As a result the Court decided the Rule did not apply in Western Australia and was not therefore part of State law. The Full Court said that instead, liability for injury or damage caused by stock straying on to the highway should be governed by the law of negligence -

¹² *SGIC v Trigwell* [1979] 26 ALR 67, 77; cf *Brackenborough v Spalding Urban District Council* [1942] 1 All ER 34, 41.

¹³ *Brook v Richards* [1951] 1 All ER 261.

¹⁴ *Ellis v Johnstone* [1963] 1 All ER 286; *Brisbane v Cross* [1978] VR 49, 63. But see paragraph 2.18 below.

¹⁵ *Brisbane v Cross* [1978] VR 49, 63.

¹⁶ [1976] WAR 141.

“..so that there is the ordinary duty imposed upon a person who has animals in his charge to take care that his animals are not so placed or used or allowed to roam or stray so as to be likely to injure his neighbour ...”¹⁷

1.10 Subsequently, however, the Full Court of the Supreme Court of Victoria decided that the Rule still applied in Victoria¹⁸ and the High Court of Australia¹⁹ decided that it applied in South Australia also. It should be noted that in neither case was this because the Rule was thought to be desirable. Rather, it was because in both cases the court involved considered the continued operation of the Rule to be an inevitable consequence of the operation of the technical rules of English law relating to the reception of the English common law into the former Australian colonies. According to the majority in the High Court,²⁰ whether or not the Rule should continue to form part of the law of a particular State or Territory was a matter for the appropriate Parliament to decide.

1.11 In arriving at the conclusion that the Rule still applied in South Australia the High Court mentioned *Thomson v Nix* only in passing and did not determine whether or not the Full Court was correct in deciding that the Rule did not apply in Western Australia. However, Gibbs J, the present Chief Justice of the High Court, did express doubts about the reasoning behind the decision²¹ and the reasons for decision given by the members forming the majority in the High Court on this point appear to conflict with those of the Full Court. As a result, the Commission is of the opinion that unless the law is reformed in the meantime the High Court will overrule *Thomson v Nix*, should the opportunity arise, and decide that the Rule still applies in Western Australia. Consequently, although *Thomson v Nix* is apparently being followed by lower courts²² in Western Australia, until the law is reformed, or the High Court or the Privy Council determines the correctness of that decision, the law in Western Australia in this area will be uncertain.

¹⁷ [1976] WAR 141, 147 per Jackson CJ. A person's “neighbour” in this context is someone who is so closely and directly affected by the person's act or omission that he ought reasonably to be considered when the person acts, or omits to take action. “For the owner or occupier of land adjoining a highway, 'neighbour' would normally include a motorist or other person lawfully using the road”: *Thomson v Nix* [1976] WAR 141, 147.

¹⁸ *Brisbane v Cross* [1978] VR 49.

¹⁹ *SGIC v Trigwell* (1979) 26 ALR 67.

²⁰ Id, 73, 74-5 and 78; Murphy J (dissenting on this point) said that the High Court should declare that the Rule no longer formed part of Australian law.

²¹ *SGIC v Trigwell* (1979) 26 ALR 69, 73. See also *Brisbane v Cross* [1978] VR 49, 54 and 61.

²² For example, *Dawson v Secreve* (Unreported, Local Court of Western Australia, Fremantle Plaintiff No 784/78); *Leahy v Sutherland* (Unreported, Local Court of Western Australia, Perth, Plaintiff No 7776/80).

6. THE WORKING PAPER

1.12 The Working Paper was issued in August 1980 and circulated widely in Western Australia and elsewhere. It described the law in Western Australia relating to the liability for animals generally, the operation of the Rule and the uncertainty surrounding it, and outlined and evaluated the position existing, and recommendations for reform made, in other jurisdictions. The paper also discussed the arguments advanced for and against the Rule and invited comment upon a number of important issues.

1.13 Advertisements drawing attention to the availability of the Working Paper were placed in a number of newspapers²³ and it received wide publicity.²⁴

1.14 The Commission has received comments from the Pastoralists and Graziers Association of Western Australia (Inc), the Main Roads Department, Sir Lawrence Jackson who, as the Chief Justice at the time, wrote the judgment in *Thomson v Nix*, the Insurance Council of Australia Ltd, the Royal Automobile Club of WA (Incorporated), Professor H Luntz (the George Paton Professor of Law in the University of Melbourne), Mr H Guthrie (a former solicitor and Speaker of the Legislative Assembly) and a number of private individuals with farming and rural experience.²⁵ Of the commentators, only one²⁶ argued that the Rule should apply in Western Australia in its traditional form. Generally speaking, the others were in agreement that the law should allow damages to be recovered by persons who suffer loss as a result of an animal straying on to the highway where this loss is attributable to negligence on the part of the person who kept the animal. A number of commentators emphasised, however, that any change to the law should not place an unfair burden upon farmers and graziers. Other commentators noted that even if damages could be recovered in cases of negligence there would still remain a large number of cases in which loss caused by animals straying on to the highway would go uncompensated.²⁷

²³ *The West Australian* (6 September 1980); the *Western Farmer and Grazier* (4 September 1980) and *The Countryman* (4 September 1980).

²⁴ See generally, *The West Australian* (1 September 1980, 33); the *Western Farmer and Grazier* (4 September 1980) ; and the *Australian Law News* (November 1980 35-36).

²⁵ A complete list of those who commented on the working paper appears in Appendix I.

²⁶ Mr R Gardiner.

²⁷ See further, paras 7.1 to 7.4 below.

CHAPTER 2

THE EXISTING LIABILITY FOR ANIMALS STRAYING ON TO THE HIGHWAY

2.1 For the reasons given above¹ it is uncertain whether the Rule now operates in Western Australia. If it does not operate, liability for loss caused by animals straying on to the highway will differ considerably from what that liability will be if it does. These differences are shown below; the description of liability in paragraphs 2.2 to 2.13 proceeds on the assumption that the Rule does not apply in Western Australia; the description in paragraphs 2.14 to 2.18 proceeds on the assumption that it does.

1. IF THE RULE DOES *NOT* APPLY IN WESTERN AUSTRALIA

(a) Liability for negligence

2.2 The law of negligence imposes upon persons who keep an animal a duty to take reasonable care to prevent it causing foreseeable loss to another person by, for example, straying on to a highway. If this duty is broken, damages for the tort of negligence can be recovered by the latter from the person keeping the animal.

2.3 The existence of this duty of care does not mean that persons who keep an animal must in all cases take reasonable care to prevent it straying on to the highway.² The duty is to take reasonable care to avoid causing another person loss, not to prevent straying. What precautions must be taken in each case to fulfil this duty will depend upon all the surrounding circumstances.³ Thus, although in the closely settled areas of the South West of Western Australia, where farmers usually fence in their livestock, it may be necessary to adopt methods designed to prevent livestock straying on to busy highways, in those parts of the North West of the State where it is common practice to allow livestock to graze freely, this may not be necessary.⁴ In such areas, the erection of signs warning users of the highway that they may encounter livestock straying thereon may, however, be required.

¹ In paras 1.9 to 1.11.

² *Wark v Steel* [1946] SLT (Sh Ct Rep) 17; *Gardiner v Miller* [1967] SLT 29; *Kelly v Sweeney* [1975] 2 NSWLR 720, 737-738.

³ *Thomson v Nix* [1976] WAR 141, 147.

⁴ *Ibid.*

2.4 The duty imposed by the law of negligence is only to take reasonable care. Therefore, persons who keep an animal are only liable to pay damages in respect of loss caused by the animal straying on to the highway if they, or a person for whose acts or omissions they are vicariously responsible, are proved to have failed to take reasonable care to prevent that loss being suffered. Consequently, even in a locality in which the duty of care requires the erection and maintenance of gates and fences to prevent animals straying on to the highway, liability will not arise merely because an animal strays on to a highway and causes loss.⁵ If in such a locality suitable gates and fences have been erected, maintained and used by the person keeping the animal, but the animal nevertheless strayed on to the highway because of acts⁶ or events outside the keeper's control, the keeper will not, subject to what is said below, be liable in negligence for any injury, damage or loss caused by the animal. In such a case, the keeper would only be liable if (a) the act or event which enabled the animal to escape was reasonably foreseeable and steps that could reasonably have been taken to guard against it were not taken, or (b) after it had been discovered that the animal had escaped, reasonable steps were not taken to place the animal back under restriction before it caused someone injury, damage or loss.

(b) Strict liability

(i) Liability for dangerous animals

2.5 The owner,⁷ and the person in control⁸ of an animal known to be dangerous⁹ must keep that animal under control¹⁰ so as to prevent it causing harm to other persons or their

⁵ *Wark v Steel*, [1946] SLT (Sh Ct Rep) 17, 22; *Wolfe v Dayton* (1975) 55 DLR (3d) 552. Similarly in *McCafferty v Van Praet* (1973) 35 DLR (ed) 323 the owner of horses that escaped from a fenced corral over a snowbank caused by snow drifting against a fence was found not to have been negligent because this event was not reasonably foreseeable.

⁶ If the animal strayed on to the highway because of the negligent action or omission of a third person (for example, the trial bike riders in accident number 22, p 50 below), that person may be liable in negligence to anyone suffering loss as a result. See also para 6.23 below.

⁷ Liability is imposed upon the owner regardless of whether he is in control of the animal at the time. The reason for this is that, as liability is strict, it cannot be delegated to anyone else; *Higgins v William Inglis and Son Pty Ltd* [1978] 1 NSWLR 649.

⁸ *McKone v Wood* (1831) 5 Car & P 1; *Fischer v Stuart* (1979) 25 ALR 336.

⁹ If the animal belongs to a species of animal normally dangerous to mankind (for example, dingoes, lions and tigers referred to as animals *ferae naturae*) knowledge that it is dangerous will be imputed, as a matter of law, to the owner or person in control of it. If on the other hand, the animal belongs to a species not normally dangerous to mankind (for example, cows, sheep and kangaroos, referred to as animals *mansuetae naturae*) a plaintiff seeking compensation must prove that the owner or person in control of the particular animal actually knew that it was dangerous. This knowledge is known as *scienter*.

¹⁰ Liability will arise only if there was a failure to control the animal: *Marlor v Ball* (1900) 16 TLR 239; *Behrens v Bertram Mills Circus Ltd* [1957] 1 All ER 583, 591. However, there need not be an escape

property.¹¹ Therefore, as an application of this duty, a dangerous animal must be prevented from straying on to a highway. If this is not done and the animal strays on to a highway causing a person loss, that person will be able to recover damages from the owner and person in control of the animal.¹²

2.6 Liability for failing to control a dangerous animal is strict. As a result, although certain limited defences are available, a person suffering loss because a dangerous animal has strayed on to a highway is able to maintain an action for damages against the owner¹³ and the person in control of the offending animal even though all reasonable care had been taken to prevent it straying. In addition, no allowance is made in such an action for "mere"¹⁴ contributory negligence on the part of the claimant.¹⁵

(ii) *Liability for nuisance*

2.7 Although the matter is not free from doubt, the owner and the person in control of an animal may also be required by the law of nuisance to prevent the animal causing a public nuisance by straying on to the highway.¹⁶ A public nuisance can be caused by the presence on the highway of something which obstructs or hinders the free passage along it of members of the public, and by something which makes using the highway in a normal manner dangerous, even though passage along it is not in any way impeded. Although there is little direct

from confinement for there to be "a failure of control": *Higgins v William Inglis and Son Pty Ltd* [1978] 1 NSWLR 649, 653.

¹¹ *Higgins v William Inglis and Son Pty Ltd* [1978] 1 NSWLR 649. According to J G Fleming *The Law of Torts* 5th ed ("Fleming") 345 footnote 50, although there are no reported cases on damage to property, that compensation can be recovered for property damage "...is hardly in doubt".

¹² *Manton v Brocklebank* [1923] All ER Rep 416, 426. Although the matter is not free from doubt, liability for an animal belonging to a species that is not normally dangerous to mankind (*mansuetae naturae*) probably only extends to damage or injury caused by the manifestation of its dangerous character (for example, personal injury caused by being bitten by a horse prone to biting people), whereas liability for an animal belonging to a species that is normally dangerous to mankind (*ferae naturae*) may extend to injury or damage howsoever caused by it when it was out of control: Fleming, 347.

¹³ As long as the owner retains ownership, liability cannot be avoided by delegating control to an independent contractor: *Brackenborough v Spalding Urban District Council* [1942] 1 All ER 34, 42.

¹⁴ If, however, the plaintiff's conduct did not merely amount to contributory negligence but was really the only cause of the loss suffered, the owner and person in control will not be liable for that loss: *Marlor v Ball* (1900) 16 TLR 239.

¹⁵ *Higgins v William Inglis and Son Pty Ltd* [1978] 1 NSWLR 649.

¹⁶ The Commission notes that *Thomson v Nix* [1976] WAR 141, 147 can be read as replacing the Rule with liability for negligence only. However, whether liability for nuisance could arise after the Rule was abolished was not specifically considered by the Full Court.

authority on the point,¹⁷ it would seem that an animal or animals, straying on to the highway could constitute a public nuisance in either of these ways.¹⁸

2.8 As a general rule, negligence is not a necessary element in nuisance so that the person responsible for the nuisance will be liable for any foreseeable loss caused by it even though all reasonable care had been taken to prevent such loss being suffered.¹⁹ Nevertheless, in the case of an accident caused by an animal straying on to the highway, it is unclear whether liability could arise in the absence of negligence on the part of the owner or person responsible for the animal.²⁰

(c) Criminal liability

(i) The Local Government Act

2.9 Under section 484(1) of the *Local Government Act 1960-1980* it is an offence, punishable by a fine of \$200, for the owner of "cattle" to permit the cattle to stray in a "street" or other "public place".²¹ As a result of section 484(2) of the Act the owner can be guilty of this offence even though he was unaware that the cattle had strayed.

¹⁷ In *Pitcher v Martin* [1937] 3 All ER 918 Atkinson J decided that a dog taken on to the highway and which escaped from control became a public nuisance

¹⁸ Mason J in *SGIC v Trigwell* (1979) 26 ALR 67, 81, appears to suggest that liability for nuisance can arise only if something obstructs or hinders free passage along the highway (ie in the first of the two situations described in the text). However, it would seem to be arguable on the basis of such cases as *Dollman v Hillman* [1941] 1 All ER 355, *Honing v Yorkshire Traction Co Ltd* [1948] 2 All ER 662 and *Cartwright v McLaine and Long Pty Ltd and Another* (1979) 24 ALR 97 involving other dangers on the highway, that a straying animal could constitute a public nuisance if it makes using the highway dangerous. See also Luntz, Hambly and Hayes *Torts: Commentary* para 12.2.06.

¹⁹ If this rule applied to straying animals it would, for example, render liable the farmer who owned the cattle described in accident number 22, Appendix II below even though he was in no way at fault.

²⁰ Thus in *Pitcher v Martin* [1937] 3 All ER 918 although the dog was said to constitute a public nuisance the person in control of it was also found to have been negligent.

²¹ "Cattle" is defined by s 6 of the *Local Government Act 1960-1980* to include horses, mares, fillies, foals, geldings, colts, camels, bulls, bullocks, cows, heifers, steers, calves, asses, mules, sheep, lambs, goats and swine. "Street" is defined to include a highway and a thoroughfare which the public are allowed to use and includes every part of the highway or thoroughfare, and other things including bridges and culverts, appurtenant to it and "public place" is defined to include a street, way, and place which the public are allowed to use, whether the street, way or place is or is not on private property.

(ii) *The Road Traffic Code*

2.10 Regulation 1702(1)(a) of the *Road Traffic Code 1975* makes it an offence, *inter alia*, for the owner or person for the time being in charge of stock²² to allow it to stray on to a road.²³ However, regulation 1702(2) provides that it is a defence for such a person to prove that all reasonable precautions had been taken to prevent this happening.

(d) **Dogs**

2.11 The *Dog Act 1976-1977* contains a number of provisions affecting the criminal and civil liability of dog owners and of persons who are treated under the Act as if they were the owner of a dog. For example, it is an offence under section 32 of the Act for a person "liable for the control of a dog" to permit it to wander at large or for "any person" to permit a dog to rush at or chase any vehicle.

2.12 The Act may have the effect of imposing civil liability upon the owner of a dog, or person deemed under the Act to be the owner, for injury done by the dog when straying on to a highway, regardless of whether the owner has been negligent.²⁴ In addition, as section 46(3) of the Act removes the need for a person injured by a dog to prove that it had a previous mischievous propensity, should it rush on to a highway in an unusually dangerous manner, the owner may be liable at common law as the owner of a dangerous animal.²⁵

2.13 Finally, a person keeping a dog can be liable for negligence in the manner described above in paragraphs 2.2 to 2.4.

²² "Stock" is defined by s 5(1) of the *Road Traffic Act 1974-1980* to include horses, mares, fillies, foals, geldings, colts, camels, bulls, bullocks, cows, heifers, steers, calves, asses, mules, sheep, lambs, goats and swine.

²³ "Road" is defined by s 5(1) of the *Road Traffic Act 1974-1980* to mean any highway, road or street open to or used by the public and includes every carriageway, footway, reservation, median strip and traffic island thereon.

²⁴ This may be the result of the combined effect of ss 22, 25, 32 and 46. In the light of *Martignoni v Harris* [1971] 2 NSWLR 102 and *Twentieth Century Blinds Pty Ltd v Howes* [1974] 1 NSWLR 244 this would seem to have been the effect of s 24 of the *Dog Act 1903* which was the forerunner of s 46 of the *Dog Act 1976-1977*. See also, Luntz, Hambly and Hayes, *Torts: Cases and Commentary* para 12.5.01.

²⁵ See generally paras 2.5 and 2.6 above.

2. IF THE RULE *DOES* APPLY IN WESTERN AUSTRALIA

(a) Liability for negligence

2.14 If the Rule does apply in Western Australia persons who keep an animal would not, generally speaking, be under any duty to prevent it causing loss to another person by straying on to the highway²⁶ regardless of how great the risk of this happening was and regardless of how easily this risk could have been guarded against. There are, however, exceptions to the Rule and where they apply the keeper of an animal would be required by the law of negligence to take reasonable care to prevent it causing another person loss.²⁷

(b) Strict liability

2.15 The Rule does not apply to dangerous animals.²⁸ Therefore the law applicable to dangerous animals described above in paragraphs 2.5 and 2.6, would operate when a person is injured by such an animal on the highway, even though it had escaped on to the highway from adjoining land.²⁹

2.16 However, as the Rule does apply to public nuisance³⁰ it would prevent a person keeping an animal being liable on this ground for loss caused by the animal straying on to the highway.³¹

(c) Criminal liability

2.17 The Rule would not affect the statutory obligations to prevent stock or cattle straying on to a highway described above in paragraphs 2.9 and 2.10. They would therefore still apply.

²⁶ See generally para 1.6 above.

²⁷ These are exceptions (ii), (iii) and (iv) discussed in para 4.8 below.

²⁸ *Searle v Wallbank* [1947] 1 All ER 12, 14, 19, 20; *SGIC v Trigwell* (1979) 26 ALR 67, 80.

²⁹ *Mason v Keeling* [1558-1774] All ER Rep 625, 627. *Fitzgerald v Cooke Bourne (Farms), Ltd* [1963] 3 All ER 36, 40.

³⁰ Liability for which is described in paras 2.7 and 2.8 above.

³¹ *SGIC v Trigwell* (1979) 26 ALR 67 esp 81.

(d) Dogs

2.18 The obligations created by the *Dog Act 1976-1977* would not be affected by the Rule. Therefore, if the Act imposes civil liability upon the owner of a dog, or the person deemed to be the owner, for injury done by the dog when straying on to a highway the Rule would not protect them from that liability. However, it would prevent the keeper of a dog being liable at common law for negligently failing to prevent it causing loss to another person by straying on to a highway.³²

3. SUMMARY.

2.19 In the following table, the law governing liability for stock straying on to the highway, assuming the Rule does *not* apply in Western Australia is compared in summary form with the law governing liability assuming that it *does* apply.

Type of Liability	If the Rule Does Not Apply	If the Rule Does Apply
1. Strict liability for dangerous animals	Liability exists (paras 2.5 and 2.6)	Liability exists (para 2.15)
2. Strict liability for nuisance	Liability exists (paras 2.7 and 2.8)	No liability (para 2.16)
3. Liability for negligence	Liability exists (paras 2.2 to 2.4)	No liability (with exceptions) (para 2.14)
4. Criminal liability	Liability exists (paras 2.9 and 2.10)	Liability exists (para 2.17)
5. Liability for Dogs	Liability under the <i>Dog Act</i> and at common law (paras 2.11 to 2.13)	Liability under the <i>Dog Act</i> . No liability at common law (para 2.18)

³² *Ellis v Johnstone* [1963] 1 All ER 286; *Brisbane v Cross* [1978] VR 49, 83.

CHAPTER 3

THE INCIDENCE OF ROAD ACCIDENTS INVOLVING ANIMALS IN WESTERN AUSTRALIA

3.1 The following figures show, within various categories, the number of reported road accidents involving animals that occurred in 1978, 1979 and 1980. It should be noted that as these are accident figures only they do not show the total number of people injured or killed in those accidents. Thus, for example, although only three fatal accidents involving animals occurred in 1978 and 1979, four people were killed in those accidents.

3.2 The figures show that in 1978-1980 inclusive there were over 800 reported motor vehicle accidents involving animals likely to come within the scope of the Rule. There are no figures available, however, which show in how many of these accidents a claim for damages was successfully made against the person who kept the animal or against the driver of the motor vehicle involved.¹

3.3 The figures also show that in 1978-1980 inclusive there were a total of 669 reported accidents involving kangaroos. Generally speaking, in accidents of that kind, compensation will not be recoverable by the person suffering loss because there will be no one responsible for the kangaroo from whom damages can be successfully claimed.² For this reason, in these and similar cases, implementation of the reforms proposed by the Commission in Chapter 6 of this Report will still not enable compensation to be recovered for the loss suffered as a result of an accident caused by the presence of an animal on the highway even though the need for compensation in those cases is as great as it is in those cases in which damages can.

¹ In single vehicle accidents, passengers in the motor vehicle will be able to recover compensation from the driver if the driver was partly, at least, responsible for the accident. If more than one vehicle is involved in the accident the passengers of both vehicles will be able to recover compensation from the driver (or drivers) partly, at least, responsible for the accident and one driver may be able to recover from the other. For example, in *SGIC v Trigwell* (1979) 26 ALR 67, the driver and passengers of one vehicle were able to recover damages from the driver of the other vehicle involved in the accident as the Court found that the accident was the result of the latter's negligence.

² Damages would be recoverable in respect of an accident caused by a kangaroo only if it was being kept by someone, it escaped from that person's control, and negligence could be established against that person. As to strict liability for kangaroos see *Lake v Taggart* (1979) 1 SR (WA) 89.

This, amongst other reasons including the anomalies discussed in the Commission's report on the *Liability of Highway Authorities for Non-Feasance*,³ led the Commission to make the recommendation contained in paragraph 7.4 below.

1978 and 1979

PERTH STATISTICAL DIVISION⁴

Category	Total of all accidents	Kangaroos	Sheep	Cattle	Horses	Domestic	Others
Fatal accidents	264	0	0	0	0	0	0
Accidents causing personal injury	10,419	0	0	3	12	24	1
Accidents causing motor vehicle damage exceeding \$100	40,150	22	6	41	53	73	4

REST OF WESTERN AUSTRALIA

Category	Total of all accidents	Kangaroos	Sheep	Cattle	Horses	Domestic	Others
Fatal accidents	297	0	1	2	0	0	0
Accidents causing personal injury	3,559	46	6	29	10	7	9
Accidents causing motor vehicle damage exceeding \$100	9,233	398	88	188	35	14	20

³ Esp p 44 footnote 5.

⁴ The outer boundary of the Perth Statistical Division is the outer boundaries of the Shires of Wanneroo, Swan, Mundaring, Kalamunda, Serpentine-Jarrahdale and Rockingham and the Town of Armadale.

1980

PERTH STATISTICAL DIVISION⁵

Category	Total of all accidents	Kangaroos	Sheep	Cattle	Horses	Domestic	Others
Fatal accidents	129	0	0	0	0	0	0
Injury – admitted to hospital	1,420	0	0	0	0	2	0
Injury – medical attention	3,176	2	0	2	8	11	0
Accidents causing motor vehicle damage exceeding \$300	13,194	10	0	14	22	13	0

REST OF WESTERN AUSTRALIA⁶

Category	Total of all accidents	Kangaroos	Sheep	Cattle	Horses	Domestic	Others
Fatal accidents	138	0	0	0	0	0	0
Injury – admitted to hospital	879	5	1	7	1	1	2
Injury – medical attention	718	11	1	5	1	2	0
Accidents causing motor vehicle damage exceeding \$300	3,726	175	24	85	11	2	5

⁵ A map showing where the accidents within this category (other than those involving kangaroos) occurred in the last quarter of 1980, and a brief description of those accidents, appears as Appendix II.

⁶ Ibid.

CHAPTER 4

WHY REFORM IS NEEDED

1. TO ENABLE DAMAGES TO BE RECOVERED IN CASES OF NEGLIGENCE

4.1 Unless damages are recoverable in respect of loss suffered as a result of an accident caused by an animal straying on to the highway, persons suffering such a loss, unless adequately insured privately, must bear it themselves. Similarly, if an accident results in death, the dependants of the deceased would be required to support themselves, or rely on social security, as the *Fatal Accidents' Act 1959-1973* only permits a claim to be made in respect of a person's accidental death if that person would have been able to recover damages had death not ensued. In these situations severe, and in some cases devastating, financial hardship may be caused to accident victims, their dependants, or to both.

4.2 The Commission is aware of arguments to the effect that compensation should be available in *all* cases in which loss is suffered as a result of a motor vehicle accident, at least where the accident was not solely attributable to fault on the part of the person suffering that loss, regardless of whether that accident was caused by another person's negligence. The argument points out that where an accident has caused loss, the need for compensation in respect thereof will be unaffected by whether the accident was the result of another person's negligence or not and that as a consequence of the requirement that negligence be proved before damages can be recovered, compensation cannot be obtained in many deserving cases.¹ The Commission also notes Sir Victor Windeyer's² hope that -

“... some day the law will provide some better way of meeting the consequences of day-to-day hazards than by actions for negligence and a measuring of damages by unproveable predictions, metaphysical assumptions and rationalised empiricism.”

In the meantime, however, the Commission considers that compensation should be recoverable where a person's loss is the product of another's fault unless there are compelling reasons to the contrary.

¹ In his submission, Professor Luntz argued that the most satisfactory solution to the problem of compensating persons injured as a result of animals straying on to the highway would be by the introduction of a comprehensive compensation scheme such as that now existing in New Zealand under the *Accident Compensation Act 1972*. It was, however, beyond the Commission's terms of reference to examine the desirability of introducing such a scheme; see further Chapter 7 below.

² *Skelton v Collins* (1966) 115 CLR 94, 136

4.3 As a general rule, persons who suffer loss as a result of another person's fault can recover compensation in respect thereof by bringing a civil action for damages against the latter. As mentioned above³ the Rule creates a rare exception to this general rule insofar as it excuses those who keep animals from the civil consequences of failing to take reasonable care to prevent them causing another person foreseeable loss by straying on to the highway.

4.4 To the extent that *Thomson v Nix* is being applied in Western Australia in preference to the Rule,⁴ damages are recoverable at present by anyone who has suffered loss as a result of an animal straying on to a highway, where it can be proved that the person who kept the animal had not taken reasonable care to prevent that loss being suffered. However, *Thomson v Nix* may be overruled when a sufficiently important case warrants that decision being challenged in the High Court.⁵ Therefore, to ensure that damages continue to be recoverable in such cases it would be desirable to introduce a statutory provision to this effect.

2. TO REDUCE UNCERTAINTY IN THE LAW

4.5 The law in Western Australia governing the civil liability of persons whose animals stray on to the highway is bedevilled by uncertainty.⁶ This uncertainty is such that arguably the only way in which persons keeping animals can be confident of being able to protect themselves against the consequences of civil liability is to assume that they can be held strictly liable⁷ for loss caused by their animals and insure accordingly. It also makes it impossible for their legal advisers to predict with any confidence what their liability will be in the event of such a loss occurring.

(a) Uncertainty concerning whether the Rule applies in Western Australia

4.6 The most striking uncertainty in the law governing civil liability for loss caused by animals straying on to the highway is as to whether the Rule applies in Western Australia. This uncertainty can only be removed by a decision of the Privy Council or the High Court, or

³ See paras 1.5 and 1.6 above.

⁴ See generally paras 1.9 to 1.11 above.

⁵ See generally, para 1.11 above.

⁶ Described in paras 4.6 to 4.9 below.

⁷ That is, liable even though the loss occurred through no fault on the part of the animal's keeper. See generally paras 2.6 and 2.8 above.

by legislation. As it may be a considerable time before either the Privy Council or the High Court settles the matter it would be desirable for the Parliament of Western Australia to do so by legislation.

(b) Uncertainties that would exist if the Rule did apply

4.7 The Rule creates an exception to the duty to take reasonable care. The Rule in turn is subject to a number of exceptions. However, it is unclear whether certain exceptions, for the existence of which there is some authority, will be recognised in Western Australia, and the precise limits of all the exceptions are uncertain. Therefore, even if the Rule clearly did apply in Western Australia the law would still be uncertain. As a result, the Commission agrees with the Law Commission for England and Wales⁸ that -

"Whether or not it is desirable to modify or abolish the exception, [namely, the rule in *Searle v Wallbank*] it would seem important in the interests both of the occupiers of land as well as those damaged by animals on the highway that the law should be made more certain."

4.8 There is authority for saying that the Rule does not apply in the following situations -

- (i) *If the animal is dangerous.* As mentioned above the Rule does not apply to dangerous animals.⁹
- (ii) *If there are special circumstances.* If the person keeping a particular¹⁰ animal knows or ought to know that it has a peculiar propensity making it unusually dangerous, a duty to take reasonable care to prevent it causing injury or damage by straying on to a highway will be imposed. This propensity is referred to in the cases as a "special circumstance".

Examples of such a propensity include a dog's habit of rushing out on to a narrow highway¹¹ and a horse's peculiar liking for leaping over hedges and on to the highway.¹² However, a mere proclivity to stray is insufficient.¹³

⁸ Law Com No 13 – *Civil Liabilities for Animals* (1967) para 30.

⁹ Para 2. 15. Liability for dangerous animals is described in paras 2.5 and 2.6.

¹⁰ A propensity common to a group of animals is not enough : *Simeon v Avery* [1959] NZLR 1345.

¹¹ *Ellis v Johnstone* [1963] 1 All ER 286, 295 and 299

¹² *Brock v Richards* [1951] 1 All ER 261, 266.

¹³ *Brock v Richards* [1951] 1 All ER 261; *Brisbane v Cross* [1978] VR 49.

Uncertainty exists in relation to this exception because whether an animal's dangerous habit is a "special circumstance" will always be a question of degree and incapable, in many cases, of determination prior to litigation. In addition, there is uncertainty because the High Court in *SGIC v Trigwell*¹⁴ rejected the suggestion that there could be special circumstances displacing the Rule, other than those arising from the propensity of the particular animal, in terms which cast doubt on whether there is a separate "special circumstances" exception at all distinct from that of dangerous animals.¹⁵

- (iii) *If the animal had been taken or allowed on to the highway.* The Rule does not apply if the animal responsible for an accident was on the highway because it had been taken there or if its presence there had been facilitated by the person in control of it. So, for example, reasonable care must be taken to control stock being driven along a highway.¹⁶ This exception has been given a wide interpretation; for example, it was applied in *Deen v Davies*¹⁷ where a pony, tethered in a stable at the end of a journey, broke loose and ran out on to the highway, and in *Gomberg v Smith*¹⁸ where the defendant's dog followed him out of his premises and on to the road. As a result of such decisions, it will not in some instances be possible to predict with certainty whether an animal's journey is regarded as having "started" or "ended" and hence whether the Rule will operate.¹⁹
- (iv) *If the animal was engaged in activity.* It has been suggested that the Rule will only apply where the straying animal has been left to its own devices and so will not confer an immunity where it escapes from an activity conducted under human control.²⁰ However, it is uncertain whether this exception would apply

¹⁴ (1979) 26 ALR 67, 70, 74, 80-81.

¹⁵ A distinction between the two exceptions, however, was clearly drawn in *Ellis v Johnstone* [1963] 1 All ER 286, 292, 294 and 297. Where the dangerous animals exception applies liability is strict; where the special circumstances exception applies, liability will arise in negligence only.

¹⁶ *Griffith v Turner* [1955] NZLR 1035.

¹⁷ [1935] All ER Rep 9.

¹⁸ [1962] 1 All ER 725.

¹⁹ See for example, the different opinions expressed by members of the Court of Appeal in *Wright v Callwood* [1950] 2 KB 515 as to whether the journey in that case had ended.

²⁰ *Bativala v West* [1970] 1 All ER 332. The existence of this exception is also supported by remarks in *Hill v Clark* [1969] 2 NSW 733, 737.

in Western Australia, having regard to the attitude of the High Court to exceptions to the Rule, manifest in *SCIG v Trigwell*.²¹

(c) Uncertainties that would exist if the Rule did not apply

4.9 If *Thomson v Nix* was affirmed by the High Court or Privy Council, and the Rule said not to apply in Western Australia, the uncertainty described above in paragraph 4.6 would be removed. Others, however, would remain. Thus, it would be unclear whether the keeper of an animal could be liable for public nuisance in the absence of negligence.²² Also in some cases it may be difficult to determine whether liability could arise on the ground that the animal was a dangerous animal, and if it could, uncertainty may then exist as to whether damages were recoverable in respect of the particular kind of loss suffered by the claimant.²³

²¹ (1979) 26 ALR 67, esp 80-81; but see *Edwards v Gould* (6.3.1981) Recent Judgments, Law Society Bulletin (South Australia) May 1981, 6.

²² See generally paras 2.7 and 2.8 above.

²³ See generally footnote 12, para 2.5 above.

CHAPTER 5

APPROACHES TO REFORM

5.1 Dissatisfaction with the law governing civil liability for loss caused by animals straying on to the highway has been felt at various times in many parts of the Commonwealth. This has led to reforms being implemented and suggestions for reform being made in a number of Commonwealth jurisdictions, including jurisdictions within which animals are kept in ways similar to the ways in which they are kept in Western Australia. Broadly, these approaches to reform can be categorised as follows:

1. SIMPLE ABOLITION OF THE RULE

5.2 The Rule has been rejected by the Supreme Court of Canada¹ and by courts in Scotland.² In both countries³ civil liability for loss caused by animals straying on to the highway is governed by the rules of law described in paragraphs 2.2 to 2.8 above and is therefore the same as it would be in Western Australia if *Thomson v Nix* continues to be followed in preference to the Rule. This is also the approach preferred by the Law Reform Commission of Tasmania.⁴

5.3 It would appear from the cases decided in both Canada and Scotland that of the duties described in paragraphs 2.2 to 2.8 above the duty to exercise reasonable care imposed by the law of negligence is by far the most important. When deciding whether reasonable care has been exercised the courts in Canada and Scotland are not required by statute to give consideration to any specified matters and the obligations and liabilities of people who own or who are responsible for the control of animals are the same, and are applied in the same manner, as those applicable to persons who own or control other dangerous or potentially dangerous things.

¹ *Fleming v Atkinson* (1959) 18 DLR (2d) 81. This decision has generally been followed in those Canadian Provinces applying the common law; see for: example, *Crosby v Curry* (1970) 7 DLR (3d) 188 (Nova Scotia); *Windrem v Hamill* (1978) 86 DLR (3d) 254 (Sask); *Judson v Harding* (1975) 8 Nfld and PEIR 261 (Prince Ed Is); *Weld v McMyn* (1972) 28 DLR (3d) 253 (Brit Col); cf *Lane v Biel* (1971) 17 DLR (3d) 632.

² Although the Rule appears to have been adopted in *Fraser v Pate* 1923 SC 748, in more recent cases the ordinary law of negligence has been applied instead; see for example *Wark v Steel* 1946 SLT (Sh Ct Rep) 17 and *Gardiner v Miller* 1967 SLT 29.

³ The law stated in the text does not apply in Quebec where a person keeping an animal is strictly liable for any damage it causes.

⁴ Report No 27: *Report on Recommendations relating to Animals Straying upon the Highway* (1980).

5.4 An important consequence of this approach is that persons keeping a dangerous animal remain exposed to the possibility of being held strictly liable for loss caused by the animal straying on to the highway.⁵ It is also possible that the person keeping any animal may be held strictly liable if the animal causes a public nuisance by obstructing or making the passage along the highway dangerous.⁶

5.5 The Commission does not favour this approach for the reasons set out in paragraph 6.10 below.

2. ABOLITION OF THE RULE COUPLED WITH NEGLIGENCE CRITERIA

5.6 The recommendations of the Law Commission for England and Wales⁷ ("the Law Commission") and the Western Australian Law Reform Committee,⁸ and to a lesser extent, the United Kingdom *Animals Act 1971*,⁹ which abolished the Rule, and the recommendations of the Queensland Law Reform Commission fall into this category.¹⁰ One distinguishing

⁵ See generally paras 2.5 and 2.6 above.

⁶ See generally paras 2.7 and 2.8 above.

⁷ The Law Commission (Law Com No 13 - *Civil Liability For Animals* (1967) paras 55 and 57) recommended the Rule be abolished and that liability for loss caused by animals straying on to the highway be determined according to the law of negligence. To assist the tribunal determining whether there had been a failure to take reasonable care and to provide guidance in advance to keepers of animals as to the standard of care expected of them the Law Commission suggested that when making this determination the tribunal should be required to have regard, among other matters to:

- (i) the nature of the land from which the animals strayed and its situation in relation to the highway;
- (ii) the use likely to be made of the highway at the time when the damage was caused;
- (iii) the obstacles, if any, to be overcome by animals straying from the land on to the highway;
- (iv) the extent to which users of the highway might be expected to be aware of and guard against the risk involved in the presence of animals on the highway;
- (v) the seriousness of any such risk and the steps that would have been necessary to avoid or reduce it."

However, the Law Commission recommended that, because users of "common land" have no right to fence it, a person should not be regarded as committing a breach of duty to take care by reason only of placing animals on common land.

⁸ Report on Project No 11 - *Liability For Stock Straying on to the Highway* (1970).

⁹ The Rule was abolished by s 8(1) of the Act; s 8(2) provides:

"Where damage is caused by animals straying from unfenced land to a highway a person who placed them on the land shall not be regarded as having committed a breach of the duty to take care by reason only of placing them there if -

- (a) the land is common land, or is situated in an area where fencing is not customary, or is a town or village green; and
- (b) he had a right to place the animals on that land. "

In two notable respects the Law Commission's recommendations were not adopted. The Act does not require the court to have regard to certain specified matters in the manner suggested by the Commission; and s 8(2) expands the category of land from which straying will not by itself be regarded as a breach of the duty of care.

¹⁰ In a working paper issued on 30 September 1977 the Queensland Law Reform Commission advocated the abolition of the Rule and recommended the enactment of an *Animals Act 1971* (UK).

feature of this approach is that in addition to abolishing the Rule, it seeks to ensure that the courts consider certain specified matters¹¹ when determining whether or not the person keeping the straying animal had taken reasonable care to prevent it causing another person loss. This is done with the apparent object of ensuring that factors favourable to the person keeping the animal are brought into consideration at this stage.

5.7 The Commission regards this as the most satisfactory, single, approach to reform adopted or recommended elsewhere and the recommendations it makes below are substantially in accordance with it.¹² In fact, the Commission's recommendations differ from this approach only in so far as the Commission has made a number of additional recommendations specifically designed to safeguard the position of fanners and graziers.¹³

3. ABOLITION OF THE SPECIAL RULES

5.8 The New South Wales *Animals Act 1977* relates to civil liability for damage caused by animals generally, and not merely for damage caused by animals straying on to the highway. Thus section 7 of this Act abolished not only the rule in *Searle v Wallbank* but all the special rules that operated only as part of the civil law relating to animals.¹⁴ As a result, the law in New South Wales differs from that in Canada and Scotland insofar as strict liability cannot arise in that State in respect of loss caused by dangerous animals.

5.9 The Commission's terms of reference do not permit a thorough examination of this approach in relation to liability generally for loss caused by animals. However, in relation to liability for loss caused by animals straying on to the highway the Commission believes that this approach has much to commend it because it reduces the extent to which strict liability can arise.¹⁵

¹¹ See, for example, the recommendation of the Law Commission set out in footnote 3 on page 26 above.

¹² See generally paras 6.5 to 6.8 and 6.13 to 6.15 below.

¹³ See generally paras 6.9 to 6.12 and 6.16 to 6.21. Note in respect of the former that although the Law Commission recommended the abolition of the common law rules described in paras 2.5 and 2.6 above, it recommended the creation of a broadly similar statutory liability. Ss 1 and 2 of the *Animals Act 1971* (UK) implemented this recommendation. Similarly, implementation of the Western Australian Law Reform Committee's report would have left intact the rules of law described above in paras 2.5 and 2.6.

¹⁴ This Act implemented the recommendations of the New South Wales Law Reform Commission contained in its report *Civil Liability for Animals* (1970) LRC 8.

¹⁵ See further paras 6.9 to 6.12 below.

4. LIABILITY FOR NEGLIGENCE ONLY WITH A SHIFT IN THE BURDEN OF PROOF

5.10 The Torts and General Law Reform Committee of New Zealand¹⁶ and the Law Reform Committee of South Australia¹⁷ both recommended that the Rule be abolished and that liability for accidents caused by animals straying on to the highway be determined according to the law of negligence only. Implementation of this recommendation would mean that liability could not arise on the grounds discussed in paragraphs 2.5 to 2.8 above.¹⁸ The recommendations of the Commission¹⁹ are consistent with this approach.

5.11 Both Committees also recommended that the burden of proof be shifted to the persons who kept the straying animal so that in the event of a prima facie case being established against them, they would be able to avoid liability only by proving that the loss was not attributable to negligence on their part.

5.12 The Commission acknowledges that in certain cases a claimant may face difficulties when trying to prove that an accident caused by an animal straying on to the highway was attributable to the negligence of the person keeping that animal. Nevertheless it does not agree with this proposal. The difficulty referred to is not unique to claims brought in respect of straying animals and in the Commission's opinion there is no justification for making a special rule in relation to them. In any case, in relation to accidents occurring in certain localities at least, the doctrine of *res ipsa loquitur* may, assist claimants. According to the doctrine, an inference of negligence may be drawn from the circumstances of the accident itself where a jury would be entitled to think that such an accident was not likely to occur without there having been a failure to take reasonable care on the part of the defendant.²⁰

5.13 The Commission is of the opinion therefore that abolition of the Rule should not be accompanied by any change in the burden of proof.

¹⁶ Report, *Law Relating to Liability for Animals* (1975) 52.

¹⁷ Seventh Report, *Law Relating to Animals* (1969) paras 3 and 7.

¹⁸ See further paras 6.9 to 6.12 below.

¹⁹ See generally paras 6.5 to 6.12 below.

²⁰ *The Government Insurance Office of NSW v Fredrichberg* (1968) 118 CLR 403.

5. RETENTION OF THE RULE BUT WITH EXCEPTIONS

5.14 In its report on *The Law Relating to Animals on Highways*²¹ the Victorian Statute Law Revision Committee expressed the view that landowners²² should be made responsible for keeping their stock securely enclosed on their land. For this reason the Committee said that it could not support the Rule as it is presently being applied.²³ However, the Committee rejected a suggestion that the ordinary common law rules of negligence operate instead, on the grounds that this would place an unfair burden on landowners.²⁴ The Committee recommended therefore that:²⁵

“...the rule in *Searle v Wallbank* be retained only as a general principle and that legislation be introduced to specify under what circumstances a land owner could be held liable in cases of accidents involving his wandering stock”.

5.15 The Commission does not favour this approach for a number of reasons. First, in certain parts of the country it would impose a greater obligation on landowners than would the mere abolition of the Rule. The reason for this is that the Committee recommends that a landowner should be deemed to be negligent if he is aware that his, stock could stray on to the highway and adequate steps are not taken by him to prevent this. This recommendation makes no allowance in respect of those areas where fencing is not customary or economically possible and where as a result, stock are known to wander on to the highway. Even in such areas, therefore, the landowner would be deemed to be negligent in an action brought by someone injured on the highway by the landowner's straying stock. On the other hand, the recommendations of the Law Commission, the New Zealand Torts and General Law Reform Committee and the Law Reform Committee of Western Australia all provide in various ways, that where fencing is not customary, permitting stock to stray on to the highway will not necessarily amount to a breach of the duty of care owed to users of the highway. Similarly, the Commission is of the view that courts applying the ordinary law of negligence would also take account of local conditions when deciding what standard of care is required of persons

²¹ Submitted in November 1978.

²² Despite its title, the report in its conclusions refers to "landowners" and "stock" rather than to "people" and "animals".

²³ Paragraph 48.

²⁴ Paragraph 51.

²⁵ Paragraph 52.

responsible for the control of animals and whether that standard has been complied with,²⁶ so that even without special provision being made, the abrogation of the Rule would not in all cases result in civil liability being imposed when animals stray on to the highway.

5.16 Secondly, the creation of additional exceptions to the Rule would add to the already considerable uncertainty existing in the law. The Rule is an exception to the operation of the laws of negligence and nuisance and to specify exceptions to it would create exceptions to an exception and circuitously re-introduce the law of negligence and nuisance where those exceptions apply. The objective of this complicated exercise is to restrict the normal operation of the law of negligence and nuisance. If this is considered desirable, a simpler approach would be to abolish the Rule but to stipulate the situations in which permitting animals to stray on to the highway is not to be regarded as a civil wrong.

5.17 Finally, the Committee appears to recommend that road users in any way at fault should be unable to recover damages from the landowner. In the Commission's opinion it would be unfair entirely to deprive road users of a remedy against a negligent landowner merely because they are also at fault in some way. The Commission believes that the law relating to contributory negligence²⁷ applicable in other areas should also be applied when determining liability arising out of an accident caused by a straying animal.

²⁶ This view was also expressed by the New South Wales Law Reform Commission in its report *Civil Liability for Animals* (1970), LRC 8 paragraph 21, and is supported by remarks in *Thomson v Nix* [1976] WAR 141, 147.

²⁷ Set out in the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947*.

CHAPTER 6

RECOMMENDATIONS FOR REFORM

1. INTRODUCTION

6.1 For the reasons set out in Chapter 4 the Commission believes that the law in Western Australia governing liability for animals straying on to the highway is unsatisfactory and is in urgent need of reform. The Commission therefore recommends the enactment of the reforms detailed below.

6.2 In essence, the Commission's recommendations are designed to enable compensation to be recovered by persons who have suffered loss as a result of an animal straying on to a highway, where the person who kept the animal failed to take reasonable care to prevent this loss being suffered. They are also designed to reduce the uncertainty that currently pervades the law governing civil liability for straying animals.

6.3 In framing its recommendations the Commission has taken care to avoid suggesting the creation of obligations that might unfairly burden farmers and graziers. With this objective the Commission, wherever possible consistent with its belief that compensation should be recoverable in cases of negligence, has made a number of recommendations specifically designed to impose limits on the ability of accident victims and their insurers to recover damages. In the result, insofar as *Thomson v Nix* is apparently being followed in Western Australia, implementation of the following reforms would reduce rather than increase the current civil liability of persons keeping animals.

2. SUMMARY OF RECOMMENDATIONS

6.4 The Commission recommends that -

- (1) the rule in *Searle v Wallbank* be abolished;
- (2) liability for loss caused by an animal straying on to the highway be determined according to the law of negligence only;

- (3) when determining liability for negligence the court should be entitled to consider, among other matters, the following -
 - (a) the general nature of the locality;
 - (b) the nature and amount of traffic using the highway;
 - (c) common practice in the locality in relation to fencing and the erection of other barriers or devices to keep animals off the highway;
 - (d) the cost of fencing or taking other measures to prevent animals straying on to the highway or to warn users of the highway of their likely presence;
 - (e) the extent to which users of the highway would expect to encounter animals on the particular highway and could be expected to guard against the risk associated with their presence.
- (4) an upper limit of at present \$500,000 be placed on the amount of damages recoverable in respect of any one accident, with provision for this limit to be increased at regular intervals;
- (5) the existing law concerning contributory negligence and contribution between persons guilty of negligence apply to claims brought in respect of loss suffered as a result of an animal straying on to the highway.

3. THE RECOMMENDATIONS IN DETAIL

(a) Abolition of the Rule in *Searle v Wallbank*

6.5 As explained above,¹ notwithstanding the decision of the High Court in *SCIG v Trigwell*, the decision of the Full Court in *Thomson v Nix* is apparently being followed by courts in Western Australia in preference to the Rule. Therefore, implementation of this recommendation would not change the law currently being applied in this State.

6.6 Because the Rule is not being applied in Western Australia, damages are recoverable at present by persons who suffer loss as a result of an accident caused by an animal straying on to a highway where it can be proved that the person who kept the animal had failed to take reasonable care to prevent the accident happening. The Commission believes that damages should continue to

¹ See generally paras 1.9, 1.11 and 4.4 above.

be recoverable in such cases. However, as there is a danger that if challenged, *Thomson v Nix* may be overruled by the High Court, the Commission recommends that the Rule be abolished by statute. Subject to the recommendations made below, this would preserve the law governing liability for straying animals that has been applied in Western Australia since 1976 and would remove the uncertainty described in paragraph 4.6 above.²

6.7 In its working paper³ the Commission discussed whether the liability described in the previous paragraph imposed an unfair cost burden upon persons keeping animals. In particular, the Commission was concerned to determine whether farmers and graziers were being, or were likely to be, subjected to a new and additional expense unfairly burdensome to them. The Commission identified the following as the forms in which such expense could arise -

- (1) the cost of obtaining indemnity insurance⁴ ("public liability insurance") in respect of liability for breach of the duty of care;
- (2) the cost of taking measures to fulfil the duty;
- (3) the payment of damages in circumstances in which, at present, there would be no breach of duty;
- (4) a combination of these.

6.8 After careful consideration, the Commission tentatively concluded that, in principle, there were no reasons why abolition of the Rule should result in a significant financial burden being imposed on anyone keeping an animal, and that it may not increase at all the costs of many farmers and graziers employing sound farming and grazing practices.⁵ As the Rule was not applied in Western Australia between 1976 and 1979, and appears not to have been applied since 1979, were this tentative conclusion proving to be incorrect in practice the Commission would expect to have been informed accordingly by the various organisations representing farmers and graziers. However, its conclusion has not been challenged. The Commission also emphasises that a number of its recommendations⁶ are designed to minimise the financial impact of reform on persons keeping animals and that if these recommendations are implemented farmers and graziers will be

² But see the Commission's other recommendations in paras 6.9 to 6.21 below.

³ Paras 5.2 to 5.13.

⁴ Under such an insurance policy the insurance company is obliged to indemnify the person insured in the event of a successful claim being made against that person. The policy usually provides that if the claim is disputed by the insurer, the insurer will arrange the conduct of the defence and will be responsible for legal costs.

⁵ The Commission's reasons are set out in paras 5.5 to 5.13 of the working paper.

⁶ See especially paras 6.16 to 6.21 below.

placed in a more advantageous position than that which they occupied between 1976 and 1979, and which they now occupy assuming *Thomson v Nix* continues to be followed in Western Australia.

(b) Liability should be determined according to the law of negligence only

6.9 As explained above,⁷ in certain cases the person keeping an animal may be strictly liable for loss caused by it straying on to a highway. If the Rule were merely abolished this position would be unaltered.

6.10 The Commission does not regard simple abolition of the Rule as the most satisfactory approach to reform for two reasons. First, it leaves persons keeping animals exposed to strict liability. The Commission believes, on the other hand, that as long as the system of compensating road accident victims and their dependants involves the person suffering loss establishing a claim for damages against another person, damages should not be recoverable for loss suffered as a result an animal straying on to a highway unless the person who kept the animal failed to take reasonable care to prevent the accident happening. Unless there was such a failure to take care the Commission sees no justification, in principle, for shifting the loss suffered by accident victims and their dependants on to the person keeping the animal. Generally speaking, this is the approach taken by the law in other areas. Secondly, simple abolition of the Rule would do nothing to resolve the uncertainties described in paragraph 4.9 above.

6.11 The Commission therefore recommends that the statute abolishing the Rule also provide that liability for accidents caused by animals straying on to the highway be determined according to the law of negligence only. The same recommendation has been made by the Torts and General Law Reform Committee of New Zealand and the Law Reform Committee of South Australia.⁸

6.12 In its working paper the Commission noted that implementation of this approach would lead to certain anomalies unless it were adopted in relation to liability for animals generally and not just in relation to liability for animals straying on to the highway. It would mean, for example, that if a person was injured by a dangerous animal when on private property the owner of the animal would be strictly liable, but that if the injury was inflicted when the person was on the highway, the owner would be liable only if negligence was established. However, the Commission is now of the opinion that this is not a serious objection. The Commission believes that it would be advantageous to have

⁷ See generally paras 2.5 to 2.8 and 2.12.

⁸ See generally para 5.10 above.

liability for all highway accidents determined according to the law of negligence because this would relieve persons keeping animals from the risk of being held strictly liable for those accidents and would remove the uncertainties described in paragraph 4.9 above. Although the liability of a person keeping an animal may then differ according to whether the loss caused by the animal was suffered as the result of an accident occurring on the highway or occurring elsewhere, this seems to the Commission to be no more objectionable than their liability for accidents occurring on the highway depending upon whether or not the animal was a dog⁹ or could be classified as dangerous, or upon whether the person suffering loss could establish nuisance.

(c) The introduction of negligence criteria

6.13 As discussed above,¹⁰ the Law Commission for England and Wales and the Western Australia Law Reform Committee both recommended that the statute abolishing the Rule specify certain criteria to be considered by the courts when determining whether or not the person who kept the straying animal had failed to take reasonable care to prevent it causing loss. The New South Wales Law Reform Commission on the other hand expressed reservations about this approach because it considered that specifying negligence criteria was unnecessary and might create difficulty which would not otherwise exist.¹¹ These reservations were also expressed by Sir Lawrence Jackson in his submission to the Commission. In Sir Lawrence's view the ordinary law of negligence is sufficiently elastic to cover all relevant circumstances.

6.14 The Commission appreciates the strength of this point of view. Nevertheless, it is of the opinion that because of the great variety in the means by which livestock in particular are kept in Western Australia, it would be desirable for legislation abolishing the Rule to specify at least some of the criteria which the courts may consider when determining liability for animals straying on to the highway. The Commission agrees with the Law Commission that this would "...provide guidance in advance to keepers of animals as to the standard of care expected of them...".¹² The Commission therefore recommends that the legislation abolishing the Rule entitle the courts, when determining whether there has been a failure to take reasonable care, to consider among other

⁹ Implementation of this recommendation would not affect the criminal liability of persons responsible for a dog; see generally para 2.11 above.

¹⁰ Para 5.6.

¹¹ *Civil Liability for Animals* (1970) LRC 8 para 22.

¹² *Civil Liability for Animals* (1967) Law Com No 13, para 57.

matters, the following¹³ -

- (a) the general nature of the locality;
- (b) the nature and amount of traffic using the highway;
- (c) common practice in the locality in relation to fencing and the erection of other barriers or devices to keep animals off the highway;
- (d) the cost of fencing or taking other measures to prevent animals straying on to the highway or to warn users of the highway of their likely presence;
- (e) the extent to which users of the highway would expect to encounter animals on the particular highway and could be expected to guard against the risk associated with their presence.

6.15 This approach was favoured by the Commissioner of Main Roads, the Pastoralists and Graziers Association of WA, and the Royal Automobile Club of WA. The existence of these criteria are not intended in any way to limit or restrict the matters that the courts are able to consider when determining liability in a particular case. Rather, they are designed simply to try to ensure that a proper balance is struck between the interests of persons keeping animals and the interests of persons using the highways and to give guidance in advance to persons keeping animals. In this respect, however, it should be noted that although it is common to speak as though these are different people, persons who keep animals also use the highways and as users of the highways farmers and graziers, for example, will benefit from the reforms proposed by the Commission.¹⁴

(d) Placing an upper limit on the amount of damages recoverable in respect of any one accident

6.16 In its working paper¹⁵ the Commission suggested that regardless of whether the Rule applied in Western Australia it was advisable for farmers and graziers to consider obtaining public liability insurance¹⁶ to enable them to pass on to their insurer any damages they were required to pay in

¹³ The matters listed for consideration are based on the list proposed by the Law Commission which is reproduced in footnote 3 on page 26 above.

¹⁴ For example, the survey of accidents conducted by an officer of the Commission (see Appendix II below) showed that in the period covered by the survey several farmers suffered loss as a result of motor vehicle accidents involving straying stock.

¹⁵ Paras 5.5, 5.6 and 5.8 of the Working Paper.

¹⁶ Public liability insurance is insurance against being held liable for loss suffered by a member of the public as a result of an accident arising out of the occupation of premises, or the carrying on of a business or undertaking by the person insured for which the latter is responsible in law. A public liability insurance policy would therefore not be restricted to liability for loss caused by straying animals.

respect of loss caused by their animals straying on to the highway.¹⁷ This was because the uncertainty surrounding the Rule was such that it could not be relied upon for protection against liability, and because farmers and graziers are under a number of civil duties in relation to their animals and property management which, if broken, could have serious financial consequences for them. The Commission noted that the apparent abolition of the Rule in 1976 had not led to an increase in the premiums payable for this kind of insurance and that this had also been the experience in New South Wales after the abolition of the Rule in that State.

6.17 The Commission has contacted a number of the insurance companies which specialise in providing insurance cover for farmers and graziers and has discussed their premium rates for public liability insurance. From these discussions, and from figures earlier supplied to the Commission by the Regional Director of the Insurance Council of Australia,¹⁸ it would appear that public liability insurance is available to farmers and graziers relatively inexpensively. As an example, the following premiums were quoted to the Commission by one prominent company¹⁹ -

<u>Size of Operation</u>	<u>Amount of Cover</u> ²⁰	<u>Annual Premium</u>
1 person farm	\$250,000	\$100
2 person farm	\$250,000	\$165
1 person farm	\$500,000	\$150
1 person farm	\$1,000,000	\$200

6.18 It has been suggested to the Commission, however, that as it is impossible to anticipate how much will be awarded as damages to persons who suffer loss as a result of an animal straying on to

¹⁷ It would also be advisable for householders keeping an animal (for example, a dog) to consider obtaining public liability insurance. The Commission notes that it is a widespread practice for insurance companies to include public liability insurance in home contents, or home and contents insurance policies. Therefore, householders having such a policy may well be indemnified in respect of liability they incur as a result of loss caused to another person by an animal kept on their house property.

¹⁸ These figures are quoted in para 5.7 of the working paper. One commentator on the Working Paper suggested that the premiums quoted therein were misleading because the criteria upon which they are assessed were not stated. However, although some insurance companies do take such things as the amount of wages paid and the number of persons engaged on the farm or station into consideration when assessing the premium, this is not the case with all companies and the Commission has been assured by the Regional Director of the Insurance Council of Australia that the premiums quoted in the Working Paper do provide an accurate indication of the cost of obtaining public liability insurance. Interestingly, the commentator in question paid only \$3.00 more in 1980 for public liability insurance in relation to his farm than the average figure quoted by the Commission.

¹⁹ The premium charged by another prominent company for \$250,000 cover was the same. One broker quoted a premium of \$166 for a cover of \$1 million; another quoted \$188 for the same cover.

²⁰ The premium quoted is in respect of equal amounts of general public liability and public liability arising out of fire and flood. If a lower amount of cover was taken in respect of public liability arising out of fire and flood (for example \$250,000 general public liability but only \$100,000 fire and flood public liability) the premium would be appreciably lower.

the highway, farmers and graziers cannot, at reasonable cost, obtain insurance cover which will guarantee them a complete indemnity no matter how high the award. This difficulty also exists in the other areas in which farmers and graziers can be held liable to pay damages. However, it is more acute in the case of highway accidents because the risk of serious personal injury being caused in such accidents is generally greater than it is in the case of other accidents, and because the rules in accordance with which damages for personal injury are assessed are in a state of flux.²¹

6.19 The Commission accepts this argument. It recommends therefore that an upper limit be fixed beyond which damages cannot be awarded, in respect of anyone accident, against the person who kept the animal which caused the accident.²² This would enable persons keeping animals to take out insurance up to the limit fixed, and thereby be certain of being fully indemnified in the event of damages being awarded against them.

6.20 It would be important, once a maximum limit to liability had been fixed, to increase that limit at regular intervals so that it keeps pace with increases in awards of damages made by the courts. With the same object in mind it is a common practice in the insurance industry for insurance companies to recommend to their clients that they increase the maximum amount recoverable under, for example, a household insurance policy, by 10 per cent annually. The Commission recommends that a similar practice be adopted in relation to the maximum limit to liability proposed above.

6.21 The Commission acknowledges that implementation of this recommendation may, in some cases, prevent accident victims recovering completely the loss they have suffered. This is most likely to occur in a case in which more than one person²³ is injured in a single accident. However, if the maximum amount recoverable is set at a realistic level this should happen, if at all, only rarely²⁴ and the disadvantage which may then be caused to accident victims should not outweigh the general

²¹ For example, the uncertainty concerning whether lump sums awarded in personal injury cases should be discounted on account of the earning capacity of the sum awarded, see further footnote 3 on page 44 below.

²² The Commission notes that a similar limitation is imposed by s 31 of the *Civil Aviation (Carriers' Liability) Act 1959-1976* (Cth), which limits the amount recoverable by a passenger from an airline (in the case of injury) and the passenger's family (in the case of the passenger's death).

²³ It would be necessary for statutory provision to be made for the division of the maximum amount recoverable in cases where an accident causes more than one person loss and the total loss suffered exceeds the maximum sum recoverable. The Commission is of the opinion that the most satisfactory method of providing for this situation would be to empower the Court to divide the maximum recoverable between the persons injured in the accident having regard to the expenses incurred and the economic loss suffered as a result of the accident, the extent to which they have received compensation (including the proceeds of insurance policies) from other sources and their need for compensation.

²⁴ Of the 42 accidents involving animals other than kangaroos occurring in Western Australia in the last quarter of 1980, only one resulted in personal injury requiring medical treatment being suffered by more than one person.

advantage to farmers and graziers of being able to obtain an insurance cover that will provide them with a complete indemnity. In this connection, the Commission considers that at the present time, a sum of \$500,000 would be an appropriate maximum. According to figures available to the Commission, insurance cover of this amount would at present cost \$150 per annum. It should be remembered that the insurance cover obtained for this premium would also include indemnity against other forms of public liability.

(e) **The law concerning contributory negligence and contribution between persons guilty of negligence should apply to claims brought in respect of loss caused by a straying animal**

6.22 The Commission recommends that the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* should apply to claims brought in respect of losses caused by a straying animal in the same manner as it applies to claims brought in respect of losses caused in other ways. This would have two principal results. First it would mean that the damages recoverable in respect of such a loss would be reduced in proportion to the extent to which the person suffering the loss was responsible for the accident giving rise to it.²⁵ For example, if a motorist was 40 per cent responsible for colliding with a straying cow, the amount recoverable by the motorist from the person who kept the cow, in the event of that person being proved to have failed to take reasonable care to prevent such an accident happening, would be only 60 per cent of the loss he suffered.

6.23 Secondly, if a third party contributed to the occurrence of an accident caused by an animal straying on to the highway then in the event of the person who kept the animal being liable in negligence, that person would be able to obtain, from the third party, a contribution towards the damages for which he was liable.²⁶

4. SUMMARY

6.24 In the following table, the existing law governing liability for stock straying on to the highway, both assuming that the Rule does *not* apply in Western Australia and assuming that it **does** apply, is compared with what the law would be if the Commission's proposals for reform were implemented.

²⁵ *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947*, s 4.

²⁶ *Id.*, s 7(1)(c).

Type of Liability	If the Rule does not apply	If the Rule does apply	If Commission's proposals were implemented
1. Strict liability for dangerous animals	Liability exists (paras 2.5 and 2.6)	Liability exists (para 2.15)	No liability (paras 6.9 to 6.12)
2. Strict liability for nuisance	Liability exists (paras 2.7 and 2.8)	No liability (para 2.16)	No liability (paras 6.9 to 6.12)
3. Liability for negligence	Unlimited liability exists (paras 2.2 to 2.4)	No liability (with exceptions) (para 2.14)	Liability only up to fixed maximum (paras 6.16 to 6.21)
4. Criminal liability	Liability exists (paras 2.9 and 2.10)	Liability exists (para 2.17)	Liability exists (para 2.9 and 2.10)
5. Liability for Dogs	Liability under the <i>Dog Act</i> and at common law (paras 2.11 and 2.12)	Liability under the <i>Dog Act</i> . No liability at common law (para 2.18)	Liability for negligence only, up to fixed maximum (paras 6.9 to 6.12 and paras 6.16 to 6.21)

CHAPTER 7

THE REPORT IN CONTEXT

7.1 The Commission believes that implementation of the recommendations contained in Chapter 6 would be an important and worthwhile reform of the law. However, as has been noted above, if the law was reformed in the manner suggested, compensation would still not be recoverable in respect of loss caused by animals straying on to the highway where an action for damages could not be brought against another person. Thus compensation would not be recoverable, where -

- * the loss was caused by a wild animal;¹
- * it could not be proved that the person keeping the straying animal had failed to take reasonable care to prevent it causing loss;
- * the animal strayed on to the highway and caused loss even though reasonable care had been taken to prevent this;²
- * the owner of the straying animal could not be identified or traced.³

7.2 There is nothing to suggest that the victims of accidents of this kind are less in need of compensation than the accident victims who *are* able to recover compensation by successfully claiming damages. Nevertheless, because the former are unable to obtain compensation they, and their dependants, must bear the loss suffered alone, or with the assistance of social security. Especially in the case of personal injury or death, this may cause them severe, and in some cases devastating, financial hardship.

7.3 The foregoing is an unavoidable consequence of a system of accident compensation which allows compensation to be recovered only where the happening of the accident causing loss can be attributed to fault on the part of another person. The inequities of such a system are not limited to accidents involving straying animals. They are also present, for example, in cases where compensation cannot be recovered for loss suffered as a result of an accident caused by the

¹ The figures reproduced in Chapter 3 show in the years 1978-1980 inclusive a total of 669 accidents occurred in Western Australia involving kangaroos. This amounted to approximately 45% of all the road accidents involving animals occurring within that period. The reforms proposed by the Commission would not enable persons who suffered loss as a result of an accident caused by a kangaroo to recover compensation, except in the unusual case in which the kangaroo escaped from human control in circumstances involving negligence on the part of the person keeping it.

² See generally paras 2.4 and 4.2 above.

³ In a significant number of the accident reports examined by the Commission it was stated that the owner of the animal involved could not be identified or traced.

dangerous condition of the highway.⁴ They are also not unique to motor vehicle accidents, although in the case of the other major cause of personal injury, namely work related accidents, Workers' Compensation Schemes are a significant palliative.

7.4 It was not within the Commission's terms of reference to consider whether, in relation to motor vehicle accidents, a no fault personal injury compensation scheme⁵ should be introduced into Western Australia. This is a complex issue and one which would require careful consideration should it be thought appropriate to investigate the matter. In the meantime the Commission believes that as the law governing liability for animals straying on to the highway is a discrete area of the law, the reforms recommended above should be implemented regardless of whether such an investigation is undertaken.⁶

(Signed)

David K Malcolm, QC
Chairman

Eric Freeman
Member

H H Jackson
Member

Charles Ogilvie
Member

L L Proksch
Member

23 June 1981

⁴ For example, a chasm in the road caused by a flash flood. This subject is dealt with in the Commission's report on Project No 62 - *Liability of Highway Authorities for Non-Feasance*.

⁵ Such a scheme was established in Tasmania by the *Motor Accidents (Liabilities and Compensation) Act 1973-1979*. A scheme providing for the payment of hospital and medical costs, loss of income up to specified limits, and compensation to the dependants of deceased persons was established in Victoria by the *Motor Accidents Act 1973-1979*. An accident compensation scheme applying to nearly all accidents operates in New Zealand under the *Accident Compensation Act 1972-1979*.

⁶ The need to review the system by which accident victims generally are compensated has recently become more critical because of statements by certain Justices in the High Court in *Barrell Insurances Pty Ltd v Pennant Hills Restaurants Pty Ltd* (1981) 34 ALR 162 (followed on this point by the New South Wales Court of Appeal in *Todorovic v Waller* (unreported) and *Brazel v Annis Brown* (unreported) and by Wickham J in *Jurovich v Western Mining Corporation Ltd* (unreported) Supreme Court of Western Australia No 1104 of 1977, 7.4.1981) that the practice of discounting lump sum awards of damages on account of the income earning capacity of the sum awarded should be discontinued.

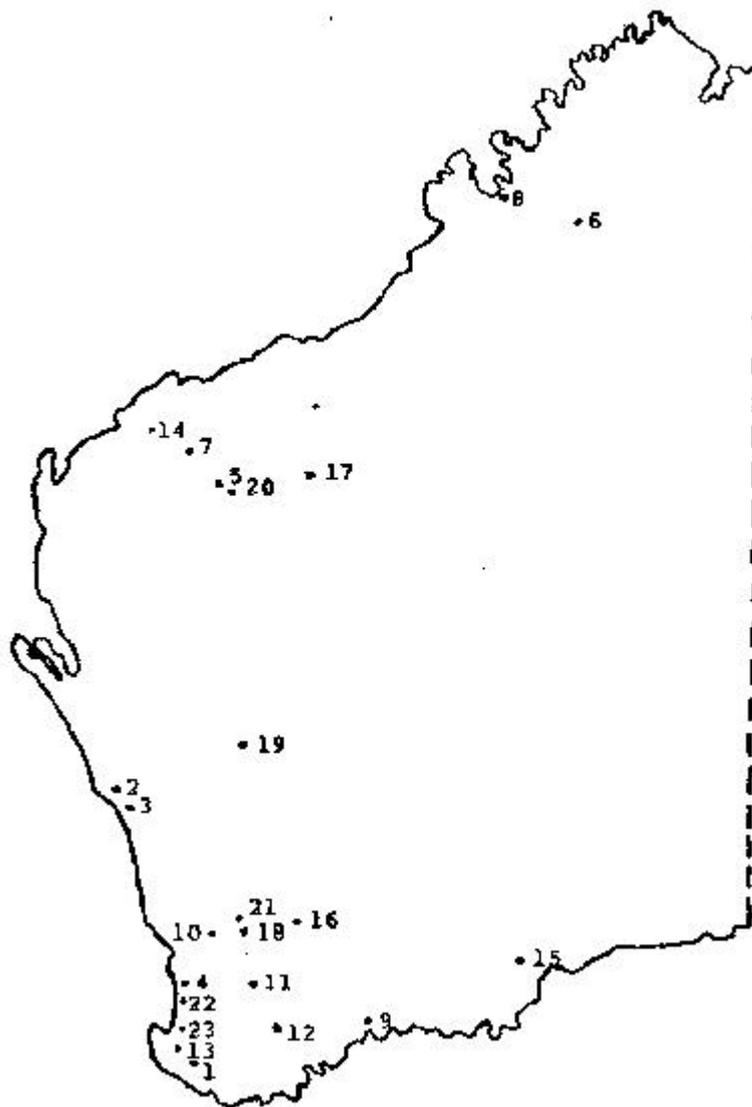
APPENDIX I

COMMENTATORS ON THE WORKING PAPER

1. The Main Roads Department
2. The Pastoralists and Graziers Association of Western Australia (Inc)
3. Professor H Luntz
4. The Insurance Council of Australia Ltd
5. Sir Lawrence Jackson, KCMG
6. The Royal Automobile Club of W A (Incorporated)
7. Mr W B Robinson
8. Mr A A Standring
9. Mr A H Finlayson
10. Mr A Spark
11. Mr H N Guthrie
12. Mr R Gardiner

APPENDIX II

LOCATION OF ACCIDENTS OCCURRING IN THE LAST QUARTER OF 1980 OUTSIDE THE PERTH STATISTICAL DIVISION INVOLVING ANIMALS OTHER THAN KANGAROOS



ACCIDENT DESCRIPTIONS

1. **Location** - Manjimup.
Accident Victim - Farm Adviser
Accident Description - A cow strayed through an open gate near the scene of the accident and ran onto the road into the path of the victim's motor vehicle.

2. **Location** - The Northampton/Nabawa Road
Accident Victim - Farmer
Accident Description - Two horses ran from trees adjacent to the highway on to the highway in front of the victim's car.

3. **Location** - Mount Scott, Geraldton
Accident Victim - Resident of Geraldton
Accident Description - Two dogs, one chasing the other, ran into the path of the victim's vehicle.

4. **Location** - Ravenswood, Pinjarra Road
Accident Victim - Resident of Perth
Accident Description - A black cow walked on to the road in front of the victim's vehicle.

5. **Location** - McRae Avenue, Paraburdoo
Accident Victim - Resident of Paraburdoo
Accident Description - Dog ran on to the road and caught the boot of the victim, who had slowed down to avoid children playing in the road, in its mouth, causing the victim to fall off his motor cycle.

6. **Location** - Great Northern Highway, west of Fitzroy Crossing
Accident Victim - Resident of Derby
Accident Description - A bull charged out of roadside scrub into the path of the victim's vehicle.

7. **Location** - Mill Stream Road, Mill Stream
Accident Victim - Resident of Karratha

Accident Description - Cow suddenly ran on to the road in front of the victim's vehicle.

8. **Location** - Great Northern Highway, 130 kilometres east of Derby

Accident Victim - Resident of Fitzroy Crossing

Accident Description - Victim struck a straying bull.

9. **Location**- Ravensthorpe Road, near Munglinup

Accident Victim - Farmer of Scadden

Accident Description - A short-horn beef cow and calf crossed the road in front of the accident victim's vehicle.

10. **Location** - Telegraph Road, Toodyay

Accident Victim - Farm hand of Toodyay

Accident Description - Victim's motor vehicle struck straying sheep.

11. **Location** - Popanyinning/Yealering Road, five kilometres east of Popanyinning

Accident Victim - Secretary of Popanyinning

Accident Description - Collided with a small pig which, as part of a mob of pigs, ran across the road in front of the victim's oncoming vehicle.

12. **Location** - Katanning/Nyabing Road

Accident Victim - Farmer of Nyabing

Accident Description - Sheep came on to the road in front of the victim's oncoming vehicle.

13. **Location** - Nannup/Vasse Highway

Accident Victim - Student of Perth

Accident Description - An emu ran on to the road, the victim swerved to avoid the emu and ran off the road hitting a tree.

14. **Location** - Pannawonica Access Road

Accident Victim - Fitter of Pannawonica

Accident Description - A cow ran out of the bush and into the path of the victim's oncoming motor vehicle.

15. **Location** - Balladonia
Accident Victim - Solider from South Australia
Accident Description - Sheep ran on to the highway from behind a white fence into the path of the victim's vehicle.

16. **Location** - Corrabin Road, south of Burracoppin
Accident Victim - Resident of Bodallin
Accident Description - A ram ran from behind bush adjacent to the highway and into the path of the victim's oncoming motor vehicle.

17. **Location** - Great Northern Highway, 120 kilometres south of Newman
Accident Victim - Resident of Subiaco
Accident Description - Cow strayed on to the highway in front of the victim's oncoming motor vehicle.

18. **Location** - Northam
Accident Victim - Resident of Northam
Accident Description - A dog ran from a house and into the path of the victim's motorcycle. As a result of colliding with the dog the victim was thrown on to the road.

19. **Location** - Mount Magnet, forty kilometres south of Mount Magnet
Accident Victim - Resident of Rockingham Park
Accident Description - Struck a bull which was straying on to the highway.

20. **Location** - Cow-camp Road, Paraburdoo
Accident Victim - Resident of Paraburdoo
Accident Description - Cow ran on to the road into the path of the victim's oncoming motor vehicle.

21. **Location** - Northam
Accident Victim - Resident of Northam
Accident Description - The victim swerved to avoid two sheep straying on the road, lost control because of the road surface, and ran off the road.

22. **Location** - Old Coast Road, near Myalup Beach Road, Myalup

Accident Victims - Resident of Bunbury and Resident of Perth

Accident Description - Fifty head of cattle strayed on to the highway from an adjacent farm as a result of a gate being left open by trail bike riders. The farmer was in no way responsible for the escape of the cattle. Two motor vehicles collided with the cattle. The cattle blocked the highway and as a result both drivers found it impossible to avoid striking several beasts.

23. **Location** - Higgins Road, Capel.

Accident Victim - Resident of Busselton

Accident Description - Black calf ran across the road into the path of the victim's oncoming motor vehicle.