Animal Welfare Regulation in the Australian Agricultural Sector: A Legitimacy Maximising Analysis

Jed Goodfellow
LLB/BA (Hons), GDLP
Macquarie Law School
Macquarie University

This thesis is presented for the degree of Doctor of Philosophy in Law

September 2015
In dedication to each of the 605 million sentient beings used for food and fibre in Australia every year, and to the people who wish to represent their interests.
Contents

Abstract ................................................................................................................................. v
Statement of Candidate ....................................................................................................... vi
Acknowledgements ................................................................................................................ vii
List of Tables and Figures .................................................................................................. ix

PART I - Setting the Regulatory Scene

Chapter 1: Introduction ...................................................................................................... 3
  1.1 Background to research problem ................................................................................ 3
  1.2 Research objectives and questions ........................................................................... 7
  1.3 Methodology: the legitimacy and regulatory analytical framework ....................... 8
    1.3.1 Legitimacy theory ............................................................................................... 9
    1.3.2 Input legitimacy ............................................................................................... 10
    1.3.3 Output legitimacy ............................................................................................ 12
    1.3.4 Empirical research .......................................................................................... 13
    1.3.5 Law reform proposals ....................................................................................... 14
  1.4 Significance of research ............................................................................................ 14
  1.5 Scope, limitations, and strategic and normative underpinnings of the thesis ........ 23
  1.6 Structure of thesis .................................................................................................... 25

Chapter 2: The Nature of the Regulatory Problem –
Industrial Livestock Production and Animal Welfare .................................................. 28
  2.1 Introduction .............................................................................................................. 28
  2.2 The development of industrialised animal farming .................................................. 29
  2.3 The conflict between animal welfare and industry productivity .......................... 38
    2.3.1 Scientific definitions of animal welfare ......................................................... 39
    2.3.2 The influence of market forces ....................................................................... 44
  2.4 Examples of the conflict .......................................................................................... 48
    2.4.1 Confinement and stocking densities ............................................................... 48
    2.4.2 Invasive husbandry procedures ...................................................................... 54
    2.4.3 Genetic alteration ............................................................................................ 58
    2.4.4 Long distance transportation .......................................................................... 60
  2.5 Conclusion .............................................................................................................. 62

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.1</td>
<td>Introduction</td>
<td>64</td>
</tr>
<tr>
<td>3.2</td>
<td>Social and economic drivers of evolving public attitudes to animals and implications for livestock industries</td>
<td>66</td>
</tr>
<tr>
<td>3.3</td>
<td>The animal protection community</td>
<td>73</td>
</tr>
<tr>
<td>3.4</td>
<td>The livestock industries</td>
<td>80</td>
</tr>
<tr>
<td>3.5</td>
<td>Conclusion</td>
<td>88</td>
</tr>
</tbody>
</table>

Chapter 4: The Current Regulatory Framework

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.1</td>
<td>Introduction</td>
<td>90</td>
</tr>
<tr>
<td>4.2</td>
<td>The Australian Constitution</td>
<td>91</td>
</tr>
<tr>
<td>4.3</td>
<td>Australian Animal Welfare Strategy</td>
<td>93</td>
</tr>
<tr>
<td>4.3.1</td>
<td>Ethical underpinnings</td>
<td>94</td>
</tr>
<tr>
<td>4.3.2</td>
<td>Goals and objectives</td>
<td>95</td>
</tr>
<tr>
<td>4.3.3</td>
<td>Governance and implementation</td>
<td>96</td>
</tr>
<tr>
<td>4.3.4</td>
<td>The 2009 Gemmell Review</td>
<td>97</td>
</tr>
<tr>
<td>4.3.5</td>
<td>Withdrawal of Commonwealth support</td>
<td>102</td>
</tr>
<tr>
<td>4.4</td>
<td>State animal welfare legislation</td>
<td>102</td>
</tr>
<tr>
<td>4.4.1</td>
<td>Historical development</td>
<td>103</td>
</tr>
<tr>
<td>4.4.2</td>
<td>Modern day Animal Welfare Acts</td>
<td>105</td>
</tr>
<tr>
<td>4.4.3</td>
<td>Prohibition on cruelty: unnecessary harm and the proportionality test</td>
<td>106</td>
</tr>
<tr>
<td>4.4.4</td>
<td>The promotion of welfare and the duty of care</td>
<td>115</td>
</tr>
<tr>
<td>4.4.5</td>
<td>Exemptions and defences</td>
<td>120</td>
</tr>
<tr>
<td>4.5</td>
<td>Codes of Practice</td>
<td>124</td>
</tr>
<tr>
<td>4.5.1</td>
<td>Legal status and relationship to principal legislation</td>
<td>125</td>
</tr>
<tr>
<td>4.5.2</td>
<td>The Code conversion process</td>
<td>126</td>
</tr>
<tr>
<td>4.6</td>
<td>Regulation of the live animal export trade</td>
<td>128</td>
</tr>
<tr>
<td>4.6.1</td>
<td>Australian Meat and Livestock Industry Act 1997 (Cth)</td>
<td>129</td>
</tr>
<tr>
<td>4.6.2</td>
<td>Export Control Act 1982 (Cth)</td>
<td>132</td>
</tr>
<tr>
<td>4.7</td>
<td>Conclusion</td>
<td>134</td>
</tr>
</tbody>
</table>

Chapter 5: Overview of Regulatory Failings

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.1</td>
<td>Introduction</td>
<td>136</td>
</tr>
<tr>
<td>5.2</td>
<td>Inadequate animal welfare standards</td>
<td>138</td>
</tr>
<tr>
<td>5.2.1</td>
<td>Popular normative conceptions</td>
<td>138</td>
</tr>
</tbody>
</table>
5.2.2 International comparators .................................................. 141
5.2.3 Legislative mandates .......................................................... 142
5.3 Prevalence of significant animal welfare incidents .................... 143
5.4 Diminishing public trust and confidence ................................ 146
  5.4.1 Public attitudes towards farming ...................................... 146
  5.4.2 Increasing prevalence and legitimacy of direct action ............ 147
  5.4.3 Increasing adversarialism between stakeholders and government .... 152
  5.4.4 Rise of alternative animal product technologies .................... 153
5.5 Conclusion............................................................................. 155

PART 2 - Investigation and Critique

Chapter 6: Regulators, Agency Design, and Regulatory Capture .... 160
  6.1 Introduction ............................................................................ 160
  6.2 Regulatory capture theory ...................................................... 162
    6.2.1 Poor agency design .......................................................... 169
    6.2.2 Cultural capture and the agricultural policy community .......... 170
    6.2.3 The ‘public interest’ .......................................................... 174
  6.3 Interviews with regulators ....................................................... 176
  6.4 Data analysis .......................................................................... 180
    6.4.1 Agency design and structural incentives ............................. 186
    6.4.2 Conception of key stakeholders ......................................... 194
    6.4.3 Conception of animal welfare .......................................... 197
    6.4.4 Approach to animal welfare regulation ............................ 203
  6.5 Implications for departmental approach to animal welfare responsibilities .. 208
  6.6 Conclusion ............................................................................. 210

Chapter 7: Animal Welfare Standard-Setting ............................ 213
  7.1 Introduction ............................................................................ 213
  7.2 Procedural fairness and legitimacy theory ............................... 215
  7.3 The standard-setting framework ............................................. 217
  7.4 The role of science ................................................................. 222
    7.4.1 Industry influence over the development of animal welfare science .... 223
  7.5 Case studies .......................................................................... 225
    7.5.1 The welfare of sows in individual stalls .............................. 226
Abstract

Sociological research indicates that public values and attitudes towards animals are changing. Since the 1970s traditional instrumental conceptions of animals as things to be used for human benefit have been giving way to a post-material ethic of care and compassion. Such changes are materialising in increased public scrutiny of animal use industries. Recent controversies over the treatment of animals within Australia’s agricultural sector have raised questions over the adequacy of current governance and regulatory arrangements for farm animal welfare. In particular, concerns have been expressed over perceived conflicts of interest on behalf of state and federal departments of agriculture in administering animal welfare law.

This thesis aims to provide analytical and empirical depth to such claims and to assess the broader democratic legitimacy of current governance structures for farm animal welfare in light of the changing societal ethic towards animals. The assessment takes place within the analytical frames of regulatory capture and legitimacy theories. Data from semi-structured interviews with regulators responsible for animal welfare in state, territory, and federal jurisdictions are analysed to provide further insight to the assessment.

The research finds that the departments responsible for protecting farm animal welfare possess conflicting institutional objectives. This conflict materialises in the form of structural incentives to prioritise industry productivity goals over those of farm animal welfare. Key personnel responsible for the administration of farm animal welfare laws operate within an institutional setting that imposes significant limitations on what they can do to protect and promote the welfare of farmed animals. As a consequence, farm animal welfare is viewed in instrumental terms and valued only to the extent it contributes to industry productivity goals. This approach causes the regulators to deviate from serving the public interest underpinning the farm animal welfare regulatory framework by creating exclusionary standard-setting and enforcement processes that do not reflect the citizenry’s values or meet their normative expectations. Consequences for the framework’s legitimacy are then assessed before the thesis concludes with proposing a number of options for reform to create a more inclusive, fair, and democratic system of farm animal welfare governance.
Statement of Candidate

This thesis is submitted in fulfilment of the requirements of the degree of PhD in Law at Macquarie Law School, Macquarie University. This represents the original work and contribution of the author, and all sources relied upon have been acknowledged.

I hereby certify that this has not been submitted for a higher degree to any other university or institution.

I further certify that the research conducted for this thesis has received ethics approval from the Macquarie University Research Ethics Committee. Ethics application ref: 5201200249 received final approval on 5 July 2012.

Signed:

[Signature]

(Student’s name) Jed Goodfellow

Date: 11 September 2015
Acknowlegments

I have many people to thank for their contribution to this project over the past four years.

First, I would like to thank my supervisors. To my principal supervisor Professor Peter Radan for his patience, guidance, and prompt and critical feedback on each chapter presented in this thesis; and to my adjunct supervisor Professor David Weisbrot whose initial interest in supervising a PhD candidate in animal law prompted me to enrol at Macquarie University. This was a fortuitous decision as I have found Macquarie Law School to be nothing but supportive of my research and teaching in animal law over the past four years. To this end, I would like to thank the Dean of Macquarie Law School, Professor Natalie Klein, Associate Professor Shawkat Alam, and Law School administrator, Debbie Loo, for their ongoing support and assistance during my time with the Law School. I would also like to acknowledge the financial support of Macquarie University’s Research Excellence Scholarship.

Throughout my PhD candidacy I also benefitted from the part-time employ of RSPCA Australia. I would like to thank my colleagues there, particularly Dr Bidda Jones and Heather Neil for being so accommodating with my research needs, including giving me six months off to complete this thesis. Not many employers would be so kind!

During this six months writing hiatus, I had the privilege of spending several weeks living at home in the beautiful coastal town of Coffs Harbour with my parents, Brett and Diana. I am so grateful for their unconditional love and support throughout my life and for the intuitive sense of justice and fairness they have instilled in me.

I am also grateful for the collegiality of my fellow animal law academics around the country and beyond, particularly Steven White, Professor Peter Sankoff, and Professor Deborah Cao who have each given me the opportunity to publish parts of my research.

I also express my appreciation to the regulators who gave up their time to participate in this research and share their experiences and perspectives.

Finally, I would like to acknowledge the many tireless animal advocates from whom I have drawn much inspiration over the years. Their efforts to represent the interests of
animals despite the institutional forces working against them is admirable. It is my hope that the work contained herein will play some role in removing those barriers and making their voices heard within our systems of government.
List of Tables and Figures

List of Tables

Table 1  Representative bodies for Australian cattle, sheep, chicken and pig industries
Table 2  Australian Animal Welfare Strategy goals and objectives
Table 3  Principal animal welfare legislation and administering departments
Table 4  Alignment of statutory ‘duty of care’ and Five Freedoms
Table 5  Exemptions and defences in state animal welfare legislation
Table 6  Responsible institutions for animal welfare law enforcement in agricultural realm
Table 7  Summary of key recommendations to improve legitimacy

List of Figures

Figure 1  Global meat production rates, 1960-2010
Figure 2  Broiler chicken slaughter rates in Australia, 1965-2014
Figure 3  Three scientific conceptions of animal welfare
Figure 4  Relationship between animal welfare and productivity
Figure 5  Sows in sow stalls
Figure 6  Layer hens in battery cages
Figure 7  Broiler chickens in shed
Figure 8  Cattle in Northern Australia feedlot
Figure 9  Rubber ring castration of calf
Figure 10  Surgical castration of piglet
Figure 11  Cross-section illustration of cattle horn anatomy
Figure 12  Dehorning cup
Figure 13  Sheep in mulesing cradle following mulesing
Figure 14  Beak trimming chick with hot blade
Figure 15  Age-related changes in size of broiler chickens, 1957, 1978, 2005
Figure 16  Changes in livestock performance, 1960-2005
Figure 17  Livestock industries’ conception of relationship between animal welfare and productivity
Figure 18  Proportional relationship between objects and means
Figure 19  Stages of the animal export supply chain
Figure 20  Relationship between coding themes
Figure 21  Interview data analysis
Figure 22  Causal relationship between stages of regulatory capture process within Australia’s farm animal welfare regulatory framework
Figure 23  Process for developing Australian Animal Welfare Standards and Guidelines
Figure 24  Typology of regulatory styles
Figure 25  Department of Agriculture (Cth) law enforcement pyramid
Figure 26  Recommended enforcement approach in typology of regulatory styles
Part I

- Setting the Regulatory Scene
Chapter 1: Introduction

1.1 Background to research problem

Australia is home to a significant livestock industry. In the 2012-13 financial year, the standing national cattle herd was 29.3 million, the sheep herd was 75.5 million, pigs numbered 2.1 million, while the national meat chicken flock stood at 84 million and layer hens totalled 14.6 million.\(^1\) The annual slaughter statistics are much higher than the standing herd and flock numbers as most livestock reach slaughter weight well within one year. For instance, chickens raised for meat reach slaughter weight between 30 to 60 days of age,\(^2\) therefore the national flock may be slaughtered six to twelve times over within a given year. In total, approximately 605 million land-based animals were slaughtered in Australia during the 2012-13 financial year.\(^3\) In addition, Australia exported approximately 2.58 million sheep and cattle for slaughter in foreign jurisdictions in the same period.\(^4\) The total value of these industries to the Australian economy was $13.1 billion for meat and other disposals, and $6.81 billion for associated products such as wool, milk and eggs.\(^5\) This amounts to approximately 42% of the country’s total $48 billion agricultural sector.\(^6\) While the agriculture sector’s contribution to the national economy may have reduced relative to other sectors over the

---


4. See, ibid.


6. Ibid.
past three decades, this does not appear to have reduced its cultural and political significance. Australia’s history and economy are often said to have been ‘built on the sheep’s back’ and agriculture is proudly claimed to be at ‘the heart of the Australian identity.’ Linda Botterill describes this as the residual agrarian imagery in Australian culture, which is often employed to gain policy influence for the agricultural sector out of proportion to its electoral significance.

However, in recent years this agrarian image has come under increasing scrutiny, particularly as industrialised forms of animal production have made their way into the Australian agricultural landscape. The traditional imagery of the farmer engaging in a natural and mutually beneficial relationship of care and stewardship with animals is being replaced with the perception of large scale, automated, industrial forms of production. The rise of the modern-day animal protection movement in the 1970s, underpinned by a post-material ethic of care and compassion for animals, has led to increasing scrutiny of the impacts such farming methods have on the welfare of animals. The use of private investigations, audio visual recordings, social media, and an increasingly responsive mainstream media have intensified such scrutiny to the point where significant cases of animal mistreatment within livestock production and processing facilities and within the live animal export trade have become a routine feature of national news programs. The prevalence of such controversies has attracted national public outrage and sparked heated political debates. A focus of the resultant public dialogue has related to the adequacy of current governance and regulatory

---


9. Linda Botterill, ‘The Role of Agrarian Sentiment in Australian Rural Policy’ in Francesca Merlan and David Raftery (eds), Tracking Rural Change: Community, Policy and Technology in Australia, New Zealand and Europe (ANU E Press, 2009) 59, 70.


11. See list of incidents at 5.3.

12. In 2011, national demonstrations were held to protest against the export of animals to Indonesia following an investigative news program depicting horrific slaughter practices. The Federal Department of Agriculture reported receiving 284,415 items of ministerial correspondence during the 2011-12 Financial Year. This represented a 556% increase from the previous year with over 97% the correspondence relating to the live export trade: Federal Department of Agriculture, Fisheries and Forestry, Annual Report 2011-2012 (2012) 37.
arrangements for farm animal welfare. In particular, a number of federal politicians have raised concerns over the role of federal, state and territory departments of agriculture or primary industries (hereafter referred to collectively as departments of agriculture) in administering animal welfare legislation on the basis that such arrangements give rise to an inherent conflict of interest due to the departments’ role in promoting productive and profitable primary industries.

This concern formed part of the basis for the Australian Labor Party’s decision to adopt a policy for the establishment of an ‘independent Office of Animal Welfare’ at its national conference in 2011. When explaining the rationale for the proposed Office in Federal Parliament, Melissa Parke MP stated that ‘public faith in Australia’s animal welfare system had been undermined in recent years by revelation after revelation of cruelty to livestock’, and that ‘[d]epartments of agriculture…are not widely regarded by the community or animal welfare groups as impartial when it comes to animal welfare.’ Such perceptions exist, she claimed, because these departments are ‘inherently conflicted…improvements in animal welfare are often not consonant with increased productivity and profitability, and vice versa.’ Similar sentiments have been expressed by the Australian Greens in giving their support for the establishment of such an institution.

Australian animal protection organisations have expressed similar concerns. They often claim that departments of agriculture are conflicted in their responsibilities and are largely indifferent to their farm animal welfare responsibilities. National animal protection organisation, Animals Australia, describes the dilemma in the following way:

Our current system has consistently failed animals for decades. Both at the Federal and State levels, departments and ministers charged with looking after animal welfare have as their primary stakeholders the very industries that cause

---

animals the greatest suffering. With this clear conflict of interest – the welfare of animals has always come second to the economic interests of the rural lobby.¹⁶

Other prominent animal protection groups share this view.¹⁷ These issues have also been identified within Australia’s animal law scholarship.¹⁸ Researchers and practitioners in the field have long criticised the ‘self-evident’ conflict of interest that arises when ‘[t]hose who are responsible for the maintenance of [the animal welfare] legal regime in its enforcement and formulation view themselves as the “friend of industry.”’¹⁹ The perceived partiality is said to create a regulatory environment in which it ‘is almost exclusively those who have a stake in profiting from animals who continue to draw the line on what is necessary or unnecessary in the treatment of animals.’²⁰

Additionally, sociological research on attitudes to farm animal welfare show a growing disconnect between public expectations regarding the treatment of farmed animals and the reality of modern agricultural production practices.²¹ There are now also signs that dissatisfaction with the current approach to farm animal welfare is leading to diminishing levels of community confidence in the regulatory framework’s performance


¹⁹ McEwen, above n 18, 5.

²⁰ Dale and White, above n 18, 166-8.

in protecting animals, which in-turn is affecting public attitudes to farmers and stimulating increased levels of direct action activism in the form of private investigations which involve farm trespass.

These outcomes may be broadly indicative of governance legitimacy problems where segments of the community feel that their norms and values are being excluded from relevant deliberative processes and not reflected in political decisions that affect those norms and values. Legitimacy problems can have significant consequences for government and industries. They can affect compliance rates on behalf of the regulated and stimulate societal conflict in the form of legal challenge, consumer boycotts, public protest, and even vigilantism. Whether the current governance and regulatory framework for farm animal welfare is equipped to adequately respond to the growing community concerns regarding the treatment of farmed animals is of critical importance to addressing such legitimacy issues.

1.2 Research objectives and questions

In light of these emerging problems, the primary objective of this thesis is to examine the legitimacy of the current animal welfare regulatory framework within the Australian agricultural sector. In doing so, it aims to provide analytic depth to claims that departments of agriculture suffer from conflicting interests in regulating farm animal welfare, and to assess the impacts any such conflicts may have on regulatory performance. Finally, it intends to propose options for reform to address the legitimacy problems identified.

The specific questions the research seeks to address include the following:

1. Do departments of agriculture suffer from conflicting interests with respect to their role in administering farm animal welfare law?

---

22 A recent study surveying the attitudes of 1,000 people in the state of Victoria found that 32% of people had a low level in trust of farmers to attend to animal welfare responsibilities without legal compulsion: Peter Parbery and Roger Wilkinson, *Victorians’ Attitudes to Farming* (2012) Department of Primary Industries, Victoria 28; and see further discussion at 5.4 of Chapter 5.

23 See discussion at 5.4.2 in Chapter 5.


2. Do departments of agriculture suffer from regulatory capture with respect to their role in administering farm animal welfare law?

3. If so, what are the effects of the regulatory capture, particularly with respect to the regulatory processes of standard-setting and enforcement?

4. What implications does this have for the legitimacy of the regulatory framework?

5. What reforms are required to address the regulatory capture and legitimacy problems within the farm animal welfare regulatory framework?

1.3 Methodology: the legitimacy and regulatory analytical framework

The nature of the research questions necessitates the adoption of a mixed methodological approach. The questions require empirical investigation guided by conceptual analysis followed by proposals for law reform. The first step in the research process was to map out the conceptual analytical framework within which the empirical research would take place. The conceptual framework must be suited to analysing the particular problems to be investigated. As noted in the discussion above, one of the primary complaints made by politicians, animal protection groups and animal law scholars concerns the perceived conflicts of interests on behalf of the government departments responsible for administering the regulatory framework. Critics claim the departments of agriculture neglect their animal welfare responsibilities and are biased towards the economic interests of the livestock industries. Conflicts of interest in performing regulatory functions and bias towards business interests are conditions familiar to the theory of regulatory capture – a process where a regulatory agency acts in the interests of the industry it is responsible for regulating in a way that deviates from the public interest the regulation is designed to serve.\textsuperscript{26} Additionally, there appears to be evidence of diminishing levels of public confidence in the regulatory framework’s performance in protecting farm animals from cruelty and in providing them with appropriate standards of welfare. A lack of public confidence in public administration is a recognised symptom of governance legitimacy problems.\textsuperscript{27} Accordingly, the theories

\textsuperscript{26} Barry Mitnick, \textit{The Political Economy of Regulation} (Columbia University Press, 1980) 95-6.

\textsuperscript{27} Martin and Shepheard, above n 25.
of regulatory capture and legitimacy were explored and each was found to provide strong analytical guidance and insight for the anticipated empirical investigation.

A key question for the methodological approach was how the two analytical frameworks could be employed together in the same research project. Was it possible to integrate the analyses? To answer this question it was necessary to consider a further question regarding the relationship between the analytical frameworks and the issues to be examined by each – is there a relationship between the conditions of conflicting interests and regulatory bias, and diminishing levels of community confidence? As the analysis will demonstrate, there is a strong connection between these two factors. Regulatory capture is found to be a primary cause of the legitimacy problems identified.\textsuperscript{28} The examination of regulatory capture therefore takes place within a broader assessment of the regulatory framework’s legitimacy. To clarify, legitimacy theory is the overall paradigm within which the regulatory analysis takes place, while regulatory capture theory is employed to assess a potential cause of the legitimacy problems identified. Thus, the regulatory capture analysis can be seen as a subset of the broader legitimacy assessment. The analytical framework for regulatory capture will therefore be introduced later in the thesis when the examination turns to the possible causes of the regulatory failings. As the legitimacy assessment is intended to run throughout the analysis its features are detailed below.

\subsection*{1.3.1 Legitimacy theory}

The concept of legitimacy is familiar to a range of disciplines, particularly law, sociology, and political science. In the context of politics and governance, legitimacy is broadly understood to mean ‘the acceptance of shared rule by a community as appropriate and justified.’\textsuperscript{29} The perceived states of appropriateness and justification derive from a ‘socially constructed system of norms, values, beliefs and definitions.’\textsuperscript{30} Thus, the legitimacy of an authority is heavily tied to its acceptance within the social and cultural context of the citizenry over which it governs. Much of the recent literature

\textsuperscript{28} The causal stages of the regulatory capture process are outlined in Figure 22 in Chapter 6.
\textsuperscript{30} Andrea Bradley and Rod MacRae, ‘Legitimacy and Canadian Farm Animal Welfare Standards Development: The Case of the National Farm Animal Care Council’ (2011) 24 \textit{Journal of Agricultural and Environmental Ethics} 19, 21.
exploring political legitimacy is in the context of evaluating models of interstate,\textsuperscript{31} international,\textsuperscript{32} and private governance\textsuperscript{33} as such systems give rise to special challenges of legitimacy due either to the weaker and more remote relationship between the governing authority and the affected citizenry or to its particular lack of actual legal authority. However, legitimacy theory is also employed in more localised and context-specific settings of governance and regulation, and can provide a useful analytical frame for assessing a particular authority’s performance.\textsuperscript{34} A common approach to such evaluative applications is to divide the concept into two interrelated yet distinct components of ‘input’ and ‘output’ legitimacy.\textsuperscript{35} The founder of this approach, Fritz Scharpf, believes this conceptual distinction can be gleaned from the history of normative political theory.\textsuperscript{36} Each component is discussed in turn below.

1.3.2 Input legitimacy

Input legitimacy, Scharpf advises, reflects the maxim, ‘government by the people’ and concerns the procedural aspects of the authority’s decision-making processes – are they fair, inclusive, and democratic?\textsuperscript{37} ‘Political choices are legitimate if and because they reflect the “will of the people”’ – that is, if they can be derived from the authentic preferences of the members of a community.’\textsuperscript{38} This conception of legitimacy draws significantly from Habermas’ theory of communicative action and its contribution to deliberative democracy.\textsuperscript{39} Habermas argued that citizens will perceive authorities – and the laws, policies, decisions, and actions that derive from them – as legitimate only ‘insofar as the democratic process, as it is institutionally organised and conducted, warrants the presumption that outcomes are reasonable products of a sufficiently


\textsuperscript{32} See for example, Steven Bernstein, ‘Legitimacy in Global Environmental Governance’ 1 Journal of International Law & International Relations 139.

\textsuperscript{33} See for example, Donald Schepers, ‘Challenges to Legitimacy at the Forest Stewardship Council’ (2010) 92 Journal of Business Ethics 279; Benjamin Cashmore, ‘Legitimacy and the Privatisation of Environmental Governance: How Non-State Market-Driven Governance Systems Gain Rule-Making Authority’ 15 Governance 503; and Bernstein and Cashmore, above n 29.

\textsuperscript{34} See for example, Bradley and MacRae, above n 30.

\textsuperscript{35} Ibid.

\textsuperscript{36} Fritz Scharpf, Governing in Europe: Effective and Democratic? (Oxford Scholarship Online, 1999) 6.

\textsuperscript{37} Ibid.

\textsuperscript{38} Ibid.

\textsuperscript{39} Jürgen Habermas, ‘Toward a theory of communicative competence’ (1970) 13 Inquiry 360.
inclusive deliberative process.'\(^{40}\) This deliberative process requires that ‘decisions rest on “good arguments” made under conditions in which free and equal autonomous actors can challenge validity claims, seek a reasoned communicative consensus about their understandings of the situation and justifications for norms guiding their action, and are open to being persuaded.’\(^{41}\) This is necessary, Habermas explains, because people construct their own world views and realities through shared perceptions and definitions about what is ‘real.’\(^{42}\) Intersubjective understanding of different stakeholder and citizen perspectives is therefore necessary to achieve *legitimate* decision-making outcomes. This requires deliberation ‘free from strategic behaviour and domination through the exercise of power’ where all actors are ‘equally and fully capable of making arguments.’\(^{43}\) The notion of procedural fairness is important in this respect. Fairness is a key component of deliberative process for legitimacy purposes. To be fair, deliberative processes should provide all stakeholders with equal opportunities for participation and to influence the outcomes of the process.\(^{44}\) Legal sociologist, Tom Tyler, has provided a strong empirical base for the influence of fair decision-making procedures on the public’s acceptance of the final decisions made and of the legitimacy of the decision-making institution.\(^{45}\) Additionally, animal law scholar, Peter Sankoff, has provided a comparative analysis of the deliberative mechanisms operating under the Canadian and New Zealand animal welfare regulatory frameworks.\(^{46}\) His research found a correlation between the quality of deliberative opportunities offered and the subsequent animal welfare protections produced by each framework.\(^{47}\)

---


\(^{41}\) Bernstein, above n 32, 147.


\(^{43}\) Ibid.

\(^{44}\) Ibid.


\(^{47}\) Ibid, 317.
Output legitimacy

Output legitimacy, as Scharpf describes, reflects the notion of ‘government for the people’. It is concerned with the outcomes of the input processes, the extent to which government is effective in satisfying the basic functions of government. According to Scharpf, satisfying the basic functions of government refers to the extent that ‘democratic procedures are able to effectively promote the common welfare of the constituency in question, as well as “achieving the goals citizens collectively care about”’. Output legitimacy is judged by the degree to which government decisions, actions, policy or law, effectively solve social problems, resonate with the citizenry’s values and identity, and meet their normative expectations and social standards of acceptability and appropriateness. Indicators of poor output legitimacy include diminishing levels of public trust and confidence in the authority’s competence manifesting in low rates of acceptance, poor compliance rates, legal challenge, public protest, or even vigilantism.

While some scholars believe the input/output features of legitimacy conflict and that trade-offs are required to reconcile tensions between fairness and inclusivity on the one hand and competence on the other, Scharpf believes they are mutually beneficial and ‘coexist side by side, reinforcing, complementing, and supplementing each other.’ From an instrumentalist perspective, the greater the degree of inclusive deliberation, the more informed, considered, and adapted the outcome. The ideal outcome, as Fabienne explains, ‘is a rationally justified decision – a decision everyone has reasons to endorse – and deliberative decision-making processes, if appropriately shaped, are uniquely able to reach such decisions.’

---

48 Scharpf, above n 36, 6.
49 Boedeltje, above n 42, 6.
50 Ibid.
51 Ibid.
52 Schmidt, above n 31, 7.
53 Haines, above n 24, 8.
55 Martin and Shepheard, above n 25, 4.
56 See for example, Boedeltje, above n 42.
57 Scharpf, above n 36, 12.
This research utilises Scharpf’s input and output legitimacy dichotomy as an evaluative framework for assessing the performance of Australia’s farm animal welfare regulatory framework. This framework also provides analytical guidance to the empirical investigation undertaken in the research.

1.3.4 Empirical research

There is a strong empirical component to the research questions. Do departments of agriculture suffer from conflicting interests with respect to their role in administering farm animal welfare law? This is largely a factual inquiry into the nature of the relationship between farm animal welfare and industry productivity. Do departments of agriculture suffer from regulatory capture with respect to their role in administering farm animal welfare law? Once definitional issues regarding regulatory capture are clarified, this question is also heavily factual in nature, as is the question regarding the effects on the regulatory processes of standard-setting and enforcement practice.

Documentary sources can only provide a cursory account of these issues. To gain the level of insight and understanding required to answer these questions it was necessary to go to the source itself, that is, to the key personnel within the departments of agriculture who are responsible for administering state and federal animal welfare legislation. The research employed qualitative research methods in the form of semi-structured interviews with these personnel in each state, territory and federal jurisdiction (with the exception of the Australian Capital Territory which does not have a livestock sector).

Qualitative methods are suited to investigating and understanding multifaceted social interactions, experiences, and world views. They seek to unearth and understand social meaning from the perspectives of research participants who are enmeshed in their context. This was the objective of the empirical component of the research: to understand the views, perspectives, and experiences of the regulators responsible for the administration of the farm animal welfare framework. This was guided by the regulatory capture literature, particularly in terms of the recognised mechanisms of capture and past empirical studies of the phenomenon. The approach to the interviews and the manner in which they were conducted is explained in further detail in Chapter 6.

60 Sharlene Hesse-Biber and Patricia Leavy, The Practice of Qualitative Research (SAGE, 2011) 12.
In addition to this empirical research, the research engaged in several case studies of standard-setting processes to analyse patterns of behaviour in how such processes were carried out by responsible institutions, and documentary analysis of government enforcement policies to understand the approach regulators take to responding to cases of noncompliance with welfare standards.

**1.3.5 Law reform proposals**

Finally, the research concludes with proposing options for law reform in light of the regulatory capture and governance legitimacy issues identified. These proposals are similarly guided by the regulatory capture and legitimacy literature in terms of past reform strategies that have proven successful in addressing equivalent problems in other regulatory contexts. Additionally, the research engages in some comparative analysis with international jurisdictions to highlight particular governance and regulatory arrangements that may reduce capture susceptibility and improve governance legitimacy. Practical proposals relating to governance structures, standard-setting and enforcement functions are considered in concluding Chapter 9.

**1.4 Significance of research**

There is some scholarship that engages in regulatory analysis of animal welfare law in Australia. In most part this literature critiques the apparent dichotomy in regulatory standards that apply to animals within the domestic realm, such as those animals used for companionship, as compared to those standards applying to animals within commercial or agricultural contexts, such as farm animals.61 Much of the focus of this critique is directed towards the use of wide ranging exemptions that operate to exclude husbandry practices prescribed in subordinate legislation from the application of the general duty of care and cruelty offence provisions of State and Territory animal welfare law. Animal lawyers argue that this deference to subordinate legislation effectively creates a whole new system of inferior regulatory standards for the vast

---

majority of animals used by humans. Steven White describes this as the ‘underlying irrationality’ of Australia’s animal welfare legislative framework: ‘If regulatory intervention is justified by the sentiency of animals and the potential for harm which they may suffer, on what basis can differential standards of care applicable to companion and farmed animals be explained?’

Australian political scientist, Siobhan O’Sullivan, has also critiqued this feature of the animal welfare framework in her book *Animals, Equality and Democracy*. She refers to the differential treatment of animals in different contexts of use as the ‘internal inconsistency’, distinct from the ‘external inconsistency’, which relates to the differential treatment between human beings and animals. O’Sullivan argues that the relative visibility of animals within society impacts the degree of protection they are afforded under animal welfare law. This is because the lack of visibility impedes the public’s ability to make informed political decisions about the treatment of animals thereby resulting in standards that offend the liberal democratic principle of equal consideration.

While this scholarship provides an important critique of the regulatory dichotomy, and in the process highlights the acute deficiencies in the farm animal welfare framework, its focus is primarily on the law as it currently stands. Most of this research does not consider the machinery of government that is responsible for governing the administration of the law including the processes of standard-setting and the procedural factors that lead to such regulatory inconsistencies in the first place. The limited accounts that do consider governance and standard-setting aspects of the framework do not rely on empirical data to inform their analysis.

Another subject that attracts particular attention within the scholarship concerns the enforcement of animal welfare law. Academics have raised concerns about the

---

62 White above n 61, 349.
63 Ibid, 361.
66 Ibid, 4.
67 See for instance, Dale and White, above n 18; and Ellis, above n 18.
independence and capacity of enforcement agencies such as the departments of agriculture and of the RSPCA. The infrequency of enforcement action and the limited impact such action has when it is taken has also been identified and criticised. Some of this literature identifies a conflict of interest on behalf of departments of agriculture in enforcing farm animal welfare law, however these accounts do not provide a comprehensive examination of the nature of this conflict. Rather, the conflict of interest is simply assumed or described as ‘self-evident.’ This is not sufficient for scholarly or policy reform purposes. Further examination of the conflict of interest is required to provide a sustained and credible case for reform. The current research fills this gap in the literature by providing a comprehensive analysis of the conflicting institutional objectives on behalf of departments of agriculture with reference to relevant scientific and economic literature and empirical data.

Internationally, regulatory analysis of animal welfare law has taken a similar approach to the studies described above. UK lawyer, Mike Radford, has provided the most comprehensive account of animal welfare law to date in his 400 page text, *Animal Welfare Law in Britain: Regulation and Responsibility*. This text examines the historical development of Britain’s animal welfare legislative regime, the political context in which such legislation was introduced and expanded, an analysis of case law on the definition of cruelty and other key offences, and consideration of enforcement arrangements. While Radford’s text does engage in some critical examination including proposing options for regulatory reform, it is mostly a descriptive account (albeit of high analytical detail) of the relevant legislation and case law. It does not engage with, or take place within, a particular theoretical analytical framework.

‘Regulation of the Treatment of Companion Animals’ in Deborah Cao, *Animal Law in Australia and New Zealand* (Lawbook Co, 2010) 151, 171-174; Katrin Sharman, above n 18, 212-221.

69 See, Caufield above n 18, Chp 7; White above n 23, 354; Sharman above n 18.


71 See above n 18.

72 See for instance, McEwen above n 18, 10.


74 Ibid, Part B and C.

75 Ibid, Chp 15.
In the US, lawyers David Wolfson and Mariann Sullivan have provided a critique of the legal regulation of farm animal welfare under state anti-cruelty law.\textsuperscript{76} In a similar vein to the Australian scholarship, this analysis focuses on the lack of legal protections afforded to farm animals and the legislative mechanisms that ‘transfer the power to determine whether or not a farming practice is illegally cruel from the court to the farmed animal industry’ via the use of wide ranging exemptions.\textsuperscript{77} The authors concluded their critique by posing the following series of questions:

Is our society really comfortable with removing judges, prosecutors and juries from any role in the determination of what is or is not acceptable treatment of nearly every domesticated animal? Are we sufficiently aware of and comfortable with customary farming practices to simply allow the farmed animal industry the power to do whatever it wants to animals? Should an industry be permitted to regulate itself? Is it right to proceed as if the law protects animals from cruelty when it does not?\textsuperscript{78}

These questions appear to raise as many issues about democratic and governance legitimacy as they do about the appropriateness of legal and regulatory arrangements. Is it fair and democratically legitimate to delegate final decision-making power to an industry to determine standards of conduct that affect an issue of moral concern to the broader public? This question lies at the heart of the legitimacy assessment conducted in this thesis.

In 2005, Peter Sankoff provided a detailed critique of New Zealand’s \textit{Animal Welfare Act 1999} and associated enforcement framework. Again, this work identified and criticised the dichotomy in regulatory standards applying to different contexts of animal use facilitated by the use of exemptions.\textsuperscript{79} It also highlighted deficiencies in enforcement arrangements including a lack of government funding and cooperation.

\textsuperscript{77} Ibid, 210.
\textsuperscript{78} Ibid, 250.
between relevant enforcement agencies. Sankoff also comments about the perception of a conflict of interest on behalf of the responsible government department:

It remains curious that responsibility over the [Animal Welfare Act] remains under the exclusive jurisdiction of the [Ministry of Agriculture], especially considering that MAF has primary responsibility for ensuring that the production of meat products continues in an economically effective manner. It is hardly conspiracy mongering to recognise that MAF faces a conflict of interest when addressing animal welfare matters.

This account of the conflict of interest is typical of others within the scholarship to date. The appearance of the conflict is simply mentioned without further examination. Sankoff dismisses the potential for further inquiry on the basis that it would be ‘impossible to determine whether this apparent conflict of interest has manifested itself to the detriment of animal welfare.’ This research is intended to prove otherwise.

Sankoff has produced another work of relevance to the issues under investigation in this thesis. In 2012, he published an article assessing the respective deliberative opportunities provided under the New Zealand and Canadian animal welfare standard-setting frameworks. The article highlights the legitimising effect that deliberative democratic engagement can have on the process of standard-setting and its subsequent outcomes: ‘allowing the public to participate in an ongoing process of law making is conducive to the way in which social norms tend to evolve and ensures that the results have a higher degree of legitimacy.’ Sankoff’s analysis does not, however, take place within a broader legitimacy assessment framework. Rather, the analysis takes an instrumental approach and assesses the extent to which such deliberative mechanisms affect the substance of legislative protections afforded to animals as a result. The current research approaches the analysis in a different way. Instead of assessing the instrumental effect democratic deliberation has on the substance of resulting standards, this thesis assesses the legitimacy of the deliberative process itself. Admittedly, this is also for an instrumental purpose based on an assumption that improved legitimacy will

81 Ibid, 19.
82 Ibid, 20.
83 Sankoff, above n 46.
84 Ibid, 292.
have a corresponding effect on the substance of legislative protections afforded to 
animals. The ‘strategic’ approach of the thesis is considered further at 1.5 below.

There is further scholarship that engages with deliberative democratic conceptions of 
animal welfare advocacy. Political philosophers Humphrey and Stears have investigated 
the extent to which activist strategies of direct action, or ‘cost-levying’, are compatible 
with notions of deliberative democracy. They note arguments that such political 
actions reflect existing power imbalances in that they are only available to those with 
more ‘time, resources and skill’. Accordingly, they give rise to tensions with 
traditional deliberative democratic accounts as they do not accord with principles of 
political equality. Additionally, Humphrey and Stears identify that activists often 
employ strategies that polarise the debate and vilify opponents, which conflicts with the 
objectives of fostering mutual respect and understanding at the core of the deliberative 
process. However, despite these tensions, Humphrey and Stears argue that this is not a 
basis for expecting activists to ‘restrain their efforts by accepting the behavioural and 
dispositional limitations urged upon them by the theorists of deliberative democracy.’
Rather, they argue for notions of deliberative democracy to be expanded:

A decent theory of democracy, we contend, has to allow these groups effective 
voice; it has to ensure that conventional wisdoms do not predominate simply 
because they are conventional, and it has to ensure that the groups that challenge 
those wisdoms have some means of overcoming the disadvantages inherent in 
their distinctiveness.

Stephen D’Arcy, however, finds that direct animal activism – that is, action directed at 
exerting ‘pressure on one’s adversaries’ as opposed to ‘convincing one’s audience with 
arguments’ – is already compatible with notions of deliberative democracy. He argues 
that direct action is actually a form of deliberative activism:

85 Mathew Humphrey and Marc Stears, ‘Animal Rights Protest and the Challenge to Deliberative 
86 Ibid, 405.
87 Ibid.
89 Ibid, 417.
90 Ibid.
of Critical Animal Studies 1.
Outcomes achieved by activists directly through cost-levying or polarising rhetoric are not *per se* legitimate, in the sense that animal advocacy victories won via cost-levying do not issue from public, reason-guided discussion. However, insofar as such tactics are designed not to impose an animal-friendly outcome, but to provoke rational discussion, to introduce neglected arguments into the public debate, and to insist that certain considerations no longer be ignored in decision-making processes, such political action is positively encouraged by the deliberative theory.92

These accounts provide an important perspective on the application of deliberative theory, and by implication, legitimacy theory, to the animal protection policy debate. However, the focus of these articles can also be distinguished from the current research in that they are more focused on assessing the political character and legitimacy of the actions of animal activists as opposed to those of government. The examination undertaken in this thesis is directly concerned with the actions and performance of government, which is assessed, in-part, by reference to its performance in facilitating fair and effective deliberative forums.

While the above analyses of farm animal welfare law and animal activism identify issues relevant to those under consideration in this research, none of these accounts take place within the broader analytical framework of legitimacy theory nor do they apply the theory of regulatory capture to enlighten their claims of conflicting regulatory interests. There is however some scholarship from non-legal disciplines that engages further with these issues in the context of animal welfare regulation.

A field of scholarship that is related to the study of regulatory capture is that of policy network analysis, an analytic framework developed within political science literature to examine the relationship between interest groups and the state in particular policy areas to better understand policy outcomes.93 UK political scientists Robert Garner and Dan Lyons have each applied policy network analysis to different contexts of animal welfare regulation.94 Garner’s analysis, conducted in the late 1990s, was the first comprehensive

---

study of animal protection public policy. It examined the institutional structures involved in the development of policy relating to the welfare of farm animals and research animals in Britain and the US. Garner found that the policy communities responsible for developing farm animal welfare policy in both Britain and the US were dominated by agricultural interests and effectively excluded animal protection groups from the process.\footnote{Garner, above n 94, 139-175.} His findings regarding the agricultural policy community are discussed further in Chapter 6. Lyons’ study related only to animals used in scientific research but his methodolgy and findings are nevertheless of significant relevance to the current research. His study mapped the historical development of animal research policy from the introduction of the \textit{Cruelty to Animals Act} in 1876 to the present day. Lyons found that over time the research community became increasingly effective at persuading the British Government to grant it further control and autonomy over the governance and regulation of animal experimentation to the point where the policy process became ‘monopolised by pro-animal research interest groups to the exclusion of animal protection actors’.\footnote{Lyons, above n 94, 4.}

New Zealand zoologist and animal studies scholar, Michael Morris, has also examined the political and procedural context of policy and standards development for farm animal welfare.\footnote{S Weaver and Michael Morris, ‘Science, Pigs, and Politics: A New Zealand Perspective on the Phase-Out of Sow Stalls’ (2004) 17 \textit{Journal of Agricultural and Environmental Ethics} 51; Micheal Morris, ‘The Ethics and Politics of the Caged Layer Hen Debate in New Zealand’ (2006) 19 \textit{Journal of Agricultural and Environmental Ethics} 495; Michael Morris, ‘The Ethics and Politics of Animal Welfare in New Zealand: Broiler Chicken Production as a Case Study’ (2009) 22 \textit{Journal of Agricultural and Environmental Ethics} 15; Michael Morris, ‘The Use of Animals in New Zealand: Regulation and Practice’ (2011) 19 \textit{Society & Animals} 368.} Morris identifies a conflict of interest on behalf of the New Zealand Ministry of Agriculture in regulating farm animal welfare and examines its alleged effects on regulatory processes, particularly standards and policy development. In doing so he identifies mechanisms closely associated with the regulatory capture hypothesis such as the effect that industry lobbying ‘through a subtle interplay of diplomacy, threats, and flattery’ has ‘had on the interpretation of scientific findings…and subsequently on government policy.’\footnote{Morris (2006), above n 85, 498.} He finds that government ‘has manipulated [scientific] evidence to suit industry preference.’\footnote{Ibid, 507.} However, Morris simply refers to
this as a form of ‘undue influence’, and even ‘corruption’, \textsuperscript{100} without providing definitions and he does not engage with the regulatory capture scholarship. Nevertheless, Morris’ critiques prove highly valuable in assessing the effects of regulatory capture in the context of standard-setting addressed in Chapter 7.

Another work of considerable relevance to the present research is the study conducted by Andrea Bradley and Rod MacRae into the legitimacy of Canada’s farm animal welfare standard-setting framework. \textsuperscript{101} This is the only known work that applies legitimacy theory to the farm animal welfare regulatory context. The findings of this study are discussed in Chapter 7’s analysis of animal welfare standard-setting. However, this work can be distinguished from the current research on the basis that it was focused solely on the process of standards development and does not consider the legitimacy of the regulatory framework as a whole including the relevant governing departments and enforcement functions. Additionally, the study is of course based on the Canadian experience. Nevertheless, the findings of the study resonate strongly with those of the current research as Chapter 7 will demonstrate.

There are numerous studies of the regulation of animal welfare in Australia and internationally. Many of these focus exclusively on the farm animal welfare context. The above accounts represent only a portion but they are of particular relevance to the current research. Further relevant studies such as those relating to regulatory capture and the agricultural policy community are considered in the body of the thesis, particularly Chapter 6. The research presented in this thesis is, however, unique in that it represents the first comprehensive examination of the Australian farm animal welfare regulatory framework through the analytical frames of legitimacy and regulatory capture theory. This will provide further analytic depth to claims of conflicting interests on behalf of departments of agriculture in regulating animal welfare. In doing so, it is hoped that this research will provide a sufficient evidence base to influence policy and regulatory reform as well as to stimulate further empirical research into the causes and effects of regulatory capture within this framework.

\textsuperscript{100} Morris (2011), above n 85, 377.
\textsuperscript{101} Bradley and MacRae, above n 30.
1.5 Scope, limitations, and strategic and normative underpinnings of the thesis

This thesis is concerned with animal welfare regulation in the Australian agricultural sector. Regulation can include a variety of meanings so it is necessary to explain what concept is adopted in this analysis. A broad conception of the term may include ‘all mechanisms of social control or influence affecting behaviour, from whatever source, whether intentional or not.’ However, such a wide-ranging definition may reduce the analytical value of the concept and make any potential analysis unwieldy. The primary focus of this thesis is on the actions of government; that is, the actions of government in addressing the regulatory problem of the impact of industrial farming methods on the welfare of animals (discussed in Chapters 2 and 3). The particular actions assessed in this research include the promulgation of the primary and subordinate laws and standards that currently govern the treatment of farmed animals, and the processes of setting and enforcing those standards. Accordingly, this thesis is predominately concerned with legal forms of regulation. It is acknowledged that many important regulatory influences derive from private, non-government sources, including industry-based quality assurance programs, NGO standards and accreditation schemes, peer review and ‘naming and shaming’ mechanisms, and through consumer demands. This thesis does not consider these forms of regulation as it is specifically focused on the role of departments of agriculture and the extent to which they suffer from legitimacy problems and regulatory capture in their approach to administering animal welfare law.

Another important clarification to make is that this thesis does not engage with, or contribute to, normative positions on animal ethics (except to the extent of briefly describing the basic distinction between animal rights and welfare-based philosophies in the discussion of key stakeholders in Chapter 3). The research is focused on engaging in an assessment of the regulatory framework’s legitimacy and in proposing options for how its legitimacy can be improved. The decision to adopt this approach is largely based on strategic grounds in acknowledgement of the fact that animals – despite the

---

103 Ibid, 2-4.
104 See Chapter 3 at 3.3.
efforts of numerous philosophers, political scientists, lawyers, and countless other advocates over the past four decades – are still politically and legally invisible. Animals are not citizens, they are not legal persons, and they are yet to be incorporated into our liberal theories of justice. As such, they have no means of asserting their interests in their own right. Instead, their interests are represented through human agency, through the demands of citizens concerned about their welfare and claimed rights. The greater such demands can be given expression within our systems of government, the better the plight of animals will be. This is the primary assumption upon which the research is based.

Of course, it is undeniable that this strategic basis is itself grounded on normative concerns – upon a sympathy with the ethical case made by those philosophers, political scientists, lawyers and advocates who advance a better deal for animals. Putting aside their ethical nuances and disagreements, what is clear, and what all within the broader animal protection community agree upon, is that animals deserve better than their current treatment (which, in the case of farmed animals, is detailed in Chapter 2). This research is intended to facilitate such an outcome by improving the democratic inclusiveness of the animal welfare governance and regulatory framework.

In addition to desiring stronger protections for animal welfare, the normative basis of the strategic approach presented in this thesis is equally founded on a desire to promote

---


108 The Third Judicial Department of the New York Supreme Court recently ruled that a chimpanzee named ‘Tommy’ could not be considered a legal person for the purposes of a writ of habeas corpus because he did not have the capacity to bear social responsibilities: ‘unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions. In our view, it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights – such as the fundamental right to liberty protected by the writ of habeas corpus – that have been afforded to human beings.’ The Nonhuman Rights Project Inc on behalf of Tommy v Paterick Lavery [2014] State of New York Supreme Court, Appellate Division, Third Judicial Department, 518336, 4 December, at [6].
the broader democratic values of fairness, equality, and inclusivity. Regardless of the beneficial outcomes produced by procedurally fair deliberative processes, the right to fair democratic expression – the right to be heard – is recognised as a good independent of its instrumental value. Many Australian citizens are intensely concerned about the interests of animals and suffer genuine psychological harm as a result of knowing that those interests are being ignored.\textsuperscript{109} Therefore, as citizens, they have a right to have their concerns heard and taken into account in the democratic processes underpinning decisions that impact the interests of animals.

Finally, this thesis does not intend to make a normative contribution to the theories of legitimacy or regulatory capture. These concepts are utilised as tools for assessing various features of the regulatory framework. Any contribution to these disciplines is simply via their application to a novel regulatory context.

\subsection*{1.6 Structure of thesis}

This thesis is divided into two parts: Part I (Chapters 1-5) sets the regulatory scene providing the necessary background and context to the regulatory framework to be examined including its current failings; while Part II (Chapters 6-9) engages in an investigation of the possible causes of such failings before proposing options for how they may be overcome.

The first step in any regulatory analysis is to set out the nature of the regulatory problem the relevant regulation seeks to address. Chapters 2 and 3 of the thesis are dedicated to this object. Chapter 2 introduces the regulatory problem that is the impact of industrialised animal agriculture on the welfare of animals. It then proceeds with exploring the scientific, economic and practical dimensions of this problem. Chapter 3 focuses on the regulatory problem’s socio-political context. This includes an exploration of the social and ethical values underpinning the public’s growing sensitivity to the treatment of farmed animals as well as the differing views and characteristics of the two key stakeholders: the livestock industries and the animal protection community.

Chapter 4 then surveys the government’s current attempts to address the regulatory problem through primary animal welfare laws and subordinate industry standards. This

\footnote{\textsuperscript{109} David Harvey and Carmen Hubbard, ‘Reconsidering the Political Economy of Farm Animal Welfare: An Anatomy of Market Failure’ (2013) 38 Food Policy 105, 108-9.}
analysis identifies the much-critiqued dichotomy in regulatory standards applying to equally sentient animals in different contexts of use.

Finally, for the regulatory scene-setting part of the thesis, Chapter 5 outlines the outcomes of the government’s current attempts to address the regulatory problem. This analysis can be said to relate to the ‘output legitimacy’ of the current framework. It identifies three distinct indicators of regulatory failure in the production of inadequate animal welfare standards, the prevalence of significant animal welfare incidents, and diminishing levels of public confidence in the performance of the regulatory framework.

Part II of the thesis then embarks on a process of investigating the potential causes of these regulatory deficiencies with the specific aim of exploring the veracity of claims that departments of agriculture suffer from conflicting interests with respect to their role in regulating the welfare of farm animals. This investigation commences in Chapter 6, which introduces the theory of regulatory capture as an analytical frame of reference within which empirical data from qualitative interviews are assessed and coded. The data analysis is then discussed according to four key themes and a case for the existence and cause of regulatory capture is presented (see Figure 22 in Chapter 6).

Chapters 7 and 8 then engage in an examination of the potential effects of regulatory capture on the key regulatory functions of standard-setting and enforcement. Chapter 7 discusses the relevance of procedural fairness and legitimacy to the process of developing animal welfare standards. Four case studies relating to different livestock industries and husbandry practices are presented and critiqued to highlight procedural (input) legitimacy flaws. Chapter 8 then examines the government’s current approach to implementing and enforcing farm animal welfare standards. This analysis relies predominately of departmental enforcement policies, enforcement statistics and a prominent case study of enforcement failure which demonstrates how regulatory capture can affect enforcement decisions.

Concluding Chapter 9 then provides an overall conclusion on the state of farm animal welfare regulation in Australia and its legitimacy deficiencies. Based on the analysis of the regulatory problem undertaken in Part I and the findings of the investigation of regulatory capture in Part II, it proposes a number of options for reform to address the identified deficiencies and to improve the framework’s legitimacy. These reforms are
proposed under the headings of ‘governance’, ‘policy and standards development’, and ‘enforcement.’

2.1 Introduction

The logical starting point for examining the adequacy of a regulatory framework is to consider the ‘problem’ the regulation is seeking to address. Effective regulatory design is dependent upon a thorough analysis of the regulatory environment.\(^1\) A proper appreciation for the nature of the regulated problem, its unique causes and effects, and the competing interests involved is fundamental for designing the right regulatory response to achieve the desired policy objectives.\(^2\) As Bloom notes, ‘every issue that is the subject of regulation…has its own features peculiar to it, which must be understood in order to rise to the challenge of regulating it sympathetically, meaningfully and effectively.’\(^3\) For these regulatory responses to be effective ‘they must identify the nature of the affective, symbolic, and non-instrumental concerns that influence policy.’\(^4\) This is the objective of the following two chapters.

The ‘problem’ that animal welfare regulation in the agricultural sector is seeking to address, as proposed in this thesis, is framed simply as the impact of modern industrial farming methods on the welfare of animals. At the heart of this problem, is the question of where the appropriate balance lies between the human freedom to exploit animals in the most economically productive way possible, and the interests of animals in not

---

3. Ibid, Bloom.
4. Freiberg, above n 1, 78.
being subjected to pain and suffering and in living a fulfilling life according to their particular biological and behavioural needs. Of course, in the political and legal context, the value attributed to the latter consideration is determined and conveyed through human agency; that is, the political demands of citizens concerned about the interests of animals. Indeed, the animal welfare impacts of modern industrial farming would not be a public policy issue at all if it were not for the growing public concern for animal welfare. The social and political context to the regulatory problem will be considered in the next chapter.

This Chapter will first explore the important practical elements of the regulatory problem to better understand its true causes and effects. This will include a brief account of the historical development of industrial animal agriculture and an analysis of the scientific and economic factors that give rise to the inherent conflict between farm animal welfare and industry productivity. Scientific conceptions of animal welfare will be considered and the challenges posed by the influence of social values in such scientific assessment will be highlighted. Finally, the chapter will present an overview of some of the more controversial animal welfare impacts of the industrial farming model to illustrate the practical manifestation of the regulatory problem. This analysis is important to demonstrate the vulnerable position of the intended beneficiaries of the regulatory framework so as to provide the necessary context for why regulatory oversight and other safeguards are required to protect their welfare and the public interest behind it.

Overall, the analysis of the regulatory problem contained in this Chapter and in Chapter 3 together with the assessment of the current regulatory framework undertaken in Chapter 4, will underpin the diagnosis of regulatory failures and the design of necessary reforms considered in Part II of this thesis.

2.2 The development of industrialised animal farming

The term ‘industrial animal farming’ is used in this thesis to refer to modern systems of farming that are characterised by the ‘application of industrial methods to the production of animals,’ typically involving mechanised and automated housing and

---

feeding systems, and the stocking of large numbers of animals at high densities. The term is also intended to encompass associated practices including routine surgical procedures, transportation and slaughter.

Even though industrial forms of animal farming now account for the vast majority of meat, dairy and eggs produced globally, such methods of farming have only existed for a relative blink in the history of livestock production. Human beings first began farming livestock about 11,000 years ago when they started to domesticate sheep following the last glacial period. The relationship between human beings and livestock during prehistoric times was described as a ‘loose coexistence;’ for it was not until people began to ‘settle,’ (which itself was only made possible through livestock farming), that such relationships became more intensive. The earliest records of common husbandry practices derive from the Middle Eastern Bronze Age (starting between 3,500 and 2,500 years BCE) in the form of Egyptian pictures depicting the farming of cattle.

Records from the Roman Iron Age (1st to 6th century CE) show that providing for the natural behavioural needs of livestock was a matter of concern for farmers in Ancient Rome. The following abstract is an account (as reproduced by Hartung) from two Roman writers, Varro and Columella of the 1st century CE, describing a poultry house and pig farm:

The [poultry] houses consisted of three different parts, which were connected by a service room for the animal attendants. The houses were illuminated by natural light through wooden windows with willow branch nettings and equipped with elevated perches and nests made of fibre baskets mounted along the walls with landing spaces in front of the nests. Openings in the wall allowed birds to use the outdoor area, which was protected by a wall and a net against predators ‘by foot’ and from the air. Columella recommended the provision of sand and ash for dust bathing in some part of these areas protected by a roof.

---

8 Ibid.
9 Ibid, 22.
Pigs were kept predominantly outdoors most of the year. Shelters were used only in wintertime or for sensitive animals like pregnant sows. Columella reports that pregnant sows were kept indoors in separate pens made of wood. The walls were 1.2 m high. A bar at the entrance of the pen was high enough to allow the sow to walk in and out, e.g. for foraging while the piglets could not go across the bar. 10

Ironically, the advice given to farmers thousands of years ago bears a remarkable resemblance to directives contained in current European Union legislation designed to improve the welfare of animals in intensive production environments today.11

While the size and prevalence of livestock farming may have increased and certain husbandry procedures refined, the fundamental nature of animal agriculture did not change throughout the Middle Ages and into the 17th century.12 The most prevalent form of animal farming throughout history was typified by its small-scale, family run, subsistence style arrangements under which humans and animals generally engaged in mutually beneficial, symbiotic relationships.13 Animal husbandry scientist, Professor John Webster describes such farming as follows:

Ruminants designed primarily for meat production (sheep and goats) were expected to forage for themselves, grazing land that the family did not own and consuming food that the family could not digest. The farmer and his family would, however, grow, cut, carry and conserve food for the house cow, since she could repay this investment through the production of milk and work. Her male calf would be killed to be eaten as veal on special occasions and before it began to compete with its mother for food. Poultry and pigs acted as scavengers who ate food that would otherwise have gone to waste. Young pigs intended to provide food for the table or for preservation and sale as cured ham were kept in styes and fed on house and farm swill to ensure they fattened as quickly and as cost-effectively as possible. Breeding sows and chickens would usually be given the run of at least part of the farm, since this let them forage for some of their

12 Hartung, above n 7, 24-26.
own food and reduced the cost and labour of housing, bedding and manure disposal.

The key to success for such arrangements, Webster explains, was in allowing the animals to harvest their own food and spread their own manure; a fundamental principle, which ‘formed the basis of livestock farming from the beginning of agriculture, almost to the present day.’

This principle underwent some change in the 18th century with the advent of the Industrial Revolution. Hartung notes that the development of crop rotations allowed for systemic fodder production, which in turn enabled animals to be kept inside and at higher densities. Instead of animals foraging for their own food and spreading their own manure, it became more economically efficient to bring the food to the animals and to collect and spread their manure in more targeted ways.

However, it was not until the middle of the 20th century that archetypal industrial methods were applied to livestock production. With increasing affluence and urbanisation following the end of World War II, demand for meat and dairy products increased dramatically throughout the developed world. Livestock industries responded with increasing the efficiency and intensity of their operations. Labour was reduced through greater mechanisation and automation and consequently the farm worker to animal ratios decreased dramatically. In fact, Henry Ford once famously remarked that he had modelled the automobile assembly line off Chicago slaughterhouse operations. As Webster notes: ‘[f]actory farming was born when it became cheaper, faster and more efficient to process feed through animals using machines than to let the animals do the work for themselves.’ In addition, significant research and development was dedicated to improving the genetic selection of animals to emphasise high growth and production traits and animal feed was altered to increase its nutrient and protein concentration. And crucially, livestock industries began

---

14 Ibid.
15 Hartung, abve n 6, 28.
16 Webster, above n 13, 97.
17 Ibid, 98.
18 Ibid, 99.
20 Webster, above n 13, 98.
21 Ibid.
administering vaccines and antibiotics to animals to manage disease associated with the intensive confinement conditions. In fact, industrial farming methods were so dependent on the use of such chemotherapies that they would not have existed without them; as Webster explains:

If access to cheap power had been all that was necessary for the success of intensive livestock farming, then this industrial revolution would have occurred in the 1920s. In fact it did not really take off until the 1950s when antibiotics effective against the major endemic bacterial diseases of housed livestock became cheap and freely available.

This, to Webster, is an indictment on the industrial farming model: ‘It is an unequivocal insult to the principle of good husbandry to keep animals in conditions of such intensity, inappropriate feeding or squalor that their health can only be ensured by the routine administration of chemotherapeutics.’

Running in conjunction this increasing industrialisation of animal farming methods, was a change to the ownership structure of the livestock industries. As meat consumption rates surged (see Figure 1 below) and the size of farming enterprises expanded, corporate entities were formed, or entered the market, to take on control of livestock businesses. This trend was marked by increasing amalgamation and vertical integration of the respective livestock sectors, particularly the pork and chicken meat industries. In the US for instance, Phillips notes that 60 companies now own nearly 80% of the country’s nine billion chickens, and that ‘many of these have fully integrated production systems, controlling the process from production of the food, growing the bird to slaughter, processing and marketing of the finished product.’ Similarly, the US pork industry experienced significant consolidation with US Department of Agriculture statistics showing a massive reduction in pork producers from over a million in the 1960s to just 67,000 in 2005.

Australian industries experienced similar structural adjustments. In the 1950s, Australia’s chicken meat was produced by thousands of backyard and family-owned

---

22 Ibid, 99.
23 Ibid, 99-100.
24 Ibid, 100.
businesses. Today, two companies, Inghams Enterprises Pty Limited and Baiada Poultry Pty Limited, with annual revenues of $1.84 and $1.25 billion respectively, process 95% of all chicken meat produced and consumed in Australia, and four companies account for 80 per cent of the industry’s total revenue. Australia’s pork industry underwent similar consolidation with 94 per cent of pig farmers reportedly leaving the industry between 1970 and 2003 despite a 130 per cent increase in pork production over the same period. While beef cattle and sheep industries have not experienced the same intensity of ownership consolidation, the red meat processing sector has nevertheless been dominated by three large foreign-owned multinationals. JBS Australia Pty Limited, Teys Australia, and Nippon Meat Packers Australia Pty Ltd now control just under 50 per cent of the country’s meat processing market.

Despite the general decrease in the number of individual farms and producers since the 1950s, the overall production of meat has increased significantly. United Nations Food and Agriculture Organisation statistics show a four-fold increase in global meat production rates between 1960 to 2010, as depicted in Figure 1 below:

In the same period, world milk production is reported to have doubled and egg production quadrupled. An estimated 64.8 billion land based animals are now slaughtered for food around the world each year. In Australia, the production of chicken meat, in particular, has increased exponentially. The Australian Chicken Meat Federation reports that an estimated three million broiler chickens were produced in the year 1950-51. Today, the chicken meat industry produces approximately 628 million chickens each year, as depicted in Figure 2 below:

![Figure 1: World Meat Production, 1961–2010](source: FAO)

**Figure 1**: Global meat production rates, 1960-2010

---

32 Christopher Delgado, ‘Rising Consumption of Meat and Milk in Developing Countries has Created a New Food Revolution’ (2003) 133 *Journal of Nutrition*, 3907.


These figures suggest that while the number of livestock farms and farmers are decreasing, the average size of the operations is increasing. This trend has increased economies of scale improving efficiencies but at the same time it has given rise to significant animal welfare challenges as the sheer number of animals dictates against any possibility of providing individual care. Large cattle and sheep grazing operations can have many thousands of animals for each stockman spread over hundreds of square kilometres. Live export vessels can ship up to 125,000 sheep in a single load with only one veterinarian and several stockman and a single broiler chicken farm can house more than 4 million birds where the flock is overseen by a handful of staff. There are no mandated staff to animal ratios for livestock facilities under Australian law.

Webster has described this as ‘probably the biggest animal welfare problem inherent to intensive livestock units’ as it ‘renders impossible the practice of proper stockmanship’. 

---

36 Wellard Rural Exports Pty Ltd, Submission to Australian Senate, Livestock Export Review Inquiry, 1 September 2011, 2.
38 Webster, above n 13, 103.
In any system whereby hundreds of thousands of animals are contained within a single building it is impossible to care for animals as individuals. This is a potential welfare risk for the individual if things go wrong. Indeed any individual that falls behind the average by virtue of ill health, impaired development or reluctance to compete at the feed trough has little chance of being nursed back to normality through sympathetic stockmanship.

There is little more that the best-intentioned of stock-keepers in a broiler unit can do than cull the dying and carry out the dead. The system simply does not make it possible for the stock-keeper to observe each individual animal, let alone attend to their individual needs.\(^{39}\)

In this respect, Webster accuses the industrial animal farming model of imposing a ‘neo-Darwinian variation on the principle of the survival of the fittest.’\(^{40}\)

Philosophy and Animal Sciences Professor, Bernard Rollin, shares Webster’s concerns. He believes the recent revolution in animal farming methods has destroyed the ‘ancient contract’ which formed the basis of the relationship between farmers and their flocks for thousands of years. Under this contract, humans practised the true art of ‘animal husbandry’ where animals were placed into the most ideal environment possible to survive and thrive, where their physical, biological, behavioural needs and natures were respected, and they were provided with sustenance, water, shelter, protection from predation.\(^{41}\) In return, humans were provided with healthy, productive animals that provided food, fibre, labour, and transportation. Such relationships, as Rollin puts it, were prudential ‘in that failure to observe husbandry inexorably led to ruination of the person keeping the animals.’\(^{42}\) Animal husbandry was therefore born out of necessity. But with the advent of industrialisation, the values of husbandry were replaced with the values of economic efficiency.\(^{43}\)

‘Animal husbandry’ instead became ‘animal industry’ and respecting the physical, biological and behavioural needs of the animals was no longer necessary to ensure productivity. Genetic alteration, routine surgical mutilations, the administration of antibiotics, and high concentrate feed allowed animals to survive and continue producing in intensive environments incompatible with their welfare and

---

\(^{39}\) Ibid, 101-3.
\(^{40}\) Ibid, 101.
\(^{41}\) Rollin, above n 5, 9.
\(^{42}\) Ibid, 10.
\(^{43}\) Ibid, 11.
behavioural needs. \textsuperscript{44} In Rollin’s words, industrial methods allowed farmers to ‘force round pegs into square holes’. \textsuperscript{45}

The development of industrialised animal agriculture is only a recent phenomenon in the history of livestock farming. Nevertheless, in this short space of time it has fundamentally altered the nature of the human/animal relationship that existed in traditional forms of farming for thousands of years. Under modern industrial methods, animal welfare is often in a state of conflict with productivity. The economic and scientific dimensions of this relationship will now be explored.

2.3 The conflict between animal welfare and industry productivity

The relationship between animal welfare and productivity within the agricultural sector is complex and multifaceted. Its true nature within a given context depends on a variety of factors including the farming model adopted, the concept of animal welfare applied, and the economic and pricing structures at play. All of these elements must be considered if policy and regulatory responses to managing the relationship are to be effective in adequately protecting and promoting farm animal welfare.

Indeed, the importance of this relational dynamic to current political discourse concerning farm animal welfare cannot be overstated. The question of whether animal welfare and productivity are in a state of conflict often forms the basis of debates about the scope of farm animal welfare regulation. The position one takes on the question will often determine their position on whether the regulation is too weak or too intrusive. Those who answer in the affirmative tend to support welfare regulation and demand that it be strengthened,\textsuperscript{46} while those who answer in the negative believe that further regulation is superfluous and object to proposals for further welfare safeguards.\textsuperscript{47} Unfortunately, as is the case with many controversial policy issues, the debate is often politicised and ideology tends to destroy any chance of reasoned factual discussion. The

\textsuperscript{44} Ibid.
\textsuperscript{45} Ibid.
\textsuperscript{47} See for instance, John Cobb, Shadow Minister of Agriculture, \textit{Minister Admits System is “Strongest” But Adds More Red Tape}, Media Statement, 31 July 2013.
true nature of the relationship between animal welfare and productivity is often reduced to simplified and misleading claims and assumptions.

2.3.1 Scientific definitions of animal welfare

To unpack the issue further, it is necessary to first consider the definition of animal welfare. What is it? How is it measured? And where does scientific inquiry end and questions of ethics begin? Adding to the complexity of this inquiry is the fact that animal welfare has a multitude of suggested meanings and measurement indicators, perhaps courtesy of the fact that the discipline of animal welfare science itself is only about 30 years old. This has been a contributing factor to some of the confusion and conflict in political and policy forums and between stakeholders on the question of what is an appropriate state of welfare for animals in a particular set of circumstances. How animal welfare is defined, including what is considered to amount to good and bad states of welfare, will largely frame one’s analysis of the relationship between welfare and productivity. As will be discussed in Chapter 3, different stakeholders have adopted widely different concepts of animal welfare and interpretations of welfare impacts.

Animal welfare scientist, Professor Donald Broom describes animal welfare as a strictly scientific concept that is distinct from ethics:

Animal welfare is a term that describes a potentially measurable quality of a living animal at a particular time and hence is a scientific concept. Much of the discussion about animal welfare concerns what humans do about it, or should do about it. Such a question, about what people ought to do, is an ethical issue. The scientific study of animal welfare should be separated from the ethics.

Broom’s distinction is an important one but as the proceeding discussion will show, it can be difficult for scientists to completely separate their ethical or values-based positions from their scientific approach to animal welfare. Broom’s scientific definition of animal welfare is presented in the following terms: ‘The welfare of an individual is

---

51 The implications of such interpretations during animal welfare standard-setting processes are considered further in Chapter 8.
52 Broom, above n 49, 122.
its state as regards its attempts to cope with its environment. This state can be measured scientifically utilising a number of indicators. Welfare will be poor, he explains, if there is difficulty in coping or failure to cope. The World Organisation for Animal Health (the OIE) has drawn on Broom’s approach to defining the construct but goes into further explanatory detail:

Animal welfare means how an animal is coping with the conditions in which it lives. An animal is in a good state of welfare if (as indicated by scientific evidence) it is healthy, comfortable, well nourished, safe, able to express innate behaviour, and if it is not suffering from unpleasant states such as pain, fear, and distress. Good animal welfare requires disease prevention and veterinary treatment, appropriate shelter, management, nutrition, humane handling and humane slaughter/killing. Animal welfare refers to the state of the animal; the treatment that an animal receives is covered by other terms such as animal care, animal husbandry, and humane treatment.

Australia’s national policy on animal welfare, the Australian Animal Welfare Strategy (discussed in detail in Chapter 4), adopts the OIE’s definition. As this definition indicates, the welfare of an animal involves a number of different elements. One of the most famous and influential set of indicators is known as the ‘Five Freedoms for Animal Welfare’ (the Five Freedoms), developed by the UK Farm Animal Welfare Council in 1979. The Five Freedoms provide that good animal welfare can be judged by the extent to which an animal is provided with the following conditions:

1. Freedom from hunger and thirst;
2. Freedom from discomfort;
3. Freedom from pain, injury or disease;

---
56 See Farm Animal Welfare Council press statement, Press Statement, 5 December 1979, recommending the development of farming Codes of Welfare that ‘provide farm animals with the following:– (1) freedom from thirst, hunger or malnutrition; (2) appropriate comfort and shelter; (3) prevention, or rapid diagnosis and treatment, of injury and disease; (4) freedom to display most normal patterns of behaviour; (5) freedom from fear.’ Available at UK Webarchives: <http://webarchive.nationalarchives.gov.uk/20121007104210/http://www.fawc.org.uk/pdf/fivefreedoms1979.pdf>
4. Freedom to express normal behaviour; and

5. Freedom from fear and distress.

The Five Freedoms are now universally recognised as a benchmark in animal welfare and are utilised by international animal welfare and veterinary organisations, such as the RSPCA, World Animal Protection, and the World Organisation for Animal Health, to promote animal welfare standards around the world. However, due to the generalised nature of the Five Freedoms, its utility is reserved more for establishing guiding principles rather than precise scientific assessment and application in practice.

Animals may employ a variety of strategies to cope with their environment so a wide range of measures must be taken into account in order to make a proper assessment of an animal’s state of welfare. These may be physiological, immunological, behavioural, or relate to the animals subjective feelings. While the ability to assess welfare through behavioural and feelings-based measures have been viewed with scepticism in the past, advancements in animal welfare science have shown that each has a basis in biology. Animals have needs with a biological basis including the need to engage in certain behaviours and when those needs are frustrated animal welfare is impacted. While feelings, such as fear, pain, pleasure, and excitement are viewed as adaptations to an animal’s external environment that motivate it to behave in ways that promote good biological functioning.

Despite this, some scientists believe that the physical functioning of the animal is the only relevant indicator of its state of welfare. Professor John McGlone, who is also a director of the Pork Industry Institute, has stated that ‘an animal is in a poor state of welfare only when physiological systems are disturbed to the point that survival or reproduction are impaired’ and that it is ‘simplistic and inappropriate’ to rely on an

---

60 Broom, above n 49, 127.
61 Ibid, 126.
63 Fraser, above n 48, 198.
animal’s affective state as measured through behavioural indicators. Australian researchers Professor Paul Hemsworth and the late Dr John Barnett also believe the ‘functioning-based’ approach (or ‘homeostasis-based’ approach), which focuses on measuring the magnitude of the animal’s biological responses to its environment and the consequences of these responses particularly for its ‘ability to grow, reproduce and remain healthy’, is ‘the most scientifically credible approach to welfare assessment.’

Fraser and colleagues believe that different values-based positions about what is most important or desirable for animals and the nature of human responsibility towards them, underlies the different approaches to animal welfare adopted by the public and by scientists. He provides the following explanation:

The different views of animal welfare do not necessarily involve disagreements about facts. An intensive animal producer might believe that welfare is good in a high-health confinement system because the animals are healthy and growing well; a critic might draw the opposite conclusion because the animals are crowded in barren pens and develop abnormal behaviour. The two parties may agree on factual issues such as the amount of space that is available and the incidence of disease. Their disagreement is about values – specifically about what they consider more important or less important for animals to have good lives.

In identifying the multiple elements of animal welfare and the growing confusion around the relative importance of each, Fraser the colleagues developed an integrated model of welfare assessment based on three main conceptions of animal welfare presented in Figure 3 below.

---

67 Ibid, Fraser (2008), 170.
Figure 3: Three conceptions of animal welfare

Broadly, these conceptions can be summarised as: 1) whether the animal is functioning well in the sense of satisfactory health, growth and normal functioning of physiological systems (Basic health and functioning); 2) whether the animal feels well by being free from prolonged and intense fear, pain, and other negative states (Affective states); and 3) whether the animal is leading a natural life through the development and use of its natural adaptations and capabilities (Natural living). 69 Webster agrees with this integrative approach recommending that welfare assessment involve three simple corresponding questions: 1) Is the animal fit and healthy? 2) Is the animal happy? and 3) is the animal living a natural life? 70

Thus, animal welfare science tells us that an animal’s physical performance is only one of several factors that need to be taken into account when making a proper assessment of its state of welfare. In addition to physical performance, an animal’s physiological functioning, behaviour and feelings should be considered to determine how a particular animal is truly coping with its environment. 71 As Broom explains, this is important

---

69 Fraser, above n 48, 187.
70 Webster, above n 13, 5-10.
because there are many instances where an animal may be in good physical health, but will nevertheless be experiencing a poor state of welfare:

There are many circumstances where behavioural or physiological coping mechanisms are activated, indicating that welfare is poor, but the animal's health remains good. These include: situations where the coping mechanisms are successful, such as when body temperature is maintained despite extreme ambient temperatures; circumstances where failure to cope has consequences for psychological, but not physical stability, such as in the development of non-injurious pathological behaviours; and where detrimental effects upon physical stability are compensated for by management practices, such as the routine use of antibiotics.72

The fact that an animal can be productive despite being in a poor state of welfare has serious implications for the way in which welfare is valued under market conditions. This brings us to the economic dimension of the welfare/productivity relationship.

2.3.2 The influence of market forces

Economic research regarding the relationship between animal welfare and productivity provides that within an economic context, farm animals are valued by their productivity.73 The economically rational producer will ensure that inputs for welfare are limited to the extent they contribute to productivity gains and overall higher returns. There are of course a number of examples of where inputs to improve productivity complement animal welfare. Obvious examples may be found in the provision of adequate food and water to ensure animals have sufficient nutrients to produce or in safeguarding animals against disease or predation. Another example may be found in ensuring low stress handling and slaughter practices so as to avoid bruising and to improve meat quality.74 These examples of complementarity between welfare and

---

72 Ibid, 6.
productivity predominately concern the ‘basic health and functioning’ dimension of animal welfare.

However, when many modern farming practices are assessed against other dimensions of animal welfare, particularly those relating to the animals’ affective states and ability to live natural lives, they do not fare so well. This is because these welfare measurements often have no bearing on the overall physical performance of the animals, and subsequently, there is no economic incentive for producers to meet the animals’ welfare needs on these indicators. The psychological wellbeing of an animal, for instance, cannot be consumed and is therefore not factored into the price of the product. As a consequence, the resultant psychological suffering of animals becomes a market externality.75

Under industrial systems of livestock production, productivity gains are often realised at the expense of animal welfare.76 To illustrate this dynamic, agricultural economist Professor John McInerney developed the following graph depicted in Figure 4.

---

75 McInerney, above n 73, 2.
The graph shows a generalised relationship between animal welfare (as perceived by humans) and productivity within a commercial farming environment, understood as the rate of output (eggs, milk, wool, meat etc) per input (costs of feed, medications, labour, infrastructure etc). It is not based on empirical data, but McInerney notes that it ‘is now well established as providing a useful framework’ and is ‘sufficiently robust to broadly fit any type of livestock production system.’ McInerney explains that while there is often a mutually beneficial relationship between welfare and productivity at lower levels of output, as the size, efficiency, and intensity of the production system increases, welfare begins to decline. Point A on the graph represents animals in the state of nature. As humans start to make use of animals providing feed, housing, and protection from predators and disease, both welfare and productivity increase as depicted at point B. However, as the biological potential of the animal is exploited.

---


78 McInerney argues that the welfare of an animal can never be determined definitively but is simply that which is perceived by humans: ‘By accepting that animals are sentient beings we have to accept that their welfare is internal to them. While we may validly assert that ‘welfare’ embraces both the physical and the mental wellbeing of animals, we know insufficiently about their perceptions or preferences to be able to make valid declarations about what they would consider good for themselves. What we are left with – and what clearly we implicitly accept as the operational concept – is our perceptions of animal welfare’. McInerney, above n 73, 10.

79 Ibid, 19.

80 Ibid, 18-20.
further through the application of industrial methods of production, welfare begins to decrease. Eventually a point is reached (depicted at point E) where animals are pushed to their biological limits, beyond which they die or become unprofitable by some other means. McInerney postulates that point D on the graph represents minimum standards of welfare currently set by law, while point C represents what may be a state of ‘appropriate’ or ‘desired’ welfare for society to aim towards. But unless animal welfare is given an economic value and factored into the price of the end product, this will be difficult to achieve under market conditions alone:

Since animal welfare is in the nature of a nonmarket good (‘externality’) it carries no evident price and so farmers inevitably focus on the animals’ productivity, which does provide commercial reward. Economic optimising theory demonstrates that market signals will tend to cause welfare standards to fall below the socially desirable norm.

There are, however, examples of meat and egg products that do factor in some costs of improved welfare standards. These products are distinguished in the marketplace precisely on the basis of their higher welfare attributes and command a price premium in return. Examples include certified free-range and organic products, and other private accreditation schemes such as the RSPCA’s Approved Farming Scheme. However, these input costs generally only address a limited range of welfare impacts, and in many cases relate solely to the overall system of production and do not address associated practices such as routine surgical procedures without pain relief and other welfare-compromising management practices (discussed below).

Ultimately, this demonstrates that there is a conflict between farm animal welfare and industry productivity. Unfortunately for animals, they have the capacity to produce despite being in poor states of welfare. This leads to significant consequences for their welfare under market conditions where productivity is valued and animal suffering is externalised. Key examples of the practical manifestation of this conflict will now be considered.

81 Ibid, 20.
82 Ibid, 2.
2.4 Examples of the conflict

The conflict between animal welfare and industry productivity is no more clearly illustrated than by reference to the key issues of concern within the farm animal welfare debate, which form the basis of the regulatory problem. The majority of these issues can be categorised under the broader groupings of ‘confinement and stocking densities’, ‘invasive husbandry procedures’, ‘genetic alteration’ and ‘long distance transportation’. This review is not intended to provide a comprehensive account of the animal welfare issues associated with each of these categories but simply to highlight some of the primary areas of concern which effectively convey the practical nature of the welfare/productivity conflict.

2.4.1 Confinement and stocking densities

A key characteristic of the industrial farming model is intensity. Confining animals in smaller spaces makes them easier to manage reducing labour costs, redirects energy the animal would otherwise expend on moving to producing body mass, and generally improves the overall input to output ratio of the operation.84 To capitalise on these benefits Australian producers have transitioned to intensive confinement systems for most species of livestock as discussed in turn below.

2.4.1.1 Pigs

The majority of pork produced in Australia derives from intensive piggeries in which female breeding pigs (sows) are confined to metal stalls measuring 60 centimetres in width by 2.2 metres in length.85 These dimensions are barely larger than the sow’s physical body. The sow can take one to two steps backwards and forwards but cannot turn around. Sows may be confined to such stalls for the duration of their 115 day pregnancy after which they are moved to a farrowing crate to give birth and feed their litters.86 Farrowing crates are even smaller in dimension than stalls, typically measuring 50 centimetres in width by 2 metres in length.87 Sows are kept in farrowing crates for

84 Lusk and Norwood, above n 76, 465-467.
approximately four weeks until weaning, at which point they are then moved to a ‘mating stall’ to be artificially inseminated before the process starts again.\textsuperscript{88}

\textbf{Figure 5:} Sows in sow stalls\textsuperscript{89}

The Tasmania Government’s Regulatory Impact Statement on restricting the use of stalls listed the following welfare impacts associated with their use:\textsuperscript{90}

- Prevention of foraging, locomotion and exploratory behaviours which normally constitute over 70\% of activity during daylight hours;\textsuperscript{91}

- Prevention of normal behaviour of dunging in a location separate to the resting location;\textsuperscript{92}


\textsuperscript{90} Tasmanian Government, above n 88, 9.

\textsuperscript{91} Alex Stolba and David Wood-Gush, ‘The Behaviour of Pigs in a Semi-Natural Environment’ (1989) 48 \textit{Animal Production} 419-425.

\textsuperscript{92} Ibid.
• Prevention of normal social behaviour of females to live in social groups;\(^93\)

• The provision of less space (0.6x2.0m) than is required to meet the dynamic space requirements of an average sow (0.85x2.2m) and thereby meet the Model Code requirement that “sows accommodated individually in stalls must be able to stand, get up and lie down without being obstructed by the bars and fittings of the stall, to lie with limbs extended, to stretch and to be able to freely undertake such movements”\(^94\)

• The provision of less space than is required to adopt the range of movements and postures necessary for comfort;\(^95\)

• The provision of less space than is required to undertake the exercise necessary for the maintenance of bone density, muscle and joint health;\(^96\)

• Increased incidence of aberrant behaviours in the form of reduced responsiveness to stimuli;\(^97\) stereotypies, the development of which are indicative of an animal not coping with its environment;\(^98\) abnormal postures such as dog-sitting;\(^99\)

• Increased incidence of skin abrasions and ulceration;\(^100\)

• Increased incidence of lameness and severe lameness;\(^101\)

• Increased incidence of urinary tract infections.\(^102\)

\(^{93}\) Ibid.


\(^{99}\) Fraser and Broom, above n 97, 344.


\(^{101}\) Ibid.

\(^{102}\) Scientific Veterinary Committee, above n 96.
2.4.1.2 Layer hens

Chickens used in egg production are confined in similarly restrictive environments in the form of battery cages. Producers may stock multiple chickens in battery cages at a density of 550 cm\(^2\) of floor space per bird.\(^{103}\) This is 73.7 cm\(^2\) less than the surface area of an A4 size sheet of paper.

![Chickens in a battery cage](image)

**Figure 6:** Chickens in a battery cage\(^{104}\)

The welfare impacts associated with the battery cage system include:

- An inability to meet the physiological and behavioural requirements of the laying hen including wing flapping, grooming, preening, stretching, foraging, dust bathing, nesting and laying in privacy;\(^{105}\)

- Increased incidence of lesions and foot problems associated with sloping wire flooring;\(^{106}\) and

---

\(^{103}\) Model Code of Practice for the Welfare of Animals: Domestic Poultry, Appendix 1.


\(^{105}\) Webster, above n 13, 121; Bernie Rollin, *Farm Animal Welfare: Social, Bioethical, and Research Issues* (Iowa State Press, 1995) 120; LayWel Project, Welfare Implications of Changes in Production Systems for Laying Hens (University of Bristol, 2004).

• Increased incidence of disuse osteoporosis and associated bone fractures.  

2.4.1.3 Meat chickens

While chickens used for meat production (referred to as broiler chickens) are predominately confined to large sheds rather than cages, they are nevertheless stocked at equally high densities. The current Model Code of Practice for the Welfare of Animals: Domestic Poultry allows broiler chickens to be stocked at a rate of 40 kilograms of bird weight per square metre. As each bird weighs approximately 2.2 kilograms, this amounts to approximately 18 birds per square metre, or one bird per 555 cm².

Figure 7: Broiler chicken farm

The welfare impacts associated with broiler chicken stocking densities include:

• general decrease in level of physical activity;
• irritated mucous membranes, respiratory and eye diseases, and reduced ability to carry out foraging, preening and resting behaviour due to exposure to high ammonia levels generated by faecal matter;\textsuperscript{111}

• increased physiological and oxidative stress levels;\textsuperscript{112}

• increased incidence of hock burns;\textsuperscript{113}

• increased incidence of skin diseases such as footpad dermatitis and lameness;\textsuperscript{114}

• heat stress leading to hyperventilation and panting due to high humidity;\textsuperscript{115} and

• increased levels of anxiety and fear.\textsuperscript{116}

2.4.1.4 Beef cattle

While cattle in Australia are grazed in paddocks for the majority of the time, for many the final 10-15 per cent of their lives (approximately 50-120 days) are spent in feedlots.\textsuperscript{117} Feedlots are yarded areas where cattle are generally held in high numbers and stocking densities. Cattle are transported to feedlots before slaughter to enable them to reach slaughter weight within a shorter period of time than would otherwise be possible under grazing conditions. This is because cattle are fed on grain diets, do not expand as much energy on moving, and may also be treated with Hormone Growth Promotants.\textsuperscript{118} The current Model Code of Practice for the Welfare of Animals: Cattle


\textsuperscript{114} T Jones, C Donnelly, and M Dawkins, ‘Environmental and Management Factors Affecting the Welfare of Chickens on Commercial Farms in the United Kingdom and Denmark Stocked At Five Densities’ 85 Poultry Science 155-1165.


\textsuperscript{118} Ibid.
recommends a stocking density of 9 m² for each animal.\textsuperscript{119} This has been followed in the recently drafted \textit{Australian Animal Welfare Standards and Guidelines for Cattle}.\textsuperscript{120}

\textbf{Figure 8:} Cattle in Northern Australia feedlot\textsuperscript{121}

The welfare impacts associated with feedlotting include deprivation of grazing behaviour and associated development of stereotypies,\textsuperscript{122} increased stress associated with higher levels of antagonistic behaviour between cattle and heat stress particularly within hot and dry regions of Australia.\textsuperscript{123}

\textbf{2.4.2 Invasive husbandry procedures}

Livestock are routinely subjected to invasive husbandry procedures, which generally involve the removal of certain parts of the animals’ anatomy. Such procedures may be performed to adapt the animal to the environment in which it is kept, to make the animal more manageable for handling, or to improve meat quality.\textsuperscript{124} The New Zealand Animal Welfare Advisory Committee report on painful husbandry procedures summaries the welfare impact such practices as follows:

\begin{itemize}
  \item \textit{Model Code of Practice for the Welfare of Animals: Cattle}, s.2.2.6.4.
  \item \textit{Australian Animal Welfare Standards and Guidelines for Cattle}, standard 10.1.
\end{itemize}
Most of these farm animal husbandry procedures involve trauma to sensitive and significant tissue such as muscle, tendon, bones, nerves and blood vessels. Consequently, the procedures can cause acute pain and distress. They are usually routinely performed without anaesthesia and analgesia. It is important to note that there are several potential types of compromises to animal welfare, not all of which are significant. Firstly, the procedures involve handling and restraint which can involve some stress, as well as the potential for harm to the animal (e.g. if facilities are inadequate). Secondly, the acute pain associated with the procedure itself. And finally, chronic pain and distress during the post-operative period, along with the potential for altered function.  

Several of the most common husbandry procedures are considered in turn below.

2.4.2.1 Castration and spaying

Male sheep, cattle, and pigs are routinely castrated to improve temperament for handling and meat quality. This is generally performed with knife but rubber rings may also be used for sheep and cattle.  

In addition, female cattle may be spayed using what is referred to as the ‘dropped ovary technique’, which involves entry through the vagina to cut the ovaries away from their attachments in the abdomen allowing them to drop within the cow’s body cavity where they remain.

---

125 Ibid.
126 *Model Code of Practice for the Welfare of Animals: Sheep*, s.94; *Model Code of Practice for the Welfare of Animals: Cattle*, s.5.4.
2.4.2.2 Dehorning

Cattle are commonly dehorned to reduce risks of injury to handlers and other cattle in yards and during transport. Dehorning is most commonly carried out using a curved dehorning knife, hot iron, or other mechanical apparatus known as cup and scoop dehorners. The procedure is painful as the calf’s horn consists of soft tissue and attaches to the skull at approximately six months of age. Pain relief is not required under the *Model Code of Practice for the Welfare of Animals: Cattle*. 

---


131 *Model Code of Practice for the Welfare of Animals: Cattle*, s.5.8.
2.4.2.3 Mulesing

Mulesing is a procedure performed on sheep, particularly the Merino breed, to reduce incidences of fly strike (fly larvae infestation). It involves the removal of several inches of loose skin from the breach area of the animal using a pair of modified shears. Pain relief is not required for sheep under six months of age.\(^\text{134}\)

Figure 13: Sheep in mulesing cradle following mulesing\(^\text{135}\)

---

\(^\text{132}\) Future Beef, above n 130.


\(^\text{134}\) Model Code of Practice for the Welfare of Animals: Sheep, Appendix 3.

\(^\text{135}\) Source: People for the Ethical Treatment of Animals, ‘Mulesing’ (2014) <http://www.peta.de/Mulesing>. As is the case with other invasive husbandry procedures, there are very few images available from industry or government sources. PETA was the only source from which a clear depiction of the mulesing procedure could be found online by the author. This may be a particularly graphic image of mulesing but the wound is consistent with illustrative guides to the practice found in the Model Code of Practice for the Welfare of Animals: Sheep, Appendix 3.
2.4.2.4 Beak trimming

Beak trimming is performed on chickens in egg production facilities to reduce injury associated with feather pecking and cannibalism. It involves the partial removal of the bird’s upper and lower beak using either a hot blade or infrared laser. Beak trimming can cause acute and chronic pain as the beak contains nerve endings. The *Model Code of Practice for the Welfare of Animals: Domestic Poultry* authorises the procedure but provides no further guidance on how it should be carried out other than to require it to be performed by an accredited operator.

![Figure 14: Beak trimming chick with hot blade](image)

2.4.3 Genetic alteration

A key component of the industrial farming model is its focus on genetics, particularly those related to the physical growth and production of livestock. Genetic selection programs have resulted in massive increases in animal yields but the high growth and production rates have impacted animal welfare significantly. There are currently no animal welfare laws that apply to such programs in Australia.

---

The growth rates of broiler chickens probably provides the most striking example. Since 1957 the broiler chicken has grown to over four times its original size, as Figure 15 from an article in *Poultry Science* illustrates.

### Figure 15: Age-related changes in size of broiler chicken from 1957, 1978 and 2005

<table>
<thead>
<tr>
<th>Strain</th>
<th>1957</th>
<th>1978</th>
<th>2005</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 d</td>
<td>34 g</td>
<td>42 g</td>
<td>44 g</td>
</tr>
<tr>
<td>28 d</td>
<td>316 g</td>
<td>632 g</td>
<td>1,396 g</td>
</tr>
<tr>
<td>56 d</td>
<td>905 g</td>
<td>1,308 g</td>
<td>4,202 g</td>
</tr>
</tbody>
</table>

These growth rates have caused a number of significant animal welfare problems including skeletal disorders such as joint inflammation, spinal cord damage, impaired mobility, ruptured tendons, and twisted legs syndrome,\(^\text{141}\) and metabolic disorders such as ascites and sudden death syndrome.\(^\text{142}\)


Dairy cows have also been subject to extensive selective breeding programs to increase milk yields. This has resulted in a doubling of the average milk production rate for cows with many now producing over 20,000 kilograms of milk per lactation.\textsuperscript{143} Such high production rates has led to increased leg and metabolic problems, and rates of mastitis infection.\textsuperscript{144}

Van der Steen et al provide a useful summary of these and other production performance increases since the 1960s courtesy of genetic breeding programs.

<table>
<thead>
<tr>
<th>Change in Livestock Performance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Species</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Pigs</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Broiler chickens</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Layer hens</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Dairy cows</td>
</tr>
</tbody>
</table>

Figure 16: Change in livestock performance from 1960s to 2005\textsuperscript{145}

2.4.4 Long distance transportation

As a result of the reduced number of production and slaughter facilities due to industry consolidation, livestock are often made to endure long journeys from their farm of origin to a saleyard, feedlot or abattoir. This is a significant issue in remote rural and regional locations of Australia, particularly in the Top End, Central and Western regions.


\textsuperscript{144} Ibid.

of the country. It is not uncommon for sheep and cattle to be transported from one side of the country to the other when there is an oversupply of animals to abattoirs due to missed live export shipments or incidences of drought. In 2010, a reported 732,070 sheep and 78,511 cattle were transported from drought-affected Western Australia to abattoirs along the Eastern Seaboard. Such journeys can take several days to complete when spell periods are factored in. Under the *Australian Animal Welfare Standards and Guidelines for the Land Transport of Livestock*, cattle and sheep may be deprived of water for a period of 48 hours during transportation, after which time they must be spelled for a period of 36 hours. Pigs and poultry may be deprived of water for 24 hours. In addition to water deprivation and risks of heat stress, the process of transport including loading and unloading is inherently stressful for livestock as demonstrated by various physiological measures.

These stressors are exacerbated further in the case of live animal exports involving sea journeys, which commonly consist of over 75,000 animals on a single voyage and extend over three weeks in duration. Australia is the largest exporter of live animals in the world, shipping 2.58 million cattle and sheep to Middle Eastern and South East Asian markets in 2012/13. Livestock are exposed to high stocking densities and ammonia levels aboard the vessels, extreme changes in climatic conditions, and changes to feed (from grass to pellets). These environmental factors can lead livestock to suffer a range of conditions including inanition (failure to eat, eventually resulting in death).

---


147 *Australian Animal Welfare Standards and Guidelines for the Land Transport of Livestock*, ss.4.1 and 11.1 respectively.

148 *Australian Animal Welfare Standards and Guidelines for the Land Transport of Livestock*, ss.9.1 and 10.1 respectively.


salmonellosis, mucosal irritation and conjunctivitis, heat stress and pneumonia. Livestock routinely experience these conditions despite shipments complying with the Australian Standards for the Export of Livestock (ASEL). The provisions of the ASEL and accompanying live export regulatory regime (discussed in Chapter 3) are directed more to ensuring the general health of the overall flock or herd as opposed to the welfare of each individual animal exported. This is reflected in the fact that exporters do not need to notify the regulating Department of Agriculture (Cth) of on-board mortalities unless they account for over 1 per cent of the total shipment in the case of cattle, and over 2 per cent in the case of sheep. These mortality thresholds are routinely exceeded. Department of Agriculture (Cth) records indicate that since 2006, there have been 49 reportable mortality events, amounting to one every two months.

The livestock husbandry practices detailed above present a clear case of conflict between the welfare of farm animals and the interests of industry productivity. While animal welfare issues certainly existed in farming prior to the application of industrial methods, the introduction of corporatisation, consolidation, and automation, have most definitely expanded the impacts in scope and intensity.

2.5 Conclusion

This Chapter has provided an overview of the practical elements of the regulatory problem that is the impact of modern industrial farming methods on the welfare of animals. The nature of the relationship between animal welfare and industry productivity was considered from its scientific and economic perspectives. This analysis showed that there are multiple domains to animal welfare including those of basic health and functioning, affective states, and natural living, and that personal values often influence the assessment of such approaches and their respective priority. The analysis also demonstrated that under market conditions animals are valued for their productivity and their suffering is largely externalised from the market as there is little to no price incentive for farmers to provide the additional inputs required to reduce or

153 Australian Standards for the Export of Livestock (Version 2.3) 2011, s 5.5 (definition of ‘reportable level’).
154 Ibid.
avoid such suffering in the production process. The introduction of industrialised methods of animal farming in the 1950-60s greatly accentuated this suffering by increasing confinement and stocking densities, employing invasive husbandry procedures without pain relief, engaging in selective breeding programs to maximise biological production capacities, and by increasing the prevalence of long distance transportation to slaughter facilities both domestically and overseas via live export.

Overall, the analysis demonstrates the vulnerable position of animals within the industrial farming model and provides the necessary context for the assessment of the regulatory framework, and critically, the role of Departments of Agriculture in administering animal welfare legislation. But before this can take place, the social and political characteristics of the regulatory problem must be considered. It is safe to say that the changes in farming practices considered in this Chapter, and their impact on animal welfare, have not gone unnoticed by the broader Australian community. Indeed, they have occupied much of the focus of a growing social movement that is dedicated to representing the interests of animals against such forms of industrial exploitation. The values of this movement with respect to animals are diametrically opposed to those which underpin the industrial livestock model. It is therefore necessary to now consider the nature of these values including the key drivers behind the growing public concern for animal welfare.

3.1 Introduction

The impacts of industrial farming on animal welfare would not be a regulatory issue at all if it were not for the objections expressed by concerned citizens. Despite the efforts of numerous ethicists and political philosophers over the past four decades, animals are yet to be granted moral status bearing any equivalence to human beings and are yet to be fully incorporated into our liberal theories of justice.\(^1\) We need look no further than the legal classification of animals as property\(^2\) and the corresponding reality of our treatment of them (as discussed in the previous chapter) for evidence of this fact. Animals are not citizens\(^3\) nor are they legal persons,\(^4\) and accordingly, they possess no political or legal personality through which to assert their interests in their own right. Such interests find expression only through the demands of concerned citizens and legal persons. As Garner notes, ‘without the concentrated efforts of those who have perceived a need for greater legislative protection for, and a change in society’s attitude towards, animals, there would not be a set of political issues here requiring resolution.’\(^5\)

Livestock industries would be left to exploit the biological potential of their respective herds and flocks using the most economically efficient means possible without restraint.

---

4. See, *The Nonhuman Rights Project Inc on behalf of Tommy v Paterick Lavery* [2014] State of New York Supreme Court, Appellate Division, Third Judicial Department, 518336, 4 Decmber, at [6].
from animal welfare legislation. Only through sustained challenge on largely ethical grounds were such actions brought to public and political attention and subsequently subjected to government regulation. In its broader sense, the regulatory problem can be seen as another manifestation of the tension between private freedom and public control. As Martin and Shepheard explain in the context of agriculture more broadly, the issue is the degree to which owners of legal rights to (animal) property can ‘fully use these resources to satisfy their economic needs, or (alternatively) the degree to which the government acting on behalf of society as a whole, can legitimately limit this private use.’

To properly understand the nature of the regulatory problem, it is therefore necessary to consider these social and political influences. What are the drivers behind the relatively recent increase in public concern for the welfare of farmed animals? And what shape are these concerns likely to take in the future? The analysis then focuses in on the views and characteristics of the two primary stakeholders involved in the regulatory problem; conceptualised as those who are ‘economically, morally, or intellectually affected’ by government actions on farm animal welfare. According to this definition, the animal protection community and the respective livestock industries are considered the primary stakeholders concerned with the regulatory problem. This analysis will show that each of these stakeholders possess widely different conceptions of animals and their place in the world relative to human beings; it is this clash of deep-seated values that is at the heart of the regulatory problem. The way in which the regulatory framework is structured to take account of, and to balance, these respective values constitutes a key component of the critique undertaken in Part II of this thesis.

---


7 Andrea Bradley and Rod MacRae, ‘Legitimacy and Canadian Farm Animal Welfare Standards Development: The Case of the National Farm Animal Care Council’ (2011) 24 *Journal of Agricultural and Environmental Ethics* 19, 21.

8 There are of course other stakeholders in the farm animal welfare debate including the veterinary profession and consumers but their respective interests are not as directly affected as those of the animal protection community and livestock industries who acts as the primary protagonists in the farm animal welfare debate.
3.2 Social and economic drivers of evolving public attitudes to animals and implications for livestock industries

Concern for the welfare of animals is by no means a recent phenomenon. There are a number of historical anecdotes involving leading spiritual, theological and philosophical thinkers advocating kindness towards animals. In ancient historical times, Pythagoras (580-500 BCE) was known for his vegetarian and animal liberationist teachings based on the belief that animals shared transmigratory souls with humans. Such beliefs were not dissimilar to those of the Buddhist tradition (established around the time of 400 BCE) in which it is believed that the consciousness of humans can be reborn in animal form and vice versa, and that treating animals with kindness and compassion builds positive *karma*. Christian theologian Thomas Aquinas (1225-1274) counselled against the cruel treatment of animals to ‘remove a man’s mind from exercising cruelty toward other men.’ German philosopher Immanuel Kant (1724-1804) shared similar sentiments expressing that: ‘If he is not to stifle his human feelings, he must practice kindness towards animals, for he who is cruel to animals becomes hard also in his dealings with men.’ Such historical proscriptions against cruelty imply, at least to some extent, an acknowledgement of animal sentience. Why else would being cruel to animals create negative *karma* or a propensity for cruelty towards other people? Most of these thinkers accepted that animals could feel (with the prominent exception of French philosopher Rene Descarte, who in the 17th century stated that animals were nothing more than organic machines or ‘automata’). But despite the general acknowledgement of sentience, this was not the basis upon which duties to refrain from cruelty were said to be owed. Rather, such duties were based in the duties one owed to fellow human beings, particularly those requiring the avoidance of harm to others. Any duties of kindness to animals were therefore indirect in nature; they were not owed to the animal

10 Ibid, 11.
13 Bruce, above n 9, 19-20.
out of respect for its intrinsic value, but because they facilitated the realisation of direct duties to other human beings.\textsuperscript{14}

It was not until the late 18\textsuperscript{th} century that such logic was challenged. This was a period of great social reform. As Radford points out, ‘the French Revolution, the framing of the American constitution, the publication of Thomas Paine’s \textit{Rights of Man} and Mary Wollstonecraft’s \textit{A Vindication of the Rights of Woman} and the debate over slavery’ all provided fertile intellectual and political ground for considering the moral status of animals.\textsuperscript{15} In the heart of this period, English legal philosopher, and founder of utilitarianism, Jeremy Bentham, proposed an ethical case for the establishment of direct duties to animals based solely on their capacity for suffering, or in other words, their sentience:

\begin{quote}
The day may come when the rest of animal creation may acquire those rights which never could have been withheld from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may one day come to be recognized that the number of legs, the villosity of the skin, or the termination of the \textit{os sacrum} are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason, or perhaps the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day or a week or even a month old. But suppose the case were otherwise, what would it avail? The question is not, Can they \textit{reason}? nor Can they \textit{talk}? but, Can they \textit{suffer}?\textsuperscript{16}
\end{quote}

Making sentience the main criterion for moral status had the effect of reducing the relevance of species membership and of those qualities possessed only by human beings such as the capacity to comprehend and act upon abstract notions of rights and duties.

\textsuperscript{14} Ibid, 21-22. This was also the basis upon which animal welfare organisations were found to be ‘charitable’ for the purposes of taxation law: see, Peter Radan, ‘Antivivisection and Charity’ (2013) 35 \textit{Sydney Law Review} 519.

\textsuperscript{15} Mike Radford, \textit{Animal Welfare Law in Britain: Regulation and Responsibility}. Oxford University Press, 2001) 23.

However, while Bentham argued for the inclusion of animal interests within his utilitarian ethical framework, he did make an important qualification regarding the moral relevance of an animal’s life (as opposed to an animal’s interest in not suffering):

If the being eaten were all, there is very good reason why we should be suffered to eat such of them as we like to eat: we are the better for it, and they are never the worse. They have none of those long-protracted anticipations of future misery which we have. The death they suffer in our hands commonly is, and always may be, a speedier, and by that means a less painful one, than that which would await them in the inevitable course of nature.\(^\text{17}\)

So while Bentham accepted that animals were sentient and possessed morally relevant interests, these interests did not extend to an interest in continued existence. In other words, Bentham appeared to believe there was no harm in using and killing animals for food provided they were not caused pain and suffering in the process. This rationale largely laid the ethical foundation for the traditional animal welfarist approach and the development of animal welfare legislation.\(^\text{18}\)

In 1800, the first laws to protect animals were proposed in the English House of Commons,\(^\text{19}\) however, it was not until 1822 that one of them actually passed and was enacted into law (see Chapter 4 at 4.4.1 for a discussion of the historical development of animal welfare legislation). Two years later, the *Society for the Prevention of Cruelty to Animals* (SPCA) was established to assist with the implementation of the law through community education and the employment of inspectors to monitor and enforce compliance.\(^\text{20}\) The SPCA – later to be known as the RSPCA after receiving royal patronage from Queen Victoria in 1840\(^\text{21}\) – also became very active in lobbying the government for reforms and improvements to the law. This resulted in successive amendments and reviews to expand the scope of the legislative protections throughout the remainder of the 19th century.\(^\text{22}\) The first half of the 20th century appeared to be a

\(^{17}\) Ibid.

\(^{18}\) Deborah Cao, *Animal Law in Australia and New Zealand* (Lawbook Co, 2010) 44.

\(^{19}\) England, ‘Bill to Prevent Bull-Baiting’ House of Commons, 2 April 1800 (Sir W. Pulteney) 202-204, as reported in *Cobbett’s Parliamentary History of England* v.35.


\(^{21}\) Radford, above n 15, 47.

period of relative dormancy on the animal welfare front, likely associated with the demands of engaging in two world wars.

It was not until the 1960s and 70s that a new era in animal protection came into being. Two significant contributions were made during this period. First, English author, Ruth Harrison, published the book *Animal Machines* in 1964 documenting the treatment of animals in intensive confinement systems. The book generated such public concern that the British Government established the Brambell Committee to inquire into the welfare of intensively reared livestock. The inquiry led to the first detailed set of standards regulating the treatment of farm animals under the *Agriculture (Miscellaneous Provisions) Act 1968* (UK).

Harrison’s book was also significant for the effect it had on Australian ethicist and modern proponent of utilitarianism, Peter Singer. Singer accredits the book with stimulating his interest in the treatment of animals as a philosophical issue. In 1975 Singer published his seminal work, *Animal Liberation*, which reignited and expanded upon Bentham’s early utilitarian approach to animal ethics providing a forceful argument for why human beings had an obligation to extend the principle of equal consideration to the interests of animals, particularly in relation to their interest in not suffering. Perhaps of equal influence to its philosophical contribution, was the detailed empirical account of different forms of animal exploitation contained in the book. Singer provided a contemporary ethical foundation for the establishment of many new animal protection organisations, which identified with a more radical agenda relative to the traditional welfarist approach. The different streams of the animal protection community will be discussed in further detail below.

Notably, greater awareness of animal protection issues during this period largely paralleled intensifying interest in other social causes such as environmental protection and expanding civil and social rights. The synchronous nature of these developments was not coincidental. Socio-political research indicates that growth in concerns about

---

24 Garner, above n 23, 95.
25 Radford, above n 15, 169.
26 Ibid.
28 Peter Singer, above n 1.
29 See discussion in Garner, above n 5, 43-81.
the environment, civil rights, and the welfare of animals is related to the development of ‘post-material’ values following periods of increased economic prosperity and standards of living. Post-material values are found to arise when physical and economic needs of security, sustenance, and shelter, are satisfied. A post-materialist culture is marked by a tendency for people to be more socially inclusive and to begin thinking more about the interests and welfare of those who were previously considered ‘others’. The growing concern for animals has been said to be indicative of such a ‘boundary breakdown’, as animals are increasingly included within the expanded circle of ‘others’ that people deem worthy of greater consideration. A prominent study into the changing nature of human-animal relations by sociologist Adrian Franklin found that 55% of Australians believed that ‘animals should have the same moral rights as human beings’. However, these results are somewhat more optimistic than data collected by leading opinion polls. For instance, a 2012 Essential Media Communications poll found that only 30% of Australians agreed with the statement ‘Animals deserve the same rights as people to be free from harm and exploitation’, while 61% favoured the statement ‘Animals deserve some protection from harm and exploitation, but it is still appropriate to use them for the benefit of humans’. These results were largely consistent with a recent Gallup poll conducted in the United States, which found that 32% of Americans believed that ‘animals should be given the same rights as people’, while 62% said they ‘deserve some protection but can still be used for the benefit of humans’. Notably, the percentage of Americans that believed animals should have the same rights as people increased from 25% when the poll was last conducted in 2008; an increase of 7% in seven years.

32 Franklin et al. above n 30, 127-130.
33 Ibid.
37 Ibid.
This expanding sphere of moral concern is said to be having an impact on the way developed societies conceive of animals and our relationships with them. Attitudes towards animals have been shifting from a traditional, utilitarian\textsuperscript{38} approach to a more compassionate, protective and empathetic sentiment.\textsuperscript{39} Animals are being viewed less in instrumental terms as commodities to be utilised for human benefit, and more as sentient beings with intrinsic value; that is, value independent of any benefit to human beings. In other words, the notion that animals matter in their own right, and that their interests are worthy of moral consideration simply because they matter to the animals themselves, is starting to be embraced more widely and is now reflected in government policies, and several Constitutional laws around the world.\textsuperscript{40} The basic approach taken by governments is directed towards recognising the ethical significance of animal sentience. Australia’s national policy on animal welfare, the \textit{Australian Animal Welfare Strategy} (discussed in further detail in Chapter 4), is unequivocal with respect to the basis upon which our ethical duties to animals are found, stating that ‘[s]entience is the reason that welfare matters.’\textsuperscript{41} The \textit{New Zealand Animal Welfare Strategy} includes similar sentiments: ‘It matters how animals are treated – it matters to the animals and it matters to us. Animals are sentient – they can feel pain and distress – and as a humane society we have responsibilities to ensure our animals’ needs are met.’\textsuperscript{42}

With the public’s growing recognition and respect for the sentience of animals and their intrinsic value, it is likely to become increasingly difficult to rely on the \textit{purpose} for which an animal is used as a means to justify causing that animal harm beyond that which is tolerated in other contexts of animal use and interaction. There is likely to be increased demands for animals to be treated with greater consistency in recognition of the fact that sentience is sentience regardless of the context of animal use. In other words, the public is likely to increasingly question the disparity in protections afforded

\textsuperscript{38} To clarify, the term ‘utilitarian’ is used here to refer to its common meaning of valuing action by its utility, not the meaning ascribed to it in the field of animal ethics, particularly by Peter Singer, above n 1.

\textsuperscript{39} Franklin, et al. above n 30, 121-122; Mazur, et al. above n 30, 21.


to different species of animals under animal welfare legislation, and may start
demanding that the protections currently afforded to domestic animals such as cats and
dogs be applied equally to farm animals. O’Sullivan argues that this approach to animal
welfare policy will find greater cogency as it resonates with our liberal democratic
principles of equality.\textsuperscript{43}

These changing attitudes are likely to have significant implications for the way
livestock industries deal with animals in the short to medium term. Most significantly,
they may alter the nature of the duties producers owe to livestock as public expectations
continue to evolve. As Hemsworth and Coleman have observed, ‘ultimately it is an
ethical decision by the general community that will determine the acceptable standards
for farm animals.’\textsuperscript{44} Accordingly, if livestock industries wish to reduce societal conflict
they will have to increasingly work towards ensuring their production practices accord
as much as possible to consumer expectations. Consumer research indicates that there is
a widening gap between public expectations and the current treatment of animals in the
farming environment. The Franklin study revealed that 52% of Australians believe that
modern farming methods relating to the production of eggs, milk, and meat, are cruel.\textsuperscript{45}
Research from Europe indicates that industry practices have fallen behind such
expectations and that there is discordance between citizen and farmer perceptions
regarding farm animal welfare.\textsuperscript{46} Public expectations regarding acceptable states of
welfare have gone beyond simply ensuring animals are ‘healthy and productive’ and
provided with adequate food and water. As Frewer has observed, such narrow
conceptions of animal welfare ‘may result in hitherto legal, but societally unacceptable
practices becoming increasingly open to citizen scrutiny and consumer disapproval.’\textsuperscript{47}

Consumers are now more concerned about the ‘naturalness’ of production and the

\textsuperscript{43} Siobhan O’Sullivan, \textit{Animals, Equality and Democracy} (Palgrave, 2012).
\textsuperscript{44} Paul Hemsworth and Grahame Coleman, \textit{Human-Livestock Interactions: The Stockperson and the
\textsuperscript{45} Franklin, above n 34, 19.
\textsuperscript{46} Hein Te Velde, Noelle Aarts, and Cees Van Woerkum, ‘Dealing With Ambivalence: Farmers’ and
Consumers’ Perceptions of Animal Welfare in Livestock Breeding’ (2002) 15 \textit{Journal of Agricultural and
Environmental Ethics} 203-219; Filiep Vanhonacker, Wim Verbeke, Els Van Poucke, Frank
Tuytten, ‘Do Citizens and Farmers Interpret the Concept of Farm Animal Welfare Differently?
\textsuperscript{47} L Frewer, A Kole, S Van de Kroon, C de Lauwere, ‘Consumer Attitudes Towards the Development of
345, 362.
overall quality of life afforded to animals.\textsuperscript{48} They expect animals to be provided with living conditions that allow them the ability to express their natural behaviour\textsuperscript{49} and are concerned about practices that cause pain and stress.\textsuperscript{50}

The increasing salience of post-material values brought about by rising affluence and social stability following the Second World War has provided an environment in which the broader public’s perception of, and relationship to, animals has undergone significant change. A prominent feature of this change has been the increasing proportion of people who view animals and their welfare in non-instrumental terms, or at least less so than in previous generations. Phillips and Fraser also point to a demographic factor behind such change associated with increasing urbanisation and detachment from primary industries.\textsuperscript{51} This has led to intensifying interest in the welfare and rights of animals used for food and fibre, which has manifested in significant changes to the dynamics of the broader animal protection community.

\section*{3.3 The animal protection community}

The animal protection community\textsuperscript{52} in Australia is by no means a homogenous group. It consists of a number of strands usually distinguished on the basis of philosophy and strategic modus operandi. Garner has provided a thorough analysis of the characteristics of animal protection communities operating in Britain and the United States.\textsuperscript{53} The makeup of Australia’s animal protection community is much the same, which of course is not surprising given its British colonial heritage.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{49} Frewer, above n 47.
\item \textsuperscript{50} Vanhockner et al. above n 46.
\item \textsuperscript{51} Clive Phillips, \textit{The Welfare of Animals: The Silent Majority} (Springer, 2009) 53; David Fraser, \textit{Animal Welfare and the Intensification of Animal Production} (2005) United Nations Food and Agriculture Organisation 3. The effect of such demographic factors will be considered further in the review of the characteristics of the livestock industry stakeholders below.
\item \textsuperscript{52} ‘Animal protection community’ is used in this thesis to refer to all organisations dedicated to advancing the protection of animals, whether they identify as animal welfare or animal rights based, and all individuals who identify as an animal advocate and engage in animal advocacy actions on a regular basis such as letter writing, social media engagement, attending demonstrations etc, regardless of whether they are a member of a particular animal protection organisation or not.
\item \textsuperscript{53} See Garner, above n 5, 43-81.
\end{itemize}
\end{footnotesize}
The Australian colonies were beneficiaries of the international SPCA movement. The first branch was established in 1871 in the colony of Victoria, shortly followed by Tasmania (1872), New South Wales (1873), South Australia (1875), Queensland (1883) and Western Australia (1892). The SPCA branches quickly took hold establishing themselves as prominent and respected organisations within their respective communities. In 1923 their services were recognised by King George V and were bestowed the ‘Royal’ warrant. Like their British counterpart, Australia’s RSPCA organisations were strictly welfarist in their philosophical orientation. That is, they were not opposed to the use of animals by humans but believed that such use should be humane and not cause unnecessary harm. Their primary functions were the provision of front line services in the form of animal shelter, veterinary, rescue and inspectorate services. The limited historical resources on the early Australian RSPCA organisations do however point to some campaigning activities however these appear in the most part to have been quite ad hoc and reactionary in nature and were employed in response to particular issues of the time. There did not appear to be a prominent coordinated and sustained campaigning arm during the earlier years.

However, as with the British RSPCA, change started to occur in the 1970s with the introduction of more radical philosophies regarding the moral status of animals and the subsequent heightened public awareness of issues such as industrial farming. The state based RSPCA’s noted the need for a nationally coordinated presence and agreed to form RSPCA Australia in 1980. RSPCA Australia was established in the country’s capital city of Canberra with the primary objectives of providing a national presence to the RSPCA movement and promoting unity and commonality of purpose between the now eight (with the establishment of branches in the Northern Territory and Australian Capital Territory) RSPCA organisations. The federal body was provided with a small staff consisting of a Chief Executive Officer, science, policy, and administrative officers. RSPCA Australia soon developed a comprehensive suite of national policies on almost all areas of animal use and interaction and began to develop its science and

---

56 RSPCA Australia, above n 54.  
57 Ibid.  
58 RSPCA Australia, Policies, 2014.
campaigning capacities. Today, RSPCA Australia is home to a strong science, policy and communications team and coordinates national animal welfare campaigns focused on issues such as industrial forms of animal farming, live animal export, and improving the regulation of the companion animal trade so as to reduce numbers of unwanted dogs and cats and to identify and shut down intensive dog and cat breeding facilities. Importantly, RSPCA Australia does not provide front line services meaning it largely avoids the typical tensions that state branches face with respect to perceived conflicts between inspectorate law enforcement responsibilities and campaigning interests. RSPCA Australia is also responsible for providing representatives for government consultative forums in the development of animal welfare standards and policy. From a representational perspective, the RSPCA maintains an effective monopoly over the animal welfare point of view. Other animal welfare organisations such as the Animal Welfare League, Humane Society International, and World Animal Protection also engage in such government representative functions but this is usually in relation to specific welfare issues relevant to their particular areas of expertise such as companion animals, marine wildlife, and disaster management, respectively. For representation and advice on animal welfare matters generally, it is almost always a representative from the RSPCA that is chosen by government. The representative capacity of the RSPCA is even statutorily recognised in various state-based animal welfare Acts.

While the foundations of the RSPCA are still very much in the traditional animal welfare camp, the organisation has undergone considerable change since the 1980s particularly in terms of the calculation and vigour with which it now pursues policy and legislative reform. However, in addition to this there has also been a noticeable strengthening in the organisation’s position on the moral status of animals and the duties owed to them. In fact, a literal interpretation of the RSPCA’s guiding Charter (contained in its book of policies) may in many cases satisfy the demands Singer’s utilitarianism. The Charter recognises that animals have ‘an intrinsic value of their own accord’ and goes on to state that no animal should be used for the production of food or fibre ‘which

---

60 See, parliamentary debates discussing such perceived conflicts: South Australia, Parliamentary Debates, Legislative Council, 27 March 2012, 669; and Western Australia, Parliamentary Debates, Legislative Council, 24 October 2013, 5443c.
in any way may cause suffering, injury or distress.' Notably, the Charter avoids the use of qualifying terms such as ‘unnecessary’, ‘unreasonable’ or ‘unjustifiable’ in reference to suffering, injury or distress. It is only with respect to the use of animals for scientific purposes that the Charter accepts the infliction of pain where it is ‘essential for the benefit of human or animals’. In practice however, the RSPCA accepts that the realisation of such policies may be a long way off and it embraces an incremental and cooperative approach to reform often working with livestock industries to improve their practices. Like the British RSPCA’s ‘Freedom Foods’ scheme, RSPCA Australia has its own ‘Approved Farming Scheme’ which operates to accredit producers who comply with higher standards of welfare.

It is precisely this pragmatic approach and willingness to compromise that has attracted the ire of a new wave of animal protection organisations. Many of these organisations were inspired by Peter Singer’s demand for the strict application of the principle of equal consideration to animals advanced in *Animal Liberation*. Perhaps the most notable of these new entrants were the state based Animal Liberation organisations founded throughout the 1970s and the representative body, Australian Federation of Animal Societies, established in 1980 by Peter Singer himself and fellow activist Christine Townend.

The various Animal Liberation organisations adopt an animal rights-based philosophy, in that they are opposed to the very notion of using animals as a means to human ends, regardless of how humane that use may be. Despite this, some Animal Liberation organisations still refer to Peter Singer as providing their guiding philosophy, perhaps not appreciating the fact that he was not opposed to the use of animals *per se* provided that use is not inconsistent with the principle of equal consideration and that, as a utilitarian, he did not endorse the very construct of rights in general. In reflection of its hard line philosophy, Animal Liberation largely adopts an abolitionist approach to its advocacy. Consistent with other animal rights groups in Britain and the US, the

---

63 Ibid.
primary function of Animal Liberation organisations is to engage in direct action and vegan education and awareness campaigns. Their direct action often takes the form of ‘open rescues’ in which activists enter farming facilities to rescue sick and injured animals while at the same time documenting and publishing their efforts. and investigations, including through the use of covert surveillance to capture evidence of animal cruelty offences but also to document legal farming practices that cause animal suffering. Abolitionists do not generally engage in formal government processes and consultative forums as they perceive this to be tacit acceptance of the animal exploitation framework.

The Australian Federation of Animal Societies was established to provide national representation for the dozens of mainly animal rights based organisations (including some branches of Animal Liberation) that arose in the 1970s. The Federation soon grew in size and was able to employ a small team of staff. By 2005, the Federation had very much established its own identity and adopted the name Animals Australia. While Animals Australia represents a number of animal rights organisations, it is not itself prescriptive about a particular philosophical or dietary position. Its website explicitly states that ‘we are not a vegan organisation’, however, ‘we do believe we can provide the information that people need in order to make truly informed choices that are in line with their own values.’ The primary functions of Animals Australia are investigations and campaigns. The organisation has risen to national prominence in recent years for its investigations into the cruel treatment of Australian livestock within the live animal export trade, particularly to the Middle East and Indonesia.

In addition to these functions, Animals Australia is still active in a representational capacity with membership on many state and national government consultative forums and would therefore fit into the category that Gary Francione refers to as ‘new

---

68 Ibid.
72 ‘Nationally, Animals Australia also represents dozens of member societies through government committees, reviews and processes’: Animals Australia, above n 70.
welfarism.’ O’Sullivan and colleagues provide a useful description of the new welfarist approach:

New welfarists are likely to oppose most, if not all, commercial animal uses such as breeding animals for meat and eggs or using them in scientific research. However, despite their opposition to the dominant moral paradigm that upholds the legitimacy of causing animals to suffer in the pursuit of human pleasure, new welfarist organisations are nonetheless commonly willing to work through the mainstream political process, which in the case of liberal democracies implies incremental change on the way to the achievement of more significant goals.

However, it would seem that the label ‘new welfarist’ may be a little misleading as the term ‘welfare’ does not just relate to a strategic position but also a philosophical one. Many of the leading people within such ‘new welfare’ organisation actually subscribe to a rights based philosophy. They engage with government and with incremental reform, even if it takes the form of welfare improvements, as they see such efforts as a productive step in the right(s) direction, not because they subscribe to a welfarist philosophical view. Such organisations should therefore be distinguished from their more abolitionist cousins by strategy not philosophy (unless of course it is clear that the particular organisation accepts the premise of using animals as a means to human ends). Accordingly, different streams of the animal protection community are probably better described via Jasper and Nelkin’s groupings of ‘welfarist’, ‘pragmatist’ and ‘fundamentalist’.

What is undeniable is that despite their differences and occasional infighting, the different streams of the animal protection community serve to complement one another. This dynamic was observed by US journalist Michael Specter when he was researching a feature story on PETA founder, Ingrid Newkirk:

It has been argued many times that in any social movement there has to be somebody radical enough to alienate the mainstream–and to permit more

moderate influences to prevail. For every Malcolm X there is a Martin Luther King, Jr., and for every Andrea Dworkin there is a Gloria Steinem. Newkirk and PETA provide a similar dynamic for groups like the Humane Society of the United States, which is the biggest animal-welfare organization in the country and far more moderate than PETA.\textsuperscript{76}

This is known as the ‘radical flank effect’ in social movement literature – a process where ‘the extreme actions of radicals can have the effect of legitimating and strengthening the bargaining position of the moderates.’\textsuperscript{77} It is arguable that a similar relationship exists in Australia between Animal Liberation and Animals Australia on the one hand and the RSPCA on the other. The former’s demands for the complete abolition of certain animal use industries serves to move the animal protection goal posts making the more moderate demands of the RSPCA look attractive. Without this context, it could be the RSPCA’s welfare-based position that is considered extreme by government and livestock industries.

Without doubt the Australian animal protection community has incurred a massive resurgence of interest and engagement since the 1970s. It has matured into an active and formidable social movement that commands an ever increasing following of the broader Australian community. As the Secretary of the Commonwealth Department of Agriculture stated when addressing a conference on animal law:

[The Agriculture Minister] receives thousands of letters a year from the public calling for government action on welfare, for the Australian Government to step in where it is perceived that state or local levels have failed. I know this because we answer all those letters. I also expect that state and territory ministers receive similar correspondence. It’s really very clear in this issue – this is not just an animal welfare lobby issue. It’s not just a bunch of passionate people exciting the social media. It’s clear that the community cares.\textsuperscript{78}

Whether that community believes in animal rights or simply the improvement of animal welfare, it is clear that the current state of animal treatment, particularly within Australia’s livestock industries, will be a major focus of their attention in the years to come.

### 3.4 The livestock industries

The other major stakeholder in the debate over the welfare of farm animals is of course Australia’s various livestock industries. The interests of these industries are represented by a variety of industry-specific and statutory marketing bodies in the form of rural research and development corporations. Table 1 provides an overview of the main representative bodies for the cattle, sheep, chicken, and pig industries.

<table>
<thead>
<tr>
<th>Industry specific</th>
<th>Statutory marketing</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cattle Council of Australia</td>
<td>Meat and Livestock Australia</td>
</tr>
<tr>
<td>Australian Meat Chicken Federation</td>
<td>Livecorp</td>
</tr>
<tr>
<td>Australian Chicken Growers Council</td>
<td>Egg Corporation Limited</td>
</tr>
<tr>
<td>Wool Producers Australia</td>
<td>Australian Pork Limited</td>
</tr>
<tr>
<td>Sheep Meat Council of Australia</td>
<td>Dairy Australia</td>
</tr>
<tr>
<td>Australian Dairy Farmers</td>
<td>Australian Wool Innovation Limited</td>
</tr>
<tr>
<td>Australian Livestock Exporters’ Council</td>
<td></td>
</tr>
</tbody>
</table>

**Table 1:** Representative bodies for Australian cattle, sheep, chicken, and pig industries

However, in addition to these bodies, livestock industries also enjoy the support of the broader farming and agricultural communities, and by extension, political parties.

---

established to represent their interests such as the National Party. State and national farmers associations such as the National Farmers Federation and its various state counterparts are among the livestock industries’ most powerful advocates. This is because despite the declining importance of agriculture to Australia’s Gross Domestic Product over the past several decades, the farming community in general still maintains strong political influence.

Public policy professor, Linda Botterill attributes this to a ‘residual agrarianism in Australian culture…which dates back centuries, and which attributes to farmers certain virtues and idealised characteristics that generally place them beyond reproach.’ Agrarianism, or ‘country-mindedness’ as it has been labelled in the Australian context, has been said to maintain two key features. First, that it is inherently worthwhile and wholesome, and contributes to the moral development of society. This perception can be traced back to the writings of Thomas Jefferson who was known for his reverence of the agrarian way of life: ‘Those who labour in the earth are the chosen people of God, if ever he had a chosen people’. John Sturt Mill also maintained high regard for agrarian pursuits stating that: ‘no other existing state of agricultural economy has so beneficial effect on the industry, the intelligence, the frugality, and prudence of the population…no existing state, therefore is on the whole so favourable both to their moral and physical welfare.’ The second key feature of the agrarian culture is the


84 Linda Botterill, ‘The Role of Agrarian Sentiment in Australian Rural Policy’ in Francesca Merlan and David Raftery (eds), Tracking Rural Change: Community, Policy and Technology in Australia, New Zealand and Europe (ANU E Press, 2009) 59, 60.


belief that city life is morally inferior and artificial. As Don Aitkin explains, country-mindedness is premised upon the following core beliefs:

i. Australia depends on its primary producers for its high standards of living, for only those who produce a physical good add to a country’s wealth.

ii. Therefore all Australians, from city and country alike, should in their own interest support policies aimed at improving the position of primary industries.

iii. Farming and grazing, and rural pursuits generally, are virtuous, ennobling and cooperative; they bring out the best in people.

iv. In contrast, city life is competitive and nasty, as well as parasitical.

v. The characteristic Australian is a countryman, and the core elements of the national character come from the struggles of country people to tame their environment and make it productive. City people are much the same the world over.

The strong ties to the land and physical labour echo the sentiments of English philosopher John Locke, particularly his conception of the relationship between labour and private property. As Williams and Martin explain, the notion of absolute private property rights is a prominent characteristic of farming values:

In the tradition of the philosopher Locke, property rights to the natural world and freedom to exploit the natural world were intertwined. In the mind of many farmers, and farming-linked political organisations, the dominant belief remains that with ownership comes a largely unfettered freedom to make full productive use of the resource, with few direct controls over the way in which the farm is managed.

---

88 Botterill, above n 84, 61.
89 Aitkin, above n 85, 34-41.
90 See, John Locke, Two Treatises on Government, (Awnsham Churchill, 1690) Chp V s 27: ‘Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.’
91 Martin and Shepheard, above n 6, V.
The sanctity of individual private property rights leads many farmers and their representative bodies to intuitively reject any proposals for laws or standards that may be seen to intrude into on-farm management practices. As will be discussed in Chapter 8, this political predisposition may also have implications for farmers’ attitudes to compliance with animal welfare laws.

Botterill argues that the National Party has been very effective in drawing on the imagery of agrarianism to pursue the interests of farming and rural communities often resulting in ‘policy influence out of all proportion to its electoral performance.’ One marked feature of such advocacy is to discredit the views of those ‘who do not have direct ties to the bush’ with the objective of excluding them from the policy debate on rural issues. This has been a prominent tactic on behalf of livestock industry representatives in dealing with criticism of their animal welfare practices. Often the imagery of the ‘urban/rural divide’ will be evoked to frame such criticism as simply a product of ‘city folk ignorance.’ Such accusations are often followed by offers from the particular industry for the critic to visit the relevant facility, or observe the relevant practice, to be ‘educated’.

A prominent example of this occurred in 2014 when independent federal MP, and vocal critic of the live animal export trade, Andrew Wilkie, was invited by the Australian Livestock Exporters’ Council to participate in a live export voyage ‘to help him understand the trade’. However, the offer was withdrawn three months later after Wilkie had accepted it and tried to progress plans for the voyage to occur. In withdrawing the offer, the Australian Livestock Exporters’ Council stated that ‘we need to build a program that will provide more trust between [Wilkie] and the live export industry’ before the trip could go ahead. More recently, the Western Australian Farmers Association offered to pay for musician, Jona Weinhofen, to attend ‘shearing
school’ after he appeared in a PETA campaign advertisement highlighting animal welfare concerns within the industry.\(^{97}\)

The tendency to exclude the views of those outside of the agricultural community is also reflected in formal government policy and standard-setting processes on farm animal welfare developed by departments of agriculture in conjunction with livestock industries. This is consistent with public policy research, which indicates that the agricultural policy community is a classic example of a ‘closed policy community.’\(^{98}\)

This will be discussed further in Chapters 6 and 7.

So how do those in the agricultural community perceive of animals and their relationship to human beings? The sociological research that has been conducted in this area shows that people who come from rural communities and those with primary production backgrounds generally tend to view animals in more traditional instrumental and utilitarian terms relative to the rest of the population. Kellert’s research on changing attitudes to animals in the United States from 1900 to 1985 found that despite a general decline in utilitarian attitudes towards animals (defined as ‘primary interest in the practical value of animals or in the subordination of animals for the practical benefits of people’), rural areas nevertheless maintained a ‘strong and stable utilitarian and emotionally detached and less anthropomorphic and protectionist attitude towards animals.’\(^{99}\)

Research by Lutz and Lutz also found that the higher a state’s percentage of agricultural employment, the lower its ranking on an ‘animal rights index’.\(^{100}\) Australian sociological research is broadly consistent with this finding. For instance, Parbery and Wilkinson have found that traditional values towards animals, which focus on production and productivity, as opposed to emerging values, which focus on caring for animals and the environment, are more prevalent in rural areas.\(^{101}\) Likewise, research by Signal and Taylor indicate that people employed in primary industries tend to score

---


101 Parbery and Wilkinson, above n 94, 7.
lower on the ‘Attitude to Animals Scale’ than those in any other occupational grouping.\textsuperscript{102}

This sociological research may also provide some context to Garner’s political research, which shows low support for welfare initiatives among representatives of rural constituencies within Britain and the United States.\textsuperscript{103} While Garner’s research was conducted in the 1990s, more recent political research supports his findings. In particular, Tauber’s quantitative analysis of 216 American state legislators’ votes on farm animal welfare bills found that legislators with a ‘connection with agriculture’ either through personal experience or occupational interest, or through the importance of the agriculture industry to the legislator’s district, were less likely to vote in favour of the bills.\textsuperscript{104}

This instrumental perception of animals and their place in the world relative to humans has implications for how animal welfare is conceived and how it relates to industry productivity. As discussed in the previous chapter, even scientists are susceptible to allowing their values to influence their conceptions of animal welfare and the subsequent priority attributed to the different domains of welfare. It should not therefore come as a surprise to learn that livestock industries will tend to prioritise the ‘basic health and functioning’ conception of animal welfare over those of ‘affective states’ and ‘natural living’.\textsuperscript{105} As Serpell notes, ‘Without exception, farmers placed considerable emphasis on the health and productivity of their charges, as if freedom from disease, rapid growth, and high reproductive performance were entirely synonymous with good welfare.’\textsuperscript{106} This was supported by qualitative research conducted by Bracke and colleagues who found that ‘producers have a production-related view on [animal] welfare, which presupposes that animals with high production rates cannot have poor

\textsuperscript{102} Tania Signal and Nicola Taylor, ‘Attitudes to Animals: Demographics Within a Community Sample (2006) 14:2 Society and Animals 147, 152.
\textsuperscript{103} Garner, above n 23, 106.
\textsuperscript{104} Steven Tauber, ‘State Legislators Roll-Call Votes on Farm Animal Protection Bills’ (2013) 21 Society and Animals 501.
Of course, when this conception of animal welfare is adopted, there is no conflict with productivity; rather, animal welfare and productivity conveniently go ‘hand-in-hand’.  

This assertion is usually portrayed through two key claims. The first claim is that productivity is an indicator of good animal welfare. This is often expressed as follows: ‘our animals are producing so therefore they must be happy’. This is ultimately a question of science. The second claim is that producers have sufficient economic incentives to provide for good states of welfare. This claim is often expressed in the following form: ‘it’s in our commercial interests to look after our animals well.’ This claim is ultimately a question of economics. When presented together, the claims form a logic as depicted in Figure 17 below.

---


110 See for example, Evidence to Senate Standing Committee on Rural and Regional Affairs and Transport, Parliament of Australia, Canberra, 15 May 2015, 44 (Chris Groves, National Farmers’ Federation): ‘A happy, healthy animal equals a productive animal.’

111 See for example, New South Wales, Parliamentary Debates, Legislative Council, 12 September 2012, (Jai Rowell), commenting on the Prevention of Cruelty to Animals Amendment Bill 2012: ‘Animals that are mistreated are not as productive as those that are not and they reproduce much less. In simple terms, unhealthy and unhappy animals produce poor-quality meat and dairy products.’

112 Lusk and Norwood, above n 44, 464. This is also broadly support by social research conducted by TNS Social Research, Attitudes Towards Animal Welfare: A Research Report (2006) 21-25.
The argument proceeds along the following lines: producer provides good standards of animal welfare, good animal welfare contributes to better productivity in terms of the animal’s output (body mass, milk, eggs etc), and better productivity results in higher returns for the producer. The argument is simple and logical, and feeds into the romantic agrarian imagery of the farmer as a carer and steward of animals. This may perhaps explain its widespread appeal, permeating through public and political debates about farm animal welfare matters. However, when the relevant scientific and economic literature is considered, as considered in the previous chapter, it becomes clear that this relationship is not so straightforward and that the industry claims are based on a very narrow and outdated conception of animal welfare. The traditional notion that animal welfare and productivity are one in the same no longer stands to

---

reason when contemporary science and its sophisticated methods of assessing welfare are applied.

Livestock industries enjoy significant political support through an assortment of representative bodies, statutory marketing companies, and political parties. They are effective at employing political tactics which draw on culturally revered notions of agrarianism and serve to discredit and ostracise critics of their practices. Animals, particularly livestock, are viewed in largely instrumental/utilitarian terms and their welfare is seen to equate largely to physical health and productivity. The values underpinning these conceptions of animals and their welfare are diametrically opposed by those underpinning the intrinsic valuation of animals maintained by the animal protection community thus giving rise to the clash of values at the centre of the regulatory problem.

3.5 Conclusion

The impacts of industrial farming methods on the welfare of animals is only a regulatory problem because of the political demands expressed by citizens to mitigate and prevent such impacts. This Chapter has explored the key drivers behind the heightened public concern for the welfare of farmed animals, particularly since the 1970s. The influence of post-material values brought about by increasing levels of economic prosperity and social stability following the Second World War has served to change the public’s conception of animals and their relationship to human beings. Traditional sentiments of utility and instrumentality are giving way to those of compassion, protection and empathy. These changes, together with the empirical and philosophical contributions of Harrison and Singer, led to the birth of the modern-day animal protection movement in the 1970s. A movement distinguished from the traditional animal welfarist approach by its more radical philosophies and forceful modes of advocacy. The animal protection community is now a prominent political force with a large community following and is represented in government consultative forums primarily through the RSPCA and Animals Australia.

The other major stakeholder considered in this Chapter was of course the livestock industries, represented through various industry-specific, statutory marketing, general farmer, and political party organisations. These industries wield significant political influence due to the residual prominence of agrarian sentient in Australian culture and
savvy political tactics which serve to deflect external scrutiny. The closed nature of this policy community may serve to explain, at least in part, why those living in rural areas or employed in primary industries have largely maintained the traditional instrumental view of animals while the rest of the community appears to be moving more towards an ethic of care and compassion.

This has given rise to the clash of values we see played out in the farm animal welfare debate, and herein lies the challenge for government policy makers and legislators – how to balance the respective interests premised upon these competing values. As Botterill notes, ‘almost every policy decision involves a compromise between differing objectives, many of which are anchored in particular values.’\textsuperscript{114} Stripped to its bare essentials, this is really a classic case of economic values versus social values, not dissimilar to the contest fought out in other public policy arenas such as workers’ rights and environmental protection where private freedoms come up against public control. The extent to which the current animal welfare regulatory framework – including its governance, administration and enforcement – is structured to take account of and to balance these competing values will be the main subject of inquiry in Part II of this thesis.

\textsuperscript{114} Botterill, above n 89, 59.
Chapter 4: The Current Regulatory Framework

4.1 Introduction

Having explored the nature of the regulatory problem, this chapter considers what regulatory actions the state and Commonwealth governments have already taken to address the growing public discontent with the animal welfare impacts of industrialised systems of livestock production. The current legislative framework for farm animal welfare is reviewed including the hierarchy of legal and policy-based instruments starting with the Australian Constitution and Australian Animal Welfare Strategy. The examination will then move to the state level with a brief history of the development of the various Animal Welfare Acts and an analysis of their key elements including the prohibition on cruelty and the imposition of positive duties of care. The impact of wide-ranging defences and exemptions for acts done in accordance with subordinate legislative instruments in the form of industry-based Codes of Practice and Standards and Guidelines will then be considered. Finally, the Commonwealth legislative regime for regulating the export of live animals will be reviewed to determine whether the national approach suffers from the same deficiencies as those found within the state regimes.

Reviewing these varied legislative inputs is intended to provide an appreciation of the regulatory space for farm animal welfare in Australia. This is critical for the diagnosis of regulatory failures and the effective design of necessary reforms considered in Part II of this thesis. While this chapter is intended to be primarily descriptive in nature, it nevertheless engages in some critical analysis. What the analysis shows is that the current animal welfare legislative model suffers from internal inconsistencies, both in terms of ethical principle and legal standard. Through the use of wide-ranging exemptions for particular forms of animal use (particularly those related to livestock production), vastly different legal standards have been enacted for the treatment of equally sentient animals. Far from addressing the regulatory problem discussed in
Chapters 2 and 3, the current legislative approach to animal welfare appears to actively promote it.

4.2 The Australian Constitution

The Australian Constitution sets out the respective legislative powers of the Commonwealth, and State and Territory governments. Section 51 of the Australian Constitution sets out an expressed list of subjects over which the Commonwealth has legislative authority while s.107 provides the States and Territories with the power to legislate with respect to all matters not expressly covered.1

Despite the existence of animal protection laws in each of the Australian colonies by the 1860s,2 the drafters of the Australian Constitution did not expressly consider the issue of animal welfare. Farm animals were a topic of some debate at the Australasian Federation Conferences but generally only in the context of disease control and interstate trade.3 It is therefore unsurprising that animal welfare is not mentioned in the text of the Australian Constitution, and consequently, regulatory responsibility for animal welfare is vested primarily within the jurisdiction of the States. The Commonwealth is however authorised to legislate in relation to matters that are ‘incidental’ to its expressed powers.4 Under the ‘trade and commerce’5 and ‘external affairs’6 powers, the Commonwealth has taken on regulatory responsibility for the welfare of farm animals subject to international trade.7 This includes both the conduct of exporting animals live8 and the processing of animals domestically for chilled and frozen meat exports.9 This area of responsibility holds great significance for animal

---

1 Refer to as the ‘residual powers’ doctrine.
4 Australian Constitution, s 51(xxxix).
5 Australian Constitution, s 51(i).
6 Australian Constitution, s 51(xxix).
7 See for instance, the Australian Standards for the Export of Livestock, which are incorporated as conditions on an exporter’s export permit under the Export Control (Animals) Order 2004 (Cth) s 2.41(2)(a).
welfare purposes as Australia is the largest exporter of live animals in the world,\textsuperscript{10} exporting 2.58 million cattle and sheep in the 2012/13 Financial Year.\textsuperscript{11} All other areas of farm animal welfare rest squarely with the States and Territories and this is unlikely to change in the foreseeable future.

There are limited circumstances under which the Commonwealth may derive additional constitutional authority to expand its jurisdiction in farm animal welfare. First, the Commonwealth Government could enter into a relevant international treaty or convention whereby the external affairs power could be relied upon to support a federal law giving effect to the agreement.\textsuperscript{12} While an international declaration on animal welfare is close to being proposed within the UN General Assembly, the instrument is only intended to provide broad principled positions on animal welfare and will not be binding on signatory nations.\textsuperscript{13} Non-binding declarations of this sort may still provide the Commonwealth with a basis upon which to rely on the external affairs power,\textsuperscript{14} however this will be subject to a finding that the subject matter of animal welfare affects or is likely to affect Australia’s relations with other countries.\textsuperscript{15} Second, the States could refer their residual power to legislate on farm animal welfare to the Commonwealth.\textsuperscript{16} However, this is very unlikely to occur. While the State and Federal Governments have committed to a cooperative approach to farm animal welfare regulation with the objective of achieving national consistency in animal welfare legislation,\textsuperscript{17} the States are keen to maintain their residual power to ensure they have the


\textsuperscript{14} \textit{Commonwealth v Tasmania} (1983) 158 CLR 1 at 131.

\textsuperscript{15} \textit{Commonwealth v Tasmania} (1983) 158 CLR 1 at 220.

\textsuperscript{16} Under the referral power, Australian Constitution, s 51 (xxxvii). Prominent examples of State referrals include the regulation of incorporating a corporation (see the \textit{Corporations Act 2001} (Cth)) and consumer credit (see the \textit{National Consumer Credit Protection Act 2009} (Cth)).

freedom to enact their own standards in the event that nationally developed standards adversely impact local livestock industries due to distinguishing features associated with geographic, environmental, political, market or other factors. Finally, some commentators have argued that the Commonwealth could rely on an expansive interpretation of the ‘corporation’s power’ to enact welfare standards applying to corporate entities that own and use farm animals. Upon this view, the corporations power is not limited to the corporate entity itself but applies to any activities carried out by that entity. However, this is also unlikely as the Commonwealth has given no indication that it intends to expand its regulatory reach in this regard. In fact, recent moves on behalf of the current Abbott Coalition Government indicate a significant scaling back of the Commonwealth’s role in animal welfare.

4.3 Australian Animal Welfare Strategy

The primary contribution of the Commonwealth Government to the regulation of animal welfare has been its coordination of the development and implementation of the Australian Animal Welfare Strategy (AAWS). The AAWS was first developed in 2004 (with revisions in 2008 and 2010) in conjunction with State and Territory governments and key stakeholders to enunciate Australia’s national policy on animal welfare and to propose a strategy for achieving a number of related objectives. As a policy document, the AAWS has no legal status but it does constitute a cornerstone instrument of Australia’s cooperative federalist approach to animal welfare policy and regulation.

For instance, in 2013 the Tasmanian Government proposed to restrict the time a sow could be kept in an individual stall to a period significantly below that allowed under the nationally endorsed Model Code of Practice for the Welfare of Animals: Pigs. Factors which influenced this move included Tasmania’s moderate climate, which is more suited to free-range production systems for pigs due to reduced risk of sun burn, the strong presence of Greens members within the Tasmanian Parliament with a focus on improving animal welfare standards, the relatively small size of the Tasmanian pig industry, and the importance of animal welfare to ‘Brand Tasmania’ and its ‘clean green’ image. Interview with animal welfare regulator, Tasmanian Government, 16 September 2013.

Australian Constitution, s 51 (xx).


See, Commonwealth v Tasmania (1983) 158 CLR 1 supporting reliance on the corporations power for a Commonwealth law prohibiting a corporation from constructing a dam. This view has also been relied upon to support the Commonwealth’s expansion into the field of industrial relations: see, New South Wales v Commonwealth (2006) 229 CLR 1.

See discussion at 4.3.5 below.

4.3.1 Ethical underpinnings

A significant feature of the AAWS is its confirmation of the ethical foundations upon which the welfare of animals is deemed to be important by the Australian Government and worthy of public concern. Consistent with the utilitarian approach to animal ethics (briefly explored in Chapter 3 at 3.3), the AAWS recognises the sentience of animals and expressly states that this quality ‘is the reason that [animal] welfare matters.’\textsuperscript{24} However, the current version of the AAWS omits an important related statement that was present in previous versions of the document – that ‘all animals have intrinsic value.’\textsuperscript{25} This statement provided further clarity regarding the nature of the ethical duties that are owed to animals as a result of their sentience. Acknowledging that animals have intrinsic value suggests that animals have moral worth of their own accord and consequently any duties owed to them are of a direct kind. In other words, the welfare of animals is important and human beings have a duty to respect and protect their welfare simply because it matters to the animals themselves, not because of some other reason that benefits human beings. Removing the recognition of the intrinsic value of animals leaves doubt as to why their sentience matters and to whom it matters. The duties owed to animals as proposed by the current version of the AAWS are open to be interpreted as simply indirect duties, as advanced by Immanuel Kant,\textsuperscript{26} whereby animal welfare is valued, not for its own sake, but for its instrumental worth to human beings. Upon this view, animal welfare is considered important because of its contribution to human interests such as livestock industry productivity, a more virtuous civil society, community and consumer trust in government and industry, or Australia’s international reputation and trade relations. Indications of this approach are found in the opening paragraph of the current AAWS:

 Animals are socially, culturally and economically important for Australia. They are core to our national identity, feature on our currency and are widely adopted as logos for our sporting teams. They provide us with companionship, recreation, entertainment, assistance, health and ecological services, and food and fibre. Animal and related industries generate many billions of dollars of

\textsuperscript{24} AAWS, above n 16, 6.
\textsuperscript{25} See previous AAWS version, Australian Government, \textit{Australian Animal Welfare Strategy} (2008) 18. The Department of Agriculture has not provided a reason for the omission in the revised version of the Strategy.
\textsuperscript{26} See discussion in Chapter 3 at 3.2.
economic activity and tens of thousands of jobs across rural, regional and urban Australia. The welfare of animals and the welfare of humans are closely linked.\textsuperscript{27} 

Here, the instrumental valuation of animals is clearly evident. While looking at it from a pragmatic point of view, one may ask what the harm is in valuing animals in this way if they are to nevertheless receive certain protections as a result. Indeed, some have argued that in this era of growing global food demands and intensifying strain on the natural environment, taking an instrumental approach to animal welfare is not only strategically expedient but a practical and political imperative.\textsuperscript{28} Marian Dawkins believes that:

\begin{quote}
the strongest arguments for animal welfare will come not from pushing the case for animal consciousness beyond what the current evidence will support, but by linking the welfare of animals with that of humans. Self-interest is a powerful driver and it will be the most powerful ally that animal welfare can have.\textsuperscript{29}
\end{quote}

However, this approach to promoting animal welfare appears to underappreciate the extent to which human interests conflict with animal welfare. Indeed, it is human self-interest that is the cause of the vast majority of animal suffering in the world. In the limited cases where human self-interest and animal welfare do coincide, the interests of the animals in these circumstances are wholly dependent upon ongoing alignment with the human interests. They are therefore completely vulnerable to the vagaries of human interests and convenience. This approach provides no stable principled footing upon which the interests of animals can be protected. As proceeding chapters of this thesis will demonstrate, the instrumental valuation of animals permeates throughout Australia’s current approach to farm animal welfare policy and regulation resulting in significant compromises to the protections afforded to farm animals when those protections conflict with commercial interests.

\section*{4.3.2 Goals and objectives}

The AAWS contains four key goals with 12 accompanying objectives. These are outlined in Table 2 below:

\begin{table}[h]
\centering
\begin{tabular}{|l|l|}
\hline
\textbf{Goal} & \textbf{Objectives} \\
\hline
\textbf{Goal 1} & \textbf{Objective 1} \\
\textbf{Goal 2} & \textbf{Objective 2} \\
\textbf{Goal 3} & \textbf{Objective 3} \\
\textbf{Goal 4} & \textbf{Objective 4} \\
\hline
\end{tabular}
\caption{AAWS Goals and Objectives}
\end{table}

\textsuperscript{27} AAWS, above n 16, 6.
\textsuperscript{29} Ibid.
AAWS goals

<table>
<thead>
<tr>
<th>Animals</th>
<th>National systems</th>
<th>People</th>
<th>International</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The welfare needs of animals are understood and met.</td>
<td>2. National systems deliver consistent animal welfare outcomes and give priority to ongoing improvements.</td>
<td>3. People make ethical decisions regarding animal welfare, supported by knowledge and skills.</td>
<td>4. Australia is actively engaged in international partnerships and developments to improve animal welfare.</td>
</tr>
</tbody>
</table>

Objectives

<table>
<thead>
<tr>
<th>1. Monitor trends.</th>
<th>4. Understand drivers, impediments and opportunities.</th>
<th>7. Engage stakeholders.</th>
<th>10. Articulate Australia’s perspective.</th>
</tr>
</thead>
</table>

Table 2: AAWS goals and objectives

Further detail on what each goal and objective entails is outlined in the AAWS. The governance and implementation of the AAWS are all orientated around these goals.

4.3.3 Governance and implementation

Implementation of the Strategy is overseen by a national AAWS Advisory Committee, which consists of representatives from key stakeholders relating to animal welfare, livestock industries, and government. Secretarial support is provided by the Commonwealth Department of Agriculture. In addition to the Advisory Committee, six animal sector working groups made up of experts and stakeholder representatives were established to provide advice on, and to coordinate activities with respect to, specific areas of animal use. The animal sector groups include those concerned with:

- Animals in research and teaching;
- Native and introduced wildlife;

---

30 AAWS, above n 16.
31 See AAWS above n 16, Attachment 4.
• Animals used for work, recreation, entertainment or display;

• Aquatic animals

• Livestock and production animals;

• Pets and companion animals.

Three cross-sector working groups were also established to facilitate the implementation of AAWS objectives and the projects of the animal sector working groups. These working groups include those concerned with:

• Communications

• Education and training; and

• Research and development.

Funding for the AAWS was provided by the Commonwealth Department of Agriculture to the value of approximately $1 million per annum. This funding was then generally matched by contributions to various AAWS projects and activities from animal use industries, universities, animal welfare organisations, and jurisdictional governments. However, the Commonwealth Government has recently withdrawn its funding support for the AAWS (discussed further at 4.3.5 below).

4.3.4 The 2009 Gemmell Review

In 2008 the Commonwealth Department of Agriculture commissioned a review of the AAWS to assess its effectiveness over the previous three years of its existence and to identify any areas for improving its operation (the Gemmell Review). Interviews were conducted with a range of stakeholders involved in the administration and implementation of the AAWS to understand their experiences and to identify areas of concern. The Gemmell Review was completed in 2009 and its subsequent report was largely positive of the achievements of the AAWS. The primary strengths identified within the report included its contribution to a deliberative democratic approach to the

33 AAWS, above n 16, 31.
34 AAWS, above n 16, 31.
development of animal welfare policy.\textsuperscript{36} The Review remarked on the success of the AAWS framework in providing an inclusive process to engage diverse stakeholders in constructive debate about controversial animal welfare issues.\textsuperscript{37} It noted that much goodwill and commitment to the objectives of the AAWS had been fostered among otherwise divergent groups and individuals.\textsuperscript{38}

This may be seen as one of the most important functions of the AAWS as deliberative democratic engagement is of critical importance to hotly contested public policy issues such as animal welfare, which often evoke strong passions and ideals among stakeholders. Effective deliberation improves understanding between competing interests and worldviews and can reduce the potential for stakeholders to withdraw from the process to engage in more disruptive forms of advocacy.\textsuperscript{39} As D’Arcy notes, confrontational and adversarial methods of advocacy (employed in place of more communicative and dialogical approaches) on animal protection matters range ‘along a continuum from such legally permitted and even “mainstream” practices as organizing consumer boycotts to more controversial measures like sabotage, economic disruption and even campaigns of personal harassment and intimidation.’\textsuperscript{40} Deliberative processes such as the AAWS may go some way to reducing the prevalence of such activities.

Another identified achievement of the AAWS was its promotion of Australia’s international reputation on animal welfare.\textsuperscript{41} The Review reported that many stakeholders believed the AAWS had ‘made Australia a world leader and placed it on the map of nations making active efforts to improve animal welfare’ allowing the Government to provide leadership to other countries and regions particularly in Asia and the Middle East.\textsuperscript{42}

The value of the AAWS and extent of its achievements have, however, been questioned by some stakeholders. A common critique of high-level deliberative processes is that

\textsuperscript{36} Gemmell Review, above n 34, 18.
\textsuperscript{37} Ibid.
\textsuperscript{38} Ibid, 3.
\textsuperscript{41} Gemmell Review, above n 34, 18.
\textsuperscript{42} Ibid, 11.
they can often devolve into a ‘talkfest’ that fails to effect any real practical change.\textsuperscript{43}

While the Gemmell Review was largely positive in its assessment of the AAWS, it did note some weaknesses which may reflect such a critique. First, it found that a disproportionate amount of the funding available to the AAWS, and a significant proportion of the available time and resources of Department of Agriculture staff, was spent on facilitating the meetings of the Advisory Committee and Animal Sector Working Groups ‘at the expense of other projects that might assist achieving AAWS objectives.’\textsuperscript{44} Additionally, it noted that some stakeholders expressed the view that AAWS was failing to address key animal protection issues by ‘not challenging the status quo’ regarding certain controversial animal use activities.\textsuperscript{45} The Review advised that this was:

associated with a concern that the process was weighted in favour of industry
and that it was inappropriate to have an industry department responsible for
animal welfare (as it will tend to favour the views of the industry). An
independent government body was preferred.\textsuperscript{46}

Compounding such concerns was the fact that there were no means of objectively assessing the performance of the AAWS in achieving its desired outcomes. The Review described this as a ‘major weakness’ and noted that ‘no effective progress is discernible in the development of national statistics, benchmarks or performance indicators on animal welfare’ and ‘this makes any review of performance incomplete with fundamental measures of success (quantifiable improvements in animal welfare) unavailable.’\textsuperscript{47} To address this weakness, the Review recommended the development of a ‘periodic public report on the state of animal welfare.’\textsuperscript{48} In response, the Department of Agriculture commissioned a scoping study on the development of a ‘State of the National Report’ on animal welfare\textsuperscript{49} (the Scoping Study). The Scoping Study explored how such a report could be developed reviewing a number of equivalent reports

\textsuperscript{43} Graeme Gibson, ‘Beyond Fear and Loathing: Local Politics at Work’ (Paper presented at the Local Community Services Association Annual Conference, August 2013) 11.

\textsuperscript{44} An estimated $800,000 had been spent on supporting meetings with a further $330,000 spent on national workshops and summits: Gemmell Review, above n 34, 19.

\textsuperscript{45} Ibid, 17.

\textsuperscript{46} Ibid.

\textsuperscript{47} Ibid, 18.

\textsuperscript{48} Ibid.

produced in other countries and on different topics such as environmental protection. It also assessed the types of performance indicators that would be used to measure animal welfare in the different animal sectors. The Animal Sector Working Groups were tasked with developing performance indicators for their respective sectors. The Livestock and Production Animal Working Group submitted the following performance indicators to measure developments in the welfare of farm animals:

- Review research and development programs and measure increase in this area;
- Gap analysis of animal welfare research and development;
- Decrease in number of prosecutions for animal welfare breaches;
- Greater uptake of third party audited industry quality assurance programs that have an animal welfare component;
- Less incidence of big animal welfare issues (for example, mistreatment of Australian cattle in Indonesia);
- An increase in the number of codes of practice converted to standards and guidelines;
- An increase in the number of animal welfare education programs and formal animal welfare tertiary course offered;
- Continuing participation of a wide range of community stakeholders in the AAWS;
- Improved opportunity for AAWS working groups to meet on a more regular basis;
- Increased participation by Australian animal welfare people in international animal welfare conferences;
- Increase in collaboration with international animal welfare agencies;
- Increase in twinning programs [partnerships between different institutions i.e. universities, government, industry etc].

It is telling – and perhaps supports the argument that the AAWS is simply a ‘talkfest’ – that none of the above performance indicators relate directly to systems of animal production, husbandry practices, or animal health. With the exception of the indicator regarding ‘big animal welfare issues’, which itself is quite vague, all of the indicators are general and indirect in nature and rely on an assumption of there being a positive causal relation with improved welfare standards.

An equivalent report produced by RSPCA in the United Kingdom, *The Welfare State: Five Years Measuring Animal Welfare in the UK 2005-2009*, contains very different performance indicators for farm animal welfare, all of which relate to systems of production, husbandry practices, or animal health. They include:

- The number of animal transported live from the UK for slaughter and further fattening;
- The production of UK non-cage eggs as a proportion of total eggs produced;
- The number and proportion of meat chickens reared to higher on-farm welfare standards;
- Piglet mortality levels between birth and weaning;
- The number, nature and outcomes of Animal Health inspections of farms and livestock markets.

Performance indicators of this sought are far more likely to provide an accurate account of the state of farm animal welfare at a given point in time. Relying on indicators that bear no direct relationship with systems of production, husbandry practices, and animal health could be seen as an attempt to avoid accountability for failing to achieve substantive improvements in animal welfare. A robust system of monitoring and evaluation must be developed if the AAWS is to achieve its objectives and contradict

---

50 Ibid, 9-14.
suggestions that it is nothing more than a bureaucratic talkfest. However, any potential improvements to the AAWS have now been put on hold for the foreseeable future as it has lost much of its government funding.

4.3.5 Withdrawal of Commonwealth support

Shortly following the change of government after the 2013 Federal Election, the new Commonwealth Minister of Agriculture announced that the Commonwealth Government would be withdrawing from its leadership role on animal welfare.\(^{52}\) With this announcement the Commonwealth Government abolished the Advisory Committee and withdrew all Commonwealth funding for the governance and administration of the AAWS.\(^{53}\) The withdrawal of funding has also resulted in the cessation of meetings of the Animal Sector Working Groups and AAWS-funded animal welfare research projects and initiatives. Consequently, the AAWS is now simply a document with no governance or administrative structure, or sustained funding source to ensure its implementation.

The Commonwealth’s descaling in animal welfare also resulted in the abolition of the Department of Agriculture’s Animal Welfare Branch, with its 23 staff being relocated to alternative roles mostly unrelated to animal welfare.\(^{54}\) The extent to which this will impact progress on the development of the Animal Welfare Standards and Guidelines (discussed at 4.5.2 below) is currently unknown.

4.4 State animal welfare legislation

As noted, the States and Territories have primary regulatory responsibility for animal welfare and all have passed comprehensive laws to regulate human conduct towards animals. This section first provides some historical context to the development of such laws, tracking the broadening of their scope from simply proscribing cruelty to imposing positive obligations upon animal owners to provide for the welfare needs of animals under their charge. It will then consider the key features of contemporary animal welfare law including the prohibition on animal cruelty, the ‘duty of care’

---


\(^{53}\) Ibid.

\(^{54}\) Email from RSPCA Australia staff to Jed Goodfellow, 3 March 2014.
requirements, and the way such provisions are largely undermined through the operation of wide-ranging defences and exemptions.

4.4.1 Historical development

The first law to protect animals in Australia was enacted in 1837 in Tasmania, or as it was then known, Van Diemen’s Land. The other colonies were slower to act. New South Wales passed its first animal protection statute in 1850, and the four remaining colonies followed by 1860. These early statutes were largely modelled off the animal protection legislation existing at the time in the British ‘mother country’. The United Kingdom of Great Britain and Ireland is often credited with having enacted the ‘world’s first’ animal protection statute with the passing of the Act to Prevent the Cruel and Improper Treatment of Cattle in 1822. However, while this legislation was the most comprehensive of its kind at the time, it was not the first. The Kingdom of Ireland had enacted the Act against Plowing by the Tayle, and Pulling the Wooll off Living Sheep almost two centuries earlier in 1635, and the colony of Massachusetts’ Body of Liberties 1641 contained an animal protection provision, stating that ‘[n]o man shall exercise any Tirranny or Cruelties towards any bruite Creature which are usuallie kept for man’s use.’ By the time the Australian colonies began enacting their own animal protection laws, the original 1822 British statute had already been significantly rewritten. Due in part to the lobbying efforts of the Society for the Prevention of Cruelty to Animals (established in 1824), the scope of the legislation was significantly expanded. As the title to the original statute attests, the 1822 law was focused on protecting cattle, defined broadly as any ‘Horse, Mare, Gelding, Mule, Ass, Ox, Cow,

57 Emmerson, above n 55, 8.
58 Jamieson, above n 55, 240.
59 Deborah Cao, Animal Law in Australia and New Zealand (Lawbook Co, 2010) 58.
60 Massachusetts Body of Liberties 1641, s 92.
61 Later to be known as the Royal Society for the Prevention of Cruelty to Animals after being granted the right to use the ‘Royal’ prefix in 1840.
Heifer, Steer, Sheep or other Cattle’. 63 This priority reflected the heavy reliance placed on working, or draught, animals in early nineteenth century Britain and the very public nature of their mistreatment. Indeed, the cruelty inflicted upon livestock at London’s Smithfield Market formed part of the impetus for laws to protect animals. 64 Historians recount stories of the law’s strongest proponent, Irish parliamentarian Richard ‘Humanity Dick’ Martin, physically intervening during the beating of a collapsed carriage horse. 65 The subsequent law made it an offence for any person to ‘wantonly and cruelly beat, abuse, or ill-treat’ any of these species. 66

As concern for other forms of cruelty continued to grow the legislation was expanded in 1835 to cover more species of animal 67 and to prohibit animal fighting events such as cockfighting, dog fighting and bear baiting. 68 To reflect the expansion, the legislation was renamed simply as the Cruelty to Animals Act 1835 (UK). The most significant addition to the legislation was the imposition of a positive duty upon animal owners requiring the provision of food and water to animals under their confinement:

every Person who shall impound or confine, or cause to be impounded or confined, any Horse, Ass, or other Cattle or Animal, in any Common Pound, open Pound, or close Pound, or in any inclosed Place, shall and he is hereby required to find, provide, and supply such Horse, Ass, and other Cattle or Animal so impounded or confined, daily with good and sufficient Food and Nourishment for so long a Time as such Horse, Ass, or other Cattle or Animal shall remain and continue to impounded or confined as aforesaid.’ 69

The imposition of a duty to provide sufficient food and water to animals under one’s control was an acknowledgement that cruelty was not confined to overt acts of violence towards animals, but could manifest in the form of failing to provide for the necessities

63 Act to Prevent the Cruel and Improper Treatment of Cattle 1822 (definition of ‘cattle’).
66 Act to Prevent the Cruel and Improper Treatment of Cattle 1822 (UK) s I.
67 The definition of ‘Cattle’ was extended to include any other ‘domestic animal’: Cruelty to Animals Act 1835 (UK) s XXI; and specific offences were made to apply to dogs (ss II & III); bears (s III); roosters (s III); and badgers (s III).
68 See, s III, Cruelty to Animals Act 1835 (UK) s III.
69 Cruelty to Animals Act 1835 (UK) s IV.
of life. This combination of general prohibitions on cruelty, specific prohibitions on particular acts like animal fighting, and positive duties to provide for the needs of animals under one’s control, was reflected in the first animal protection laws enacted in the Australian colonies during the 1830-50s. Together with the introduction of detailed subordinate laws for particular areas of animal use, and the operation of key defences and exemptions, these features still make up the basic structure of animal welfare legislation today.

4.4.2 Modern day Animal Welfare Acts

The principal statutes for animal welfare in Australia today and the responsible government departments can be found in Table 3 below.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Principal legislation</th>
<th>Administering department</th>
</tr>
</thead>
<tbody>
<tr>
<td>Qld</td>
<td>Animal Care and Protection Act 2001</td>
<td>Department of Agriculture, Fisheries and Forestry</td>
</tr>
<tr>
<td>NSW</td>
<td>Prevention of Cruelty to Animals Act 1979</td>
<td>Department of Primary Industries</td>
</tr>
<tr>
<td>ACT</td>
<td>Animal Welfare Act 1992</td>
<td>Territory and Municipal Services Directorate</td>
</tr>
<tr>
<td>Vic</td>
<td>Prevention of Cruelty to Animals Act 1986</td>
<td>Department of Environment and Primary Industries</td>
</tr>
<tr>
<td></td>
<td>Livestock Management Act 2010</td>
<td></td>
</tr>
<tr>
<td>Tas</td>
<td>Animal Welfare Act 1993</td>
<td>Department of Primary Industries, Water and Environment</td>
</tr>
<tr>
<td>SA</td>
<td>Animal Welfare Act 1985</td>
<td>Department of Environment and Natural Resources</td>
</tr>
<tr>
<td>WA</td>
<td>Animal Welfare Act 2002</td>
<td>Department of Agriculture and Food</td>
</tr>
<tr>
<td>NT</td>
<td>Animal Welfare Act 2000</td>
<td>Department of Primary Industry and Fisheries</td>
</tr>
</tbody>
</table>

Table 3: Principal animal welfare legislation and administering departments

70 Jamieson, above n 55, 240.

71 Current as at 22 February 2014.
Despite the AAWS objective of seeking to achieve national consistency in animal welfare legislation, each state and territory law has been developed independently. A uniform animal welfare law has not been developed. However, all state and territory statutes have succeeded in achieving a reasonably high level of consistency in terms of their operational effect. Each statute maintains the basic structure of their historical predecessors with respect to foundational features such as the prohibition on cruelty and the imposition of positive duties. However, the detail, scope, and refinement of key provisions has developed significantly.

4.4.3 The prohibition on cruelty: unnecessary harm and the proportionality test

The general prohibition on cruelty in each animal welfare statute has been expanded from its original form and is now accompanied by a non-exhaustive list of acts that constitute cruelty so as to provide greater clarity in the prohibition’s application. Commonly prescribed acts of cruelty include beating, abusing, torturing, overdriving, overworking, tormenting, fighting and terrifying an animal. In addition to listing specific acts, each statute provides a catch-all definition of cruelty that focuses on the outcome of the relevant act or omission. It provides, variously, that an act of cruelty is committed if a person causes an animal unreasonable, unnecessary, or unjustifiable harm, pain or suffering (hereafter referred to as ‘unnecessary harm’). This ‘unnecessary harm’ definition of cruelty was originally developed by the courts in their interpretation and application of the general cruelty offence provisions contained in the

---

72 See, Animal Welfare Act 1985 (SA) s 13(3); Animal Welfare Act 1993 (Tas) s 8(2); Animal Welfare Act 2002 (WA) s 19(2) and (3); Prevention of Cruelty to Animals Act 1979 (NSW) s 4(2); Prevention of Cruelty to Animals Act 1986 (Vic) s 9(1); Animal Care and Protection Act 2001 (Qld) s 18(2); Animal Welfare Act 2000 (NT) s 9(2) and (3); and Animal Welfare Act 1992 (ACT) ss 7, 7A and 8.

73 See variously, ibid.

74 Animal Welfare Act 1985 (SA) s 13(2); Animal Welfare Act 1993 (Tas) s 8(1); Animal Welfare Act 2002 (WA) s 19(1); Prevention of Cruelty to Animals Act 1979 (NSW) s 4(2); Prevention of Cruelty to Animals Act 1986 (Vic) s 9(1); Animal Care and Protection Act 2001 (Qld) s 18(1); Animal Welfare Act 2000 (NT) s 9(1); and Animal Welfare Act 1992 (ACT) s 8. The term ‘unnecessary harm’ will be used hereafter as the majority of state animal welfare laws utilise the noun ‘harm’ as opposed to ‘pain’ or ‘suffering’. It is acknowledged that the term ‘unnecessary suffering’ is most commonly used in animal law literature, particularly that deriving from Britain: see Mike Radford, Animal Welfare Law in Britain: Regulation and Responsibility (Oxford University Press, 2001) Chp 10; Mike Radford, ‘Unnecessary Suffering: The Cornerstone of Animal Protection Legislation Considered’, (1999) September Criminal Law Review 702; and Gary Francione and Robert Garner, The Animal Rights Debate: Abolition or Regulation? (Columbia University Press, 2010) 141.
original animal protection statutes of the nineteenth century. It has since become a cornerstone principle of the contemporary animal welfare legislative model.\textsuperscript{75}

A foundational case on the meaning of unnecessary harm is the 1889 Queen’s Bench decision of \textit{Ford v Wiley}.\textsuperscript{76} This case was an appeal of a decision by a magistrate to acquit a cattle producer of a charge of cruelty for dehorning cattle with a saw.\textsuperscript{77} The two Justices of the appellant court, Chief Justice Lord Coleridge and Justice Hawkins, had to consider whether the dehorning amounted to ‘cruelly ill-treating, abusing or torturing’ the afflicted animals under s.2 of the \textit{Cruelty to Animals Act 1849} (UK).\textsuperscript{78} In construing the meaning of the section, the Court placed primary focus on the adverb ‘cruelly’ as it was held to run through and govern the whole sentence.\textsuperscript{79} In considering whether the challenged act amounted to cruelty the Court found that two elements must be established: first, that pain and suffering had been inflicted in fact; and second, that such pain was ‘inflicted cruelly, that is, without necessity’.\textsuperscript{80} In other words, the mere infliction of pain upon an animal was lawful\textsuperscript{81} (as it remains today); it is only when such pain is inflicted without ‘good reason’ that it attracts the application of the prohibition.\textsuperscript{82} The first limb of the examination was not in dispute. The trial court heard irrefutable evidence from several expert witnesses that the cattle suffered extensively during the procedure and for several days thereafter.\textsuperscript{83} The case was focused on the second limb, being the process for determining when an act can be said to have caused pain ‘without necessity’ and thereby amount to cruelty. The court addressed this question by applying a proportionality test, summarised by Justice Hawkins in the following passage:

\begin{quote}
[T]he beneficial or useful end sought to be attained [by the harm causing practice] must be reasonably proportionate to the extent of the suffering caused, and in no case can substantial suffering be inflicted, unless necessity for its infliction can reasonably be said to exist.\textsuperscript{84}
\end{quote}

\textsuperscript{75} Radford (1999), above n 73; and Francione and Garner, above n 73, 141.
\textsuperscript{76} (1889) 23 QBD 203 (‘Ford v Wiley’). Despite its age, the decision is still regarded as good law in the United Kingdom: see Radford (2001), above n 73, 241-258 for an in-depth analysis of the decision.
\textsuperscript{77} Ford v Wiley, 204.
\textsuperscript{78} Ibid, 203.
\textsuperscript{79} Ibid, 218.
\textsuperscript{80} Ibid.
\textsuperscript{81} Ibid, 209.
\textsuperscript{82} Ibid, 218.
\textsuperscript{83} Ibid, 213-214.
\textsuperscript{84} Ibid, 219.
In applying the test, Hawkins J outlined a number of critical elements for consideration:

[E]ach case in which the question arises must depend upon a variety of circumstances; the amount of pain caused, the intensity and duration of the suffering, and the object sought to be attained, must, however, always be essential elements for consideration.\(^{85}\)

The examination necessarily involves a two-step process. The first comprises an assessment of the object sought to be achieved by the challenged practice in terms of its legitimacy and value in the eyes of the community. Peter Sankoff, a strong critic of the proportionality approach, argues that courts typically take a very broad view of the legitimacy of animal use as it is inevitably assessed against a backdrop of an anthropocentric world view in which animals exist for the use of man.\(^{86}\) Indications of this sentiment are found in the decision. Chief Justice Coleridge approved of practices that cause pain to animals ‘over which we have been given or have assumed dominion’ if such practices are necessary for the animal to ‘attain its full development or be fitted to its ordinary use.’\(^{87}\) Accordingly, almost any purpose for which an animal is used, including any practice that facilitates such use, will be deemed to have been carried out in pursuit of a legitimate object if it can be shown to benefit the owner of the animal or the broader community in some way, whether commercially, scientifically, or even recreationally.\(^{88}\) The only case in which an object of animal use will be deemed to be illegitimate at the outset is when it is carried out for purely sadistic purposes.\(^{89}\) This is largely because such deviate intentions have historically been considered detrimental to the moral development of society and are believed to foster aggressive tendencies among people in their dealings with one another.\(^{90}\)

---

85 Ibid, 218.
88 Sankoff, above n 85, 17-19.
89 Sankoff identifies two further categories of illegitimate purposes relating to economic waste, and laziness or poor management: ibid, 19. However, it is suggested that this is a mischaracterisation. A person does not set out to use an animal with the object of being economically wasteful or lazy. These matters are more related to the means used to pursue the purpose, the second step of the examination (discuss below).
90 Immanuel Kant is well known for counselling against animal cruelty on the basis that ‘he who is cruel to animals becomes hard also in his dealings with men’: Immanuel Kant, Lectures on Ethics, translated by L Infeld (Harper and Row, 1963) 23. These assumptions have now been supported by
Ford v Wiley also recognised that there were different degrees of legitimacy attached to different forms of animal use and the degree of legitimacy sets the context for the second step of the proportionality test: the assessment of the means used to achieve the legitimate object. As Justice Hawkins noted at [218], ‘[t]o attain one object the infliction of more pain may be justified than would be ever tolerated to secure another.’91 In other words, the degree of pain that can be inflicted upon an animal in pursuit of medical research for instance may be far greater than that which would be tolerated for the purposes of entertainment. But regardless of how legitimate an object of animal use may be, the means used to achieve that object must still be proportional. The pain and suffering cannot be inflicted beyond that which is considered necessary and cannot outweigh the benefit sought to be attained. As Justice Hawkins noted at [220]:

The magnitude of the operation and the pain caused thereby must not so far outbalance the importance of the end as to make it clear to any reasonable person that it is preferable the object should be abandoned rather than that disproportionate suffering should be inflicted.92

Figure 18 below provides a diagrammatical representation of the relationship between object and means according to the proportionality approach. It shows that under the proportionality analysis, the higher the legitimacy of the object (portrayed along the y axis), the greater the scope for causing harm to the animal (portrayed along the x axis). If too great a level of harm is caused to the animal, relative to the legitimacy of the object, the practice will overstep the line of proportionality (the dividing diagonal line) and fall into the realm of ‘unnecessary harm’ amounting to animal cruelty.

91 contemporary scientific research: see, Andrew Linzey (ed), The Link Between Animal Abuse and Human Violence (Sussex Academic Press, 2009).
92 Ford v Wiley, 218.
Ibid, 220.
Sankoff argues that due to the anthropocentric context in which this balancing exercise takes place almost all means of facilitating a legitimate object will be accepted:

Just as human purposes cannot be questioned in light of human privilege, the methods for achieving those purposes must take into account human priorities, which rank higher on the scale than those of animals.  

So long as the means taken are reasonably related to a legitimate purpose, they will not be questioned.

Sankoff’s greatest concern relates to those means employed to achieve economic purposes, particularly in the farming context:

Perhaps the most significant concern is the consistent focus on economic efficiency, which tends to enshrine harmful practices and render them immune from scrutiny. In a farmed animal context, once we accept that producing food at an economic price is necessary, the whole question of animal welfare ends up being mostly redundant, as just about any profit-maximising initiative that imposes pain tends to be accepted.

---

93 Sankoff, above n 85, 20.
94 Ibid, 22.
95 Ibid, 21.
However, it may be argued that Sankoff’s account of the proportionality test is not an entirely fair assessment. This is partly due to the fact that his analysis relies predominately on the Canadian case of *R v Menard*[^96] in which the justices take a particularly anthropocentric view of the human/animal relationship stating at [465] that man has been given the right by virtue of their ‘position as supreme creatures to put animals at their service to satisfy their needs.’[^97] Sankoff does not engage with the judgement in *Ford v Wiley* and only refers to it in a footnote.[^98] The Justices’ decision in *Ford v Wiley* rejects the notion that economic expediency of itself can justify a harm-causing practice and protect it from scrutiny. In reply to the respondent’s proposition that the dehorning could not be considered unnecessary as it generated higher profits for the producer, Lord Coleridge stated the following:

> There is no necessity and it is not necessary to sell beasts for 40s. more than could otherwise be obtained for them; nor to pack away a few more beasts in a farm yard... These things may be convenient or profitable to the owners of cattle, but they cannot with any show of reason be called necessary.[^99]

The pain and suffering caused by the procedure was considered disproportionate to the commercial object sought to be achieved and the practice was subsequently found to constitute cruelty:

> [T]o put thousands of cows and oxen to the hideous torments described in this evidence in order to put a few pounds into the pockets of their owners is an instance of such utter disproportion between means and object, as to render the practice as described here not only barbarous and inhuman, but I think clearly unlawful also.[^100]

The Justices did not come to this conclusion lightly. They foresaw the potential for their methodology to render other livestock husbandry practices unlawful but they maintained their position, confident in the integrity of their reasoning; Lord Coleridge at [215]:

[^96]: (1978) 43 CCC (2d) 458.
[^98]: Sankoff, above n 85, 15.
[^99]: *Ford v Wiley*, 209.
[^100]: *Ford v Wiley*, 215.
I am not afraid of the possible application of the principle to other practices which have not yet been attacked, but which may hereafter turn out to be prohibited by law. If the suffering inflicted is necessary, as I have tried to explain it, it may be inflicted; if not, it is “unnecessary abuse of the animal,” and we have neither the moral nor the legal right to inflict it, a conclusion not of sentimentalism but of good sense.101

Contrary to Sankoff’s critique, it is clear that economic considerations will not always trump concerns for animal welfare. Applied correctly, the proportionality analysis as set out in Ford v Wiley provides a robust analytical framework for enabling stringent review of painful animal husbandry practices, and indeed any form of animal use that causes harm. UK animal law scholar, Mike Radford, agrees. He identifies two particular strengths of the proportionality approach. First, it is flexible and can be applied to the infinite array of different factual circumstances where the legality of harm may be questioned; and second, ‘it can be constantly reinterpreted by the courts in the light of greater understanding about animal suffering, and changing social attitudes regarding the proper treatment of animals.’102 Political scientist, Robert Garner, writing in a broader strategic and political context, shares Radford’s views on the potential for the proportionality approach to evolve over time:

Crucially, what is regarded as unnecessary is not static, nor is it objective. Indeed, over the past few decades what is regarded as unnecessary suffering has expanded to reflect a growing awareness of the different ways animals can suffer, changes in cultural norms, and technological developments that have made it possible to use alternatives.103

This potential was demonstrated in an Australian judicial context by the case of Department of Local Government and Regional Development v Emmanuel Exports,104 which involved a challenge to the legality of exporting a particular class of live sheep to the Middle East under Western Australia’s Animal Welfare Act 2002. While only a Magistrates Court decision, the case was significant as it concerned an accepted

---

102 Radford (2001), above n 73, 258.
103 Garner, above n 73, 142.
104 (Unreported, Magistrates Court of Western Australia (Criminal Jurisdiction), Crawford M, 8 February 2008).
industry practice and had the potential to impose significant economic consequences in the event the practice was found to be in breach of the Act. The Western Australian Government had charged live export company Emmanuel Exports under s.19(1) of the Act for transporting an animal ‘in a way that causes, or is likely to cause it, unnecessary harm.’ In particular, the charges related to the transportation of 13,163 fat adult wethers (castrated male sheep) during the month of November in temperatures that significantly increased the risk of the sheep suffering inanition and salmonellosis. In deciding whether this caused, or was likely to cause, the relevant sheep unnecessary harm, the Magistrate applied the *Ford v Wiley* proportionality analysis [at 98-99]:

The principle which emerges from [Justice Coleridge’s] judgement and that of Lord Justice Hawkins is that necessity requires proportion between the object and the means. In his words, “in each case however the beneficial or useful ends sought to be attained must be reasonably proportionate to the extent of the suffering caused, and in no case can substantial suffering be inflicted, unless necessity for its infliction can reasonably be said to exist.”

What made shipment of fat adult sheep in November a necessity? An order from [the importer], that is, the prospect of profit. There was no evidence that failure to supply sheep in that category would jeopardise the whole shipment. If that evidence were available, the logic of the Defence submission is to say in order to do the business it was necessary to export fat adult sheep notwithstanding the higher risk of pain, injury or death in the second half of the year. That is, trade for commercial gain. In the context of this case that commercial gain has to be balanced against the likelihood of pain, injury or death to relevant sheep shipped in the second half of the year. I am satisfied and find that any harm suffered to fat adult sheep was unnecessary.

Accordingly, the Magistrate found that the shipment had breached s.19(1) of the *Animal Welfare Act 2002* (WA). However, the Magistrate went on to acquit the defendant on the basis of an apparent inconsistency with the Commonwealth legislative regime governing live exports which had authorised the shipment. Under s.109 of the Australian Constitution, Commonwealth law prevails in the event of any inconsistency

---

105 Ibid, 1-3 [1-10].
106 Ibid, 33 [203].
with a law of a state or territory. Subsequently, the Western Australia Animal Welfare Act was found to be invalid to the extent of its inconsistency with the Commonwealth law that authorised the shipment. An appeal was lodged by the State Solicitor’s Officer but this was later withdrawn on direction of the Minister responsible for the Department of Local Government and Regional Development. When questioned in State Parliament over the direction to withdraw, the Minister simply advised that ‘the government’s preference was to seek improved livestock welfare outcomes through policy consideration and negotiation with the commonwealth, rather than continuing costly legal action.’

The minister advised that all further reasons were subject to legal professional privilege.

While the case ultimately failed, it did demonstrate the potential for the *Ford v Wiley* proportionality approach to be applied in a way that prioritises the welfare of animals over purely commercial interests. Were it not for the purported legislative inconsistency, the export of many thousands of animals during the Australian summer would be deemed to be cruel under the Animal Welfare Act 2002 (WA) and would therefore be prohibited.

Despite the robust methodology established by *Ford v Wiley*, Australian legislatures have, to-date, failed to articulate the proportionality approach in legislation. Consequently, the onus is placed on the judicial process to identify the correct approach and apply it accordingly. This risks inconsistencies in application. In contrast, the United Kingdom legislature has identified the significance of the proportionality approach and in 2006 incorporated key elements of the analysis within its animal welfare legislation. Section 4 of the Animal Welfare Act 2006 (UK) prohibits a person from causing an animal unnecessary suffering, and to provide guidance to the courts on the question of ‘necessity’, subsection (3) now provides as follows:

---


108 Ibid.

(3) The considerations to which it is relevant to have regard when determining for the purposes of this section whether suffering is unnecessary include –

(a) whether the suffering could reasonably have been avoided or reduced;

(b) whether the conduct which caused the suffering was in compliance with any relevant enactment or any relevant provisions of a licence or code of practice issued under an enactment;

(c) whether the conduct which caused the suffering was for a legitimate purpose, such as –

(i) the purpose of benefiting the animal; or

(ii) the purpose of protecting a person, property or another animal;

(d) whether the suffering was proportionate to the purpose of the conduct concerned;

(e) whether the conduct concerned was in all the circumstances that of a reasonably competent and humane person.

By referring the court to the legitimacy of the challenged action’s purpose and to the proportionality of the suffering involved, the statute is clearly lending from the Ford v Wiley decision. A similar subsection should be introduced to Australian state and territory animal welfare legislation to provide the courts with further guidance on determining when a challenged practice amounts to animal cruelty.

4.4.4 The promotion of welfare and the duty of care

While the prohibition on cruelty is clearly a critical feature of the animal welfare legislative model, fundamentally, it is reactive in nature. In most cases, it can only be applied after an animal has suffered unnecessary harm. State legislatures recognised this limitation and through a series of legislative reforms in the 1990s to early 2000s implemented a more proactive regulatory approach to protecting animals. In particular, they altered the emphasis of the legislation from simply seeking to prevent cruelty to

If the prohibition is drafted to include an act or omission ‘likely’ to cause harm (as in the case of Tasmania: Animal Welfare Act 1992 (Tas) s 8(1); and Victoria: Prevention of Cruelty to Animals Act 1986 (Vic) s 9(1)(c)) then arguably the prohibition could be applied in a proactive manner in the absence of harm in fact.
animals, to actively promoting their welfare. The changes were perhaps most prominently recognised with amendments to the title of the various statutes. In most jurisdictions, the title of the relevant enactment was changed from the *Prevention of Cruelty to Animals Act* to the *Animal Welfare Act*. From an operational perspective, the emphasis on promoting animal welfare was primarily effected through an expansion in the range of positive duties that people owed to animals under their control, the introduction of a new enforcement tool for inspectors in the form of the ‘animal welfare direction’, and through the expanded development of industry-specific minimum standards for the welfare of animals. These features will be discussed in turn below.

As noted above, the imposition of duties to care for animals in a particular way was part of the first animal protection laws proposed in the Australian colonies during the nineteenth century, but they generally only related to the provision of sufficient food and water. For instance, the NSW *Act for the more effectual prevention of Cruelty to Animals 1850* required that ‘every person who shall impound or confine…any animal, shall provide and supply during such confinement a sufficient quantity of fit and wholesome food and water to such animal’. The range of duties imposed during the recent reforms expanded considerably and multiple jurisdictions have begun framing such duties separately from the general cruelty provisions using the concept of a ‘duty of care’ to animals.

Tasmania was the first state to introduce an expressed reference to a ‘duty of care’ to animals. However, Queensland’s *Animal Care and Protection Act 2001* provides the most detailed exposition of the concept. Section 17 of that Act provides as follows:

### 17 Breach of duty of care prohibited

(1) A person in charge of an animal owes a duty of care to it.

(2) The person must not breach the duty of care.

(3) For subsection (2), a person breaches the duty only if the person does not take reasonable steps to –

---


112 14 Vict 40 (NSW) s 5.

(a) provide the animal’s needs for the following in a way that is appropriate –

(i) food and water;

(ii) accommodation or living conditions for the animal;

(iii) to display normal patterns of behaviour;

(iv) the treatment of disease or injury; or

(b) ensure any handling of the animal by the person, or caused by the person, is appropriate.

While other state and territory jurisdictions may not refer to the term ‘duty of care’, they nevertheless impose obligations with the same or very similar practical effect. Generally, the duties are five-fold and relate to the provision of appropriate (1) food and water; (2) shelter or living conditions; (3) treatment for disease and injury; (4) handling; and (5) exercise or freedom to express normal behaviour.\textsuperscript{114} Notably, the duties go beyond the traditional approach of simply providing for the immediate physical needs of the animal such as the provision of appropriate food and water. Duties to allow an animal to exercise or express normal behaviour are clearly concerned with the animal’s psychological wellbeing. Similarly, duties to ensure appropriate handling may serve to reduce an animal’s fear and distress and duties to provide appropriate living conditions may operate to improve an animal’s level of ‘comfort’. These conditions relate to the affective states of an animal rather than simply its basic health and functioning.\textsuperscript{115}

This expansion in the range of duties owed to animals has been influenced by the development of scientific research into animal welfare, particularly in relation to the way it is assessed and the establishment of key indicators of good or bad states of welfare. For instance, the ‘Five Freedoms’ (discussed in Chapter 2 at 2.3.1) directly influenced the nature of the duties owed to animals under Australian legislation. The Explanatory Notes to the Queensland’s \textit{Animal Care and Protection Bill 2001} expressly state that ‘[t]he duty of care requirements are based on the internationally acknowledged

\textsuperscript{114} \textit{Animal Welfare Act 1985} (SA) s 13(3); \textit{Animal Welfare Act 1993} (Tas) s 8(2); \textit{Animal Welfare Act 2002} (WA) s 19(3); \textit{Prevention of Cruelty to Animals Act 1979} (NSW) s 8; \textit{Prevention of Cruelty to Animals Act 1986} (Vic) s 9(1); \textit{Animal Care and Protection Act 2001} (Qld) s 17(2) and (3); \textit{Animal Welfare Act 2000} (NT) s 8 and 9; and \textit{Animal Welfare Act 1992} (ACT) s 8(2).

\textsuperscript{115} See discussion in Chapter 2 at 2.3.1.
‘Five Freedoms’ of animal welfare.” The alignment of Queensland’s ‘duty of care’ with the Five Freedoms is depicted in Table 4 below:

<table>
<thead>
<tr>
<th>Five Freedoms</th>
<th>Corresponding duty of care requirement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Freedom from hunger and thirst</td>
<td>Appropriate food and water</td>
</tr>
<tr>
<td>Freedom from discomfort</td>
<td>Appropriate accommodation or living conditions</td>
</tr>
<tr>
<td>Freedom to express normal behaviour</td>
<td>Allow animal to display normal patterns of behaviour</td>
</tr>
<tr>
<td>Freedom from pain, injury or disease</td>
<td>Appropriate treatment for disease or injury</td>
</tr>
<tr>
<td>Freedom from fear and distress</td>
<td>Appropriate handling</td>
</tr>
</tbody>
</table>

**Table 4:** Alignment of statutory ‘duty of care’ and Five Freedoms

In keeping with the objective of creating a more proactive approach to protecting the welfare of animals, the recent reforms also included a new enforcement mechanism for inspectors to ensure that such duties were complied with before an offence occurred. Previously, the legislation restricted inspectors to waiting until a person had definitively breached their duties before they were authorised to intervene. Often this required the relevant animal to endure some degree of suffering before relief could be provided, and such relief usually came by way of the inspector seizing the animal, removing it from familiar surroundings and taking it into the custody of the RSPCA or local government pound. State legislatures recognised the absurdity of this approach and its potential to undermine the objectives of the legislation. To address the deficiency, inspectors were afforded a new power to issue statutory directions to persons regarding the care of

---


animals under their control. The powers were purposely drafted in very broad terms to enable flexible application to the infinite number of factual scenarios in which a person may be failing, or at risk of failing, in their duty of care to an animal. The powers are enlivened in South Australia, New South Wales, Queensland, Victoria, Australian Capital Territory, and Northern Territory if the relevant inspector has a reasonable belief, or is satisfied on reasonable grounds, that an animal is not being cared for properly or is the subject of an offence. In Western Australia and Tasmania there are no preconditions to exercising the power. In all jurisdictions, an inspector may direct a person to care for an animal in a way that is considered by the inspector to be necessary to ensure the welfare of the animal or to avoid the commission of an offence.

The changing emphasis of animal welfare legislation from preventing cruelty to promoting welfare is significant for both symbolic and practical reasons. The expanding range of duties imposed on those in charge of animals can be seen as a reflection of society’s evolving attitudes to animals and expectations regarding their care. The continuing shift from the negatively geared prohibition on cruelty, which seeks to prevent certain conduct from occurring, to the imposition of positive duties requiring certain conduct to occur, is a notable development in the legal regulation of our relationship with animals. Implicitly, it acknowledges that animals have a legally recognisable interest that goes beyond the simple desire to avoid cruelty and reflects the collective will of society to afford positive states of welfare to animals under human control. Again, developments in animal welfare science are informing this approach. The influential UK Farm Animal Welfare Council has recently proposed a new framework for assessing animal welfare through the concept of ‘a life worth living.’ In a 2009 report, the Council expressed concern that the Five Freedoms were overly focused

---

118 Some jurisdictions had already created a power to issue statutory directions but only in relation to specific circumstances such as in the working or transportation of animals: see for instance, *Prevention of Cruelty to Animals Act 1985* (SA) (Reprint No. 1) s 29(5).
on avoiding negative states of welfare. The benchmark of providing an animal with ‘a life worth living’ was developed to better incorporate the positive experiences of animals based, in-part, on measuring and giving effect to their preferences.

In addition to the obvious practical benefits that accrue to animals as a result of expanding legal duties of care towards them, the approach has also been attributed with producing a number of advantages for enforcement purposes. Sankoff is supportive of the shift to imposing more extensive duties of care on two bases. First, he notes that a breach of such duties does not require the prosecution to prove any particular mental state of mind such as intention or recklessness on behalf of the defendant, nor does it require evidence that the animal has suffered in fact. However, in practice, an influential factor in determining whether a duty has been breached is the effect the relevant omission has on the animal, particularly the degree of suffering caused. Second, proving a breach of such duties does not require an assessment of proportionality. Accordingly, the process of balancing human benefits with animal harms is avoided. The assessment simply becomes one of whether the animal was provided with sufficient food, shelter, treatment etc judged according to the needs of the particular animal.

While the increasing emphasis on promoting animal welfare through the imposition of positive duties is a welcomed improvement, the extent to which animals, and particularly farm animals, experience the benefits of these laws is largely curtailed by the use of wide-ranging exemptions and defences.

4.4.5 Exemptions and defences

A historical feature of animal welfare legislation that has survived almost two centuries of reforms is the practice of exempting significant areas of animal use from the law’s application. The first legislative exemptions for certain practices involving the treatment of animals in Australia were introduced in the Victorian colony in 1881 during

---

123 Ibid, 14.
124 Sankoff, above n 85, 25.
126 Sankoff, above n 85, 25.
parliamentary debates regarding the *Protection of Animals Bill*. Parliamentarian Sir B. O’Loghlen proposed the following qualification to the general prohibition on cruelty:

Provided always that neither any act done in the process of exterminating rabbits, foxes, wild dogs, or vermin of any kind, nor any act done in the hunting, snaring, trapping, or shooting of any wild animal, shall be deemed an offence under this Act, nor shall this Act apply to any experiment or to any case of vivisection performed on any animal by any legal qualified medical practitioner.\(^{127}\)

By the early 1900s, every other state in the country possessed equivalent exemptions or defences.\(^{128}\) Generally, these related to specific agricultural or scientific practices such as the dehorning of cattle, castration, spaying, ear-marking, branding, tail docking, or vivisection.\(^{129}\) Each State and Territory legislature had by then recognised the potential consequences of applying the prohibition on causing unnecessary harm and the duties of care (albeit in their then limited form) to their full extent. In practice, many commercial and instrumental forms of animal use in agriculture, scientific research, public exhibition, sport and entertainment would be vulnerable to legal challenge and could be found to be in breach of state law.

The fear of legal challenge to established animal use practices was so great that some states later enacted blanket exemptions for any ‘acknowledged husbandry practices’,\(^{130}\) or ‘accepted farming practice’.\(^{131}\) In practice, such exemptions granted complete discretion to livestock industries to decide what was an acceptable degree of pain or suffering to cause to animals in the course of producing food and fibre as ‘acknowledged’ or ‘accepted’ farming practice was determined by the farming community itself. In Jamieson’s words, this was perhaps ‘the high-water mark in recognition of rural autonomy on the question of necessary suffering of domesticated animals’.\(^{132}\)

---

128 Jamieson, above n 54, 250.
129 Ibid.
130 *Animals Protection Act Amendment Act 1977* (Qld) as cited in Jamieson, above n 54, 250.
131 *Protection of Animals Act 1966* (Vic) s 12(1)(aa) as cited in Jamieson, above n 54, 250.
132 Jamieson, above n 250.
Such blanket carve outs from the legislative protections contained in the animal welfare Acts have since been replaced with more tailored exemptions. Only Western Australia maintains the same approach by providing a defence for any act done in accordance with a ‘generally accepted animal husbandry practice’.\(^{133}\) The more usual legislative practice is to provide exemptions for specific practices, including hunting,\(^{134}\) fishing,\(^{135}\) scientific research,\(^{136}\) control of pests and feral animals,\(^{137}\) routine livestock surgical procedures,\(^{138}\) and religious slaughter.\(^{139}\) Often these exemptions are qualified with the condition that such practices be carried out in a ‘humane manner’,\(^{140}\) or in a way that ‘causes as little pain as is reasonable.’\(^{141}\)

There is no real consistency to the way such provisions are drafted nor to the type of conduct they cover. The most consistent form of exemption is for any act done in accordance with an industry based Code of Practice.\(^{142}\) Only New South Wales and Tasmania lack such an exemption. However, in New South Wales, compliance with an adopted Code of Practice can be admissible as evidence to defend a charge under the *Prevention of Cruelty to Animals Act 1979* (NSW).\(^{143}\) The legal status of such Codes of Practice will be discussed in further detail at 4.5.1 below.

Most states exempt the relevant practice they are seeking to protect from the legislation entirely, however, New South Wales, Western Australia, and the Northern Territory rely on the use of defences to provide the desired legal immunity.\(^{144}\) In practice, however, exemptions and defences operate in the same way. The defendant will still be required

---

135 Animal Welfare Act 1992 (Tas) s 4; Prevention of Cruelty to Animals Act 1986 (Vic) s 6; Animal Care and Protection Act 2001 (Qld) s 44.
136 Animal Welfare Act 1992 (Tas) s 4; Prevention of Cruelty to Animals Act 1979 (NSW) s 24; Animal Care and Protection Act 2001 (Qld) s 40.
137 Animal Care and Protection Act 2001 (Qld) s 42; Animal Welfare Act 2002 (WA) s 24.
139 Animal Care and Protection Act 2001 (Qld) s 45; Prevention of Cruelty to Animals Act 1979 (NSW) s 24.
141 See for instance, Animal Care and Protection Act 2001 (Qld) s 42.
143 Prevention of Cruelty to Animals Act 1979 (NSW) s 34A. Conversely, non compliance can be admitted as evidence for the prosecution.
to argue that the relevant exemption applies to the conduct in question in the same way he or she would be required to assert the application of a relevant defence.

Table 5 provides an overview of the various exemptions and defences in each jurisdiction:

<table>
<thead>
<tr>
<th>State</th>
<th>Defence or exemption</th>
<th>Compliance with Code</th>
<th>Hunting</th>
<th>Fishing</th>
<th>Scientific research</th>
<th>Pests/feral</th>
<th>Routine surgical procedures</th>
<th>Religious slaughter</th>
</tr>
</thead>
<tbody>
<tr>
<td>Qld</td>
<td>Exemption</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>NSW</td>
<td>Defence</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Vic</td>
<td>Exemption</td>
<td>✓</td>
<td></td>
<td>✓</td>
<td></td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tas</td>
<td>Exemption</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>WA</td>
<td>Defence</td>
<td>✓</td>
<td></td>
<td></td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>ACT</td>
<td>Exemption</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NT</td>
<td>Defence</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SA</td>
<td>Exemption</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 5: Exemptions and defences in state and territory animal welfare legislation

While the use of exemptions and defences may now be more refined in detail than in the past years of complete ‘rural autonomy’, their application is nevertheless far reaching. In effect, they operate to exclude the vast majority of animals that are under human control from the substantive protections afforded by the principal animal welfare Acts. The bulk of the animals that are farmed, shot and hunted, experimented upon, and used in sport and entertainment are not protected by such provisions, but instead, are subject to a different set of legal standards. These standards are prescribed in the various industry-based Codes of Practice. The apparent need to exempt the practices prescribed within these subordinate laws can be seen as an implicit acknowledgment that such practices may be considered cruel if they were no so exempt. Why else would there be a need for the exemption? This highlights the inherent double standard at the heart of the current animal welfare legislative model, and to some extent, gives credence to
Sankoff’s claims that economic considerations will almost always trump animal welfare concerns.  

4.5 Codes of Practice

The substance of Australia’s farm animal welfare standards is contained within subordinate legislation adopted under the principal animal welfare statutes in the form of industry-based Codes of Practice for the Welfare of Animals (Codes of Practice). At the time of writing, there are 14 national Codes of Practice pertaining to farmed animals (listed in Appendix 1) and one Australian Animal Welfare Standards and Guidelines (Standards and Guidelines) document pertaining to the land transport of livestock. These subordinate instruments provide for the detailed minimally accepted requirements regarding the treatment of animals within different industries and at different stages of the production process including housing and accommodation, handling, routine surgical procedures, feed and watering, transport and slaughter.

The first Code of Practice was developed at the request of the chicken meat and egg industries in the late 1970s, which later became known as the Model Code of Practice for the Welfare of Animals – Domestic Poultry. In 1980, the Australian Agricultural Council (consisting of federal and state ministers for agriculture; now known as the Agriculture Ministers Forum (AGMIN)) recommended the development of further Codes of Practice in response to ‘mounting challenges by animal welfare interests to accepted methods of Australian livestock management.’ The intended objective of the Codes was to enhance national consistency in livestock production practices and to serve as a tool for ‘reassuring the public that animal welfare is being managed and standards exist.’ However, the subsequent Codes of Practice developed under the Australian Agricultural Council’s stewardship did not necessarily seek to establish new requirements for farming to improve animal welfare standards; rather they simply sought to ‘describe accepted husbandry and management practices’.

145 Sankoff, above n 85, 15.
149 Ibid.
150 Ibid.
151 Ibid.
involvement of livestock industries in the development of the Codes of Practice was on the basis that they would be ‘documenting existing management practices and that compliance would be voluntary.’\footnote{Ibid, 10.} Consequently, the Codes of Practice simply prescribed the various husbandry practices that together make up the industrialised approach to animal agriculture discussed in Chapter 2. For this reason, the Codes of Practice are often at the centre of public debates about the welfare of farmed animals and are commonly referred to as the ‘Codes of Cruelty’ by animal protection groups.\footnote{See for instance, Animals Australia, ‘Codes of Cruelty’ (2013) <http://www.animalsaustralia.org/issues/codes-of-cruelty.php>.} In combination with the exemptions and defences described above, the Codes of Practice effectively provide legislative immunity for the practices described therein, many of which cause significant pain and suffering to animals.

\subsection*{4.5.1 Legal status and relationship to principal legislation}

The precise legal status of the Codes of Practice depends upon the manner in which they are incorporated under state legislation. State regulators have adopted two basic approaches to implementation. First, selected Codes are partly regulated by converting particular provisions that are considered especially important (usually due to public sensitivity associated with the relevant practice and the degree of risk posed to animal welfare from noncompliance) into regulations under the jurisdiction’s principal animal welfare Act. Part regulated Codes of Practice include the \textit{Model Code of Practice for the Welfare of Animals: Domestic Poultry}\footnote{See, \textit{Animal Welfare Regulations 2002 (SA) Pt 5; Prevention of Cruelty to Animals Regulations 2012 (NSW) Pt 2; Animal Care and Protection Regulation 2012 (Qld) Sch 1; Animal Welfare (Commercial Poultry) Regulations 2008 (WA)}.} and the \textit{Model Code of Practice for the Welfare of Animals: Pigs}.\footnote{See, \textit{Animal Welfare Regulations 2002 (SA) Pt 6; Animal Welfare (Pig Industry) Regulations 2010 (WA); Animal Care and Protection Regulation 2012 (Qld) Sch 2.} Second, Codes of Practice are simply referenced in a schedule to the regulations under the principal animal welfare Acts as adopted Codes.\footnote{See, \textit{Animal Welfare Regulations 2002 (SA) Sch 2; Animal Care and Protection Regulation 2012 (Qld) Sch 4; Prevention of Cruelty to Animals Regulations 2012 (NSW) Sch 1; Animal Welfare (General) Regulations 2003 (WA) Sch 1.} Compliance with adopted Codes of Practice is not mandated in the majority of jurisdictions. South Australia is the only state in which all adopted Codes are compulsory.\footnote{See, \textit{Animal Welfare Regulations 2002 (SA) reg 5(1).}} The primary legal significance of the Codes of Practice lies in their exempt status. As noted above, all acts done in accordance with the provisions of an
adopted Code of Practice are exempt from prosecution under the cruelty provisions of the principal animal welfare Act (with the exception of NSW and Tasmania). Conversely, noncompliance with a Code of Practice, while not an offence of itself (with the exception of South Australia), may leave the relevant person open to prosecution for cruelty.

4.5.2 The Code conversion process

In 2005 the Commonwealth Government commissioned a review of the effectiveness of the Codes of Practice due to the apparent inconsistencies in the way they had been incorporated into state legislation and increasing concerns regarding their usefulness as an enforcement tool. Consultant Geoff Neumann produced a highly critical report of the Code system (the Neumann Review). He found that the Codes did not achieve their purpose of enhancing uniformity in regulatory standards, concluding that:

[t]his inconsistent approach to the purpose and enforcement of Codes in the face of international scrutiny and rising community expectations reflects poorly on Australia’s position as a major livestock producing and exporting country. In their current form it appears that Codes do little to provide consistency, provide poor support to regulators, result in considerable additional work producing codes suitable to some States and generally satisfy few expectations.

The report stated that regulators and livestock producers alike found the content of the Codes confusing due to their tendency to intermix provisions that required certain action to be taken on what was considered minimum accepted practice and provisions that simply described or provided commentary on current industry practice. This was reflected in the mixed use of references to ‘must do’ and ‘should do’ when describing the obligations of producers.

To improve national consistency and enhance public confidence in Australian livestock industries, Neumann recommended that the Codes of Practice be converted into clear and definitive standards in the form of ‘Australian Standards for Animal Welfare’. The intended approach was for the Standards documents to outline the mandatory

---

158 Neumann, above n 147, 3-5.
159 Neumann, above n 47, 10.
160 Ibid, iii.
161 Ibid, 11.
162 Ibid, 23.
minimum animal care requirements that would be regulated under state law, while all other non-obligatory advisory material contained in the Codes were to be transferred into ‘National Guidelines for the Management of Livestock’. Neumann believed this approach would improve the clarity of the livestock industries’ animal welfare obligations and make it easier for state governments to incorporate the standards into state regulations.

The Commonwealth Government accepted most of Neumann’s recommendations but decided that it would be more manageable to include the Standards and Guidelines in one document, hence the development of the ‘Australian Animal Welfare Standards and Guidelines.’ However, since 2005, only one Standards and Guidelines document has been finalised and incorporated into state law. The Australian Animal Welfare Standards and Guidelines for the Land Transport of Livestock received state ministerial endorsement through the then Primary Industries Ministerial Council in 2009 and was incorporated into state regulations, variously, between 2012 and 2014. Western Australia is the only state yet to regulate the Standards at the time of writing (February, 2015). Standards and Guidelines for cattle and sheep farming have been drafted but are yet to be ministerially endorsed. There are 12 further codes of practice yet to be converted. At the time of writing, it is unclear how the Commonwealth Government’s withdrawal of financial support from the Australian Animal Welfare Strategy process will impact the progress for converting the Codes of Practice.

While the Codes of Practice have been heavily criticised by animal protection groups for endorsing practices that cause harm to animals, current government policy indicates that they will remain a significant feature of the animal welfare legislative model for the foreseeable future, albeit in the new form of Standards and Guidelines. However, despite their deficiencies, it is preferable to have Codes of Practice and Standards and Guidelines than to have no posited standards at all. They serve to provide a degree of certainty regarding the legality of particular livestock husbandry practices that was not

166 Ibid.
present in the past. What is an ‘accepted’ or ‘acknowledged’ husbandry practice has now been reduced to writing and is not left solely to the industry itself to decide. The process of reducing such practices to writing involves consultation with various stakeholders including from the animal protection community. However, as will be explored in Chapter 7, this process is currently flawed, and is still heavily weighted in favour of the interests of commercial productivity. While animal protection representatives may now have a seat at the negotiating table, the extent to which their concerns are reflected in final decisions is severely limited. It is argued that this is why the Codes of Practice and Standards and Guidelines have simply prescribed current industry practice, even if such practice causes harm to animals and is inconsistent with the provisions of the enabling legislation. To improve the coherency of the legislative framework, such subordinate legislation should be consistent with its enabling statutes and not prescribe practices that require exemption from its application.

4.6 Regulation of the live animal export trade

The final area of farm animal welfare regulation to be considered is that pertaining to the export of live animals. As noted in section 4.2 above, this is one of the few areas of animal welfare regulation that falls within the jurisdictional domain of the Commonwealth Government. Regulation of the live animal export trade is undertaken by the Commonwealth Department of Agriculture via two legislative regimes established by the *Australian Meat and Livestock Industry Act 1997* (Cth) (AMLI Act) and the *Export Control Act 1982* (Cth) (Export Control Act). In basic summary, the AMLI Act sets out a licensing regime for individuals or companies who wish to export livestock, while the Export Control Act provides a system for the approval of individual consignments of livestock. Both regimes are heavily interdependent; compliance with one regime is a requirement of the other. These regimes also incorporate the concurrent operation of state-based animal welfare laws but Commonwealth law will of course prevail in the event of any inconsistency.168 A brief summary of the relevant aspects of each regime is set out below.

---

168 Australian Constitution s 109; see also, *Department of Local Government and Regional Development v Emmanuel Exports* (Unreported, Magistrates Court of Western Australia (Criminal Jurisdiction), Crawford M, 8 February 2008).
4.6.1  Australian Meat and Livestock Industry Act 1997 (Cth)

The AMLI Act prohibits the export of livestock without a livestock export licence. The Secretary of the Department of Agriculture is empowered to make orders that impose certain conditions on export licences. The relevant order for animal welfare purposes is the Australian Meat and Livestock Industry (Standards) Order 2005. This Order requires licence holders to comply with the Australian Standards for the Export of Livestock (Version 2.3) 2011 (ASEL). The ASEL provide for the substantive animal welfare requirements for the live export process. They are equivalent to the Codes of Practice under the state based animal welfare regimes. However, the practices outlined in the ASEL are not exempt from the provisions of the principal AMLI Act. This is because the AMLI Act contains no expressed animal welfare provisions so there is no potential for conflict between the primary and subordinate laws. The ASEL cover the following stages of the export supply chain:

---

169 Australian Meat and Livestock Industry Act 1997 (Cth) s 54.
As with the Codes of Practice, the ASEL are quite prescriptive. They provide for many requirements relating to animal welfare including:

- detailed selection criteria for determining whether animals are fit for the export process;

**Figure 19:** Stages of the export supply chain

<table>
<thead>
<tr>
<th>Stage</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Planning the consignment</td>
<td>Planning begins well before the export consignment and covers the entire live export chain, from preparation and sourcing of the livestock in Australia until the livestock have been unloaded in the importing country. Planning also includes the development of contingencies in the case of unexpected threats to the health and welfare of the livestock.</td>
</tr>
<tr>
<td>2. Sourcing &amp; on farm preparation of livestock</td>
<td>The livestock exporter sources livestock in Australia that meets Australian and importing country health, welfare and commercial requirements. This may necessitate specific on-farm preparation of animals, including husbandry and animal health tests and treatments.</td>
</tr>
<tr>
<td>3. Land transport</td>
<td>The initial land transport phase commences when the first animal is loaded onto a vehicle at the property of origin and ends when the last animal is unloaded at the premises approved or registered by AQIS. A second phase of land transport commences when the first animal is loaded onto a vehicle to leave the premises and ends when the last animal is unloaded at the embarkation port. Where the property of origin is also the premises, the land transport phase commences when the first animal is loaded onto a vehicle and ends when the last animal is unloaded at the embarkation port.</td>
</tr>
<tr>
<td>4. Pre-embarkation assembly</td>
<td>The pre-embarkation assembly of animals for export commences with the unloading of the first animal from the vehicle at the approved or registered premises and ends with the loading of the last animal onto the vehicle for departure from the premises, whether or not the animal is passed as fit for export.</td>
</tr>
<tr>
<td>5. Vessel preparation and loading of the vessel</td>
<td>Vessel preparation includes selection and preparation of a suitable vessel to transport livestock overseas. Loading of the vessel is said to commence with the arrival of livestock at the port of loading. Loading ends when the last animal has been loaded onto the vessel and an export permit and health certificate is issued by AQIS. Loading includes an inspection of the livestock for health and fitness to travel at the port, before the animals are moved onto the vessel.</td>
</tr>
<tr>
<td>6. Sea/air voyage</td>
<td>On-board management covers the period from the time the first animal is loaded onto the vessel until the time the last animal is unloaded at the final port of disembarkation.</td>
</tr>
</tbody>
</table>
- the time of year certain categories of animals may be exported, and from which areas of the country they may be sourced;
- stocking densities for land transportation;
- feed, water and rest periods;
- the design of facilities used for transport and at registered premises;
- the preparation of animals for export including feed familiarisation;
- the manner in which rejected animals are to be dealt with;
- the appointment of sufficient personnel to ensure health and welfare during loading and the voyage; and
- stocking densities and conditions aboard the vessels.

Like the Codes of Practice, the ASEL have been heavily criticised by animal welfare groups on the basis that they permit practices that would be likely to constitute an offence if the same standards of the general cruelty and duty of care provisions contained in state animal welfare Acts were to apply. Indeed, this is precisely what Magistrate Crawford concluded in the Emmanuel Exports case when finding that the exporter had committed an act of cruelty under the state Animal Welfare Act 2002 (WA) with respect to the export of fat adult wethers during the summer months, but was nevertheless acquitted on the basis of an operational inconsistency with the live export legislative regime.\textsuperscript{172}

Another condition imposed on export licences through the AMLI Act framework is a requirement to comply with the Export Control (Animals) Order 2004 and the Export Supply Chain Assurance System (ESCAS).\textsuperscript{173} These legislative instruments are discussed below.

\textsuperscript{172} See discussion above at 4.4.3.
\textsuperscript{173} Effected by the Australian Meat and Live-stock Industry (Conditions on Live-stock Export Licences) Order 2012 (Cth).
4.6.2 Export Control Act 1982 (Cth)

The Export Control Act provides a legislative framework for governing the export of ‘prescribed goods’ (including live animals) from Australia. The administrative detail of this regime is effected through subordinate instruments known as Export Control Orders. The primary Export Control Order for the export of live animals is the Export Control (Animals) Order 2004 (Cth) (EC (Animals) Order). Under the EC (Animals) Order, a person who wishes to export live animals must first be licensed under the AMLI Act and must comply with any conditions imposed on that licence.\(^{174}\)

A key condition imposed on AMLI Act export licences is the requirement to submit and comply with an ESCAS.\(^{175}\) The ESCAS regime was introduced in 2011 following an independent review of the live animal export trade by retired diplomat Bill Farmer AO (the Farmer Review).\(^{176}\) The Commonwealth Government was prompted to commission the Farmer Review after an investigation by animal protection group Animals Australia and the ABC’s *Four Corners* revealed brutal treatment of Australian cattle in Indonesian abattoirs.\(^{177}\) The effectiveness of the Commonwealth’s regulatory arrangements for safeguarding animal welfare within the trade was a key component of the Farmer Review’s mandate.\(^{178}\) To provide further assurance of animal welfare standards, the Farmer Review recommended the establishment of a regulatory system that traces exported animals from their place of origin to the point of slaughter in the foreign jurisdiction.\(^{179}\) The system, later to be known as the ESCAS, was designed to meet the following criteria:

The minimum requirements should be that all elements of the supply chain must meet, at a minimum, the OIE standards; that animals entering a supply chain must be accounted for; that there be independent third party assessment of each supply chain; and that the exporter demonstrate whole of supply chain control.

---

\(^{174}\) See orders 2.41(2)(a), 2.44(2), 2.54(3) and 2.59 of the Export Control (Animals) Order 2004 (Cth).

\(^{175}\) Effected by the Australian Meat and Live-stock Industry (Conditions on Live-stock Export Licences) Order 2012 (Cth).


\(^{178}\) See, Farmer Review, above n 176 ‘Terms of Reference’ 104.

\(^{179}\) Ibid, ‘Recommendation 10’ xxvi.
enabling accounting for animals and ensuring treatment according to OIE standards.\textsuperscript{180}

In acknowledgement of the inherent jurisdictional limitations of the ESCAS, the Farmer Review recommended that it be effected through licence conditions placed on the exporter:

Under this system the Australian Government is not purporting to regulate overseas nor is it responsible for providing accreditation, approval or regulation of offshore facilities. The Australian Government maintains its regulatory relationship with the Australian export licence holder, and issues export permits on the basis that the exporter is to fulfil all performance requirements.\textsuperscript{181}

Hence, compliance with an approved ESCAS is now a requirement of all animal export licensees under the AMLI Act.\textsuperscript{182}

While the ESCAS may instil greater accountability and transparency within live export trade, the animal welfare standards it imposes are far from equivalent to those required under Australian law. One particularly significant issue of public concern is the allowance of unstunned slaughter for cattle. Under ESCAS, the exporter need only demonstrate that animals will be handled and slaughtered in accordance with the standards of the World Organisation for Animal Health.\textsuperscript{183} These standards allow the slaughter of cattle without stunning to render the animal unconscious before or after its throat is cut.\textsuperscript{184} Australian law requires prior stunning for the non-religious slaughter of cattle,\textsuperscript{185} and immediate post-stunning for halal and kosher slaughter; that is, ‘stunning the animal immediately after the throat is cut.’\textsuperscript{186} Curiously, the requirement – although imposed to protect animal welfare – does not derive from state animal welfare

\textsuperscript{180} Ibid.
\textsuperscript{181} Ibid, 79.
\textsuperscript{182} Effected by the Australian Meat and Live-stock Industry (Conditions on Live-stock Export Licences) Order 2012.
\textsuperscript{186} Federal Department of Agriculture, Meat Standards Committee Guideline 01-2004 – Ritual Slaughter for Ovine and Bovine.
legislation, but from state food safety regulations pertaining to the hygienic production of meat\textsuperscript{187} and the Commonwealth’s own standards regulating export abattoirs.\textsuperscript{188}

What is clear from this short overview, is that like state legislative regimes, the Commonwealth’s approach to regulating welfare standards within the live export trade appears to apply different legal standards of care depending on the context of animal use. Whether they relate to authorising the exposure of fat adult wethers to unnecessary harm during summer months or to approving foreign abattoirs that do not practice stunning under ESCAS arrangements, welfare standards appear to be readily compromised for competing commercial interests.

4.7 Conclusion

This Chapter has surveyed the current legislative landscape for the regulation of animal welfare at both the state and Commonwealth level. In doing so, it has identified the internal incoherence at the heart of the animal welfare legislative model, whereby different sets of welfare standards have been enacted for the treatment of equally sentient animals. The strengths of the animal welfare statutes in prohibiting cruelty and imposing duties of care have been largely subverted by the introduction of wide-ranging exemptions and defences for the vast majority of practices that routinely and systematically cause harm to animals. These exemptions are no more prevalent than in the context of industrial livestock production as described in the various industry-based Codes of Practice and Standards and Guidelines. Much of what is authorised under these subordinate legislative instruments would otherwise be prohibited by the provisions of the principal animal welfare Acts were it not for the operation of the exemptions. Steven White has described this as the ‘underlying irrationality’ of Australia’s animal welfare legislative framework.\textsuperscript{189} After examining the differences in

\textsuperscript{187} The Meat Standards Committee Guideline 01-2004 – Ritual Slaughter for Ovine and Bovine, which requires post stunning of cattle, was created to inform the ‘approved arrangements’ for ritual slaughter under clause 7.12 of the Australian standard for the hygienic production and transportation of meat and meat products for human consumption, FRSC Technical Report No.3 – AS 4696:2007 (the Australian standard). Compliance with the Australian standard is mandated under all state and territory food safety and meat hygiene regulations.

\textsuperscript{188} AQIS Meat notice 2009/08 Guidelines for the Preparation, Identification, Storage and Certification for Export of Halal Red Meat and Red Meat Products s 52. For a comprehensive legal analysis of regulatory deficiencies associated with the live export trade, see Morfuni, above n 109.

\textsuperscript{189} White, above n 55, 348.
legislative standards applying to companion and farmed animals, he poses the following question:

If regulatory intervention is justified by the sentiency of animals and the potential for harm which they may suffer, on what basis can differential standards of care applicable to companion and farmed animals be explained? Given their shared sentiency, there is no rational basis for distinguishing between the two.\textsuperscript{190}

The distinction clearly demonstrates that the recognition of animal sentience is not the only factor in determining how we treat animals. Rather, it is economic considerations that are more often than not front and centre of the decision-making process, consequently creating the inherent double-standard featured in the animal welfare legislative structures. This approach to animal welfare legislation does nothing to address the regulatory problem discussed in Chapters 2 and 3. Rather, it is a product of it.

\textsuperscript{190} Ibid, 361.
Chapter 5: Overview of Regulatory Failings

5.1 Introduction

As explained in Chapter 1, evaluating the legitimacy of a regulatory framework involves an assessment of both the ‘input’ and ‘output’ components of the framework’s functions. Input legitimacy relates to the procedures and structures of standard-setting and enforcement decisions, while output legitimacy refers to the results or outcomes of those functions and the regulatory framework as a whole.¹ Often, issues associated with input legitimacy will have a direct correlation with output legitimacy. For instance, standard-setting procedures that fail to properly take into account the views of key stakeholders (input) will often result in standards that do not achieve their intended objective and have low rates of acceptance materialising in poor compliance rates, legal challenge, public protest, or even vigilantism (output).² Input legitimacy issues associated with the responsible authorities, standard-setting and enforcement functions of the farm animal welfare regulatory framework are considered in Chapters 6, 7 and 8, respectively. This Chapter is focused on the key output legitimacy issues in the form of a number of poor regulatory outcomes produced by the current regulatory framework. These outcomes may be considered as indicators of regulatory failings. It may seem counterintuitive to explore such output legitimacy issues before considering the input legitimacy factors that produce them. However, it is important to clearly identify the regulatory failings first as they will inform and give context to the subsequent consideration of input legitimacy issues, particularly the analysis of regulatory capture on behalf of departments of agriculture in Chapter 6.

The term ‘regulatory failing’ is used in this context to refer to a failure of the regulation to achieve its intended policy objectives, as opposed to the meaning given to a similar term – ‘government failure’ – which in economic literature, refers to government intervention in the market that causes inefficiency and misallocation of scarce resources. The intended policy objectives for the farm animal welfare regulatory framework can be gleaned from reviewing government policy documents, second reading speeches, prefaces to Codes of Practice and Standards and Guidelines, and objects clauses of animal welfare legislation. While expressed in varying ways, four primary policy objectives emerge from reviewing these documents. They include:

- Protecting and promoting the welfare of farmed animals;
- Responding to community expectations/demands regarding the treatment of farmed animals;
- Instilling community confidence and trust in Australian livestock industries; and
- Safeguarding Australia’s international reputation on animal welfare, particularly for the purposes of trade in animals and animal products.

As this Chapter will outline, there is evidence to suggest that Australia’s current approach to farm animal welfare regulation fails to deliver on a number of these policy objectives. The primary indicators of regulatory failure identified below include inadequate animal welfare standards, the prevalence of significant animal welfare incidents, and diminishing public confidence in the regulatory framework.

In identifying the indicators it is important to ensure they are defensible and can be measured by some objective benchmark. If they are not defensible they will be vulnerable to dismissal on the grounds that they are simply the views of a disgruntled stakeholder that has failed to have its particular interests or subjective worldview reflected in the otherwise legitimate democratic processes involved in the development and administration of the framework. As will be noted below, the indicators proposed can be defended and measured via a number of objective benchmarks including

---

international comparators, public survey data, and compliance and enforcement statistics.

Ultimately, the indicators of regulatory failure presented here will help to demonstrate how the public interest in the welfare of farmed animals – which animal welfare legislation is designed to serve – has been subverted by the interests of livestock industries represented through the departments of agriculture.

### 5.2 Inadequate animal welfare standards

The first indicator of regulatory failure concerns the inadequacy of the farm animal welfare standards produced by the current framework. As discussed in Chapter 4, the standards\(^4\) currently provide for the common forms of intensive animal farming including the use of battery cages for layer hens, individual stalls for pigs, high stocking densities for broiler chickens, invasive husbandry procedures, and other farming practices outlined in Chapter 2. Of course, determining ‘adequacy’ in this context is a value laden exercise. Different stakeholders will inevitably have different views on what may be considered adequate in a given context. Often, this is because social and cultural values influence one’s conception of animal welfare and the ethical status of animal interests.\(^5\) There are however some benchmarks and points of comparison that can provide objective guidance on this question.

#### 5.2.1 Popular normative conceptions

As noted in Chapter 2, farm animal welfare law is designed to address the concerns and demands of citizens. One benchmark for assessing the adequacy of farm animal welfare standards may therefore be the extent to which they accord with popular normative conceptions of animal welfare. Sociological and consumer research on concern for animal welfare and human-animal relations more broadly was canvassed in Chapter 3. It showed that over the past 40 to 50 years public attitudes to animals have been shifting from a traditional utilitarian\(^6\) approach to a more compassionate and empathetic ethic of

---

\(^4\) Codified variously in the *Model Codes of Practice for the Welfare of Animals* and the *Australian Animal Welfare Standards and Guidelines*.

\(^5\) See Chapter 2 at 2.3.1.

\(^6\) The term ‘utilitarian’ is used here for its common meaning in terms of valuing action by its utility, not the meaning ascribed to it in the field of animal ethics, particularly by Peter Singer.
care\(^7\) and that such changing attitudes were leading to intensifying concern for animal welfare causing a growing disparity between current livestock production methods and consumer expectations.\(^8\) One national study revealed that 52\% of Australians believe that modern farming methods relating to the production of eggs, milk, and meat, are cruel.\(^9\) The research from the European Union indicated that consumers are concerned about the ‘naturalness’ of production and the overall quality of life afforded to animals.\(^10\) Consumers expected animals to be provided with living conditions that allowed them the ability to express their natural behaviour\(^11\) and were concerned about practices that caused pain and stress.\(^12\)

The willingness of consumers to pay more for products that derive from higher welfare practices may also be a measure of the discrepancy between current minimum standards prescribed by law and normative expectations. Many consumer-based studies have confirmed the willingness of consumers to pay more for welfare standards that go beyond minimum legal requirements.\(^13\) Consumer research in Australia found that 86\% of people were willing to pay more to ensure farm animals were provided with the ‘Five

---


\(^11\) Frewer et al., above n 8, 345.

\(^12\) Vanhonacker et al., above 8, 131.

Freedoms’. While some studies have noted a discrepancy between stated willingness to pay and actual purchasing behaviour, this should not discount the sincerity of the professed concern for animal welfare as there are additional market, political and social factors that influence such behavioural discrepancy. Nevertheless, the market for higher welfare meat and egg products has experienced considerable growth over recent years as ‘consumer citizens’ increasingly give effect to their political and ethical values through purchasing decisions. An Australian survey conducted between 2000-2004 found that 48% of people were more likely to buy free-range eggs than they were a few years before. These sentiments appear to be reflected in the changing retail market share for non-cage eggs, which has doubled in size from 24.8% of the market in 2005 to 50% in the 2012/13 financial year. Higher welfare chicken meat and pork products have also experienced considerable growth – including those sold under the RSPCA’s Approved Farming Scheme. Further evidence of ‘consumer citizen’ behaviour can be found in the recent changes to the conditions for the supply of meat and egg products to major Australian supermarkets Coles and Woolworths. In 2010, Coles announced, in response to customer demands, that its own brand of eggs would be cage-free from 2013, and its pork products would be ‘sow stall free’ by 2014. In October 2013, Woolworths announced that it would remove all cage eggs from its supermarkets by 2018, and its own-brand chicken would only be sourced from farms under the RSPCA Approved Farming Scheme. Coles followed suite, announcing on 3 January 2014, that

---

17 Frewer et al., above n 8, 346.
18 Franklin, above n 9, 21.
its own-brand chicken would also be sourced from RSPCA Approved farms. The movement of the retail sector towards phasing out certain systems of production from their supply chains is evidence that legal standards are falling behind popular normative conceptions of acceptable farming practices.

5.2.2 International comparators

A second benchmark for assessing the adequacy of Australia’s farm animal welfare standards may be the status of equivalent standards in other developed nations. Comparative analysis shows that Australia is falling behind many other developed countries with respect to some of the more controversial systems of livestock production. The European Union, consisting of 27 member states, passed legislation in 1999 to phase out the use of conventional battery cages by 2012. In 2001, it passed legislation to prohibit the use of sow stalls by 2013. In 2010, New Zealand amended its Pig Code of Welfare to phase out the use of sow stalls by 2015, and in 2012, it amended the Layer Hen Code of Welfare to phase out the use of battery cages by 2022. Additionally, several State jurisdictions within the US have enacted similar bans and restrictions, and most recently, the Canadian Government implemented a ban on the construction of new sow stalls from 1 July 2014, and a phase out of all stalls by 2024.

The Australian Government is yet to foreshadow any intended legislative phase-out of such production practices despite such progress being made in much of the developed world. The Australian Capital Territory (ACT) has passed legislation to prohibit sow stall and battery cage production practices. However, the move was more symbolic

---

23 Coles, ‘Coles Brand Fresh Chicken Now 100% RSPCA Approved’, Media Statement, 3 January 2014.


29 Code of Practice for the Care and Handling of Pigs (Canada).

30 Animal Welfare Act 1992 (ACT), ss 9A and 9B.
than practical as there is only one commercial egg producer and no pig farming operations within the Territory.\textsuperscript{31} The State of Tasmania has regulated to restrict the use of sow stalls to 10 days within a reproductive cycle.\textsuperscript{32} It also foreshadowed a phase out of battery cages in 2012,\textsuperscript{33} but no legislation was introduced before the new Liberal Government was elected in 2014. The absence of further progress on such farm animal welfare issues at the national level demonstrates that Australian standards are lagging behind much of the developed world.

\textbf{5.2.3 Legislative mandates}

A third benchmark for assessment may be found in the legislative mandates under which the farm animal welfare standards are developed. As outlined in Chapter 4, industry-based Codes of Practice and Standards and Guidelines are given legal effect via incorporation within State and Territory animal welfare laws. The expressed objects of these laws are generally to prevent animal cruelty and to promote animal welfare\textsuperscript{34} and all such legislation contains a prohibition on causing an animal unnecessary harm.\textsuperscript{35} At the heart of this prohibition is the principle of proportionality, which provides that any harm caused to an animal must be for a legitimate purpose, and any pain caused must not be disproportionate to that purpose.\textsuperscript{36} As enunciated by Hawkins J in \textit{Ford v Wiley} (1889) 23 QBD 205 at [219] – ‘[t]he beneficial or useful end sought to be attained [by the harm causing practice] must be reasonably proportionate to the extent of the suffering caused, and in no case can substantial suffering be inflicted, unless necessity for its infliction can reasonably be said to exist.’ If considered against this objective standard, the legality of many of Australia’s current farming practices could be brought

\textsuperscript{32} Animal Welfare (Pigs) Regulations 2013 (Tas), Reg 25A.  
\textsuperscript{34} See generally, Animal Welfare Act 2002 (WA) s 3; Prevention of Cruelty to Animals Act 1979 (NSW) s 3; Prevention of Cruelty to Animals Act 1986 (Vic) s 1; Animal Care and Protection Act 2001 (Qld) s 3.  
\textsuperscript{35} Animal Welfare Act 1985 (SA) s 13(3)(a); Prevention of Cruelty to Animals Act 1986 (Vic) s 9(1)(c); Animal Welfare Act 1993 (Tas) s 8(1); Animal Welfare Act 2002 (WA) s 19(2)(c); Prevention of Cruelty to Animals 1979 (NSW) s 4(2); Animal Care and Protection Act 2001 (Qld) s 18(2)(a); Animal Welfare Act 1992 (ACT) s 8(1).  
\textsuperscript{36} Mike Radford, \textit{Animal Welfare Law in Britain: Regulation and Responsibility} (Oxford University Press, 2001) 247-249. For a critique of this principle, see Peter Sankoff, ‘The Protection Paradigm: Making the World a Better Place for Animals?’ in Peter Sankoff, Steven White and Celeste Black (eds), \textit{Animal Law in Australasia} (Federation Press, 2\textsuperscript{nd} ed 2013) 13-30.
into question, particularly when the availability of less harm-causing alternatives are taken into consideration. This is precisely why State governments have sought to exempt the practices prescribed in the Codes of Practice from the application of animal welfare law. This demonstrates the discrepancy between the standards of care promoted by the principal animal welfare Acts and those outlined in the Codes of Practice.

So while assessing ‘adequacy’ may to some extent be a subjective exercise, there are a number objective benchmarks and comparators that can provide further perspective. As the above discussion indicates, Australia’s farm animal welfare standards fall short of the standards of care promoted within popular normative conceptions of animal welfare, international standards, and the legislative mandates of State and Territory animal welfare law.

5.3 Prevalence of significant animal welfare incidents

A second indicator that may be evidence of regulatory failure is the prevalence of animal welfare incidents within the agricultural sector in recent years. However, attempting to make an accurate assessment of this indicator is difficult as there is no data collected nationally on such cases. This was an issue identified in the Gemmel Review (discussed in Chapter 4 at 4.3.4), which described the lack of data as a ‘major weakness’ and noted that ‘no effective progress is discernible in the development of national statistics, benchmarks or performance indicators on animal welfare’ and ‘this makes any review of performance incomplete with fundamental measures of success (quantifiable improvements in animal welfare) unavailable.’ However, despite the lack of coordinated data collection, anecdotal evidence from the reports of animal protection groups, the media, and government, as discussed below, suggest that cases of significant animal welfare incidents are quite frequent, and in the case of live animal export, they are routine.

Several high profile cases of animal mistreatment within intensive production and processing facilities have been revealed in the past three years. These have included

---

separate incidents within pig, broiler chicken, and duck production facilities, and cases of cruelty in the processing of dairy calves, pigs, sheep, and turkeys. All of these cases were reported widely in the mainstream news media.

In addition to intensive production and processing operations, anecdotal evidence suggests that welfare incidents within Australia’s extensive production systems are commonplace. In giving evidence at a parliamentary inquiry into the starvation of hundreds of cattle at a university-run cattle station in the Northern Territory, a senior government veterinary officer stated that high death rates on cattle properties in the North (relative to those in Southern regions) were the industry norm. Accordingly, he could not ‘support a teaching facility being prosecuted when other properties with similar situations would not be considered for prosecution.’ This view suggests that incidents of mass cattle starvation are not unusual in the country’s Northern regions. This was supported more recently, when a Federal politician reported in January 2014, that between 5,000-10,000 cattle were dying every day across the North of Queensland due to a prolonged drought. While this figure may well have been exaggerated for political purposes, the scale of such deaths was no doubt significant.

By far the most highly reported cases of animal mistreatment have related to Australia’s live export trade. At the time of writing (June 2015), Commonwealth Department of

---


45 Evidence to Council of Territory Co-operation, Sub-committee – Animal Welfare Governance, Parliament of Northern Territory, Darwin, 3 August 2011, 5-6 (Dr Brian Radunz, Chief Veterinary Officer, Department of Primary Industry (NT)).

46 Ibid, 5.

Agriculture records indicate that since 2006, there have been 49 reportable mortality events, amounting to one every two months.\textsuperscript{48} Recent incidents include 4,179 sheep that died of heat stress en route to Qatar in September 2013,\textsuperscript{49} and a further 1,653 sheep that died in February 2014 on a Middle East-bound voyage that suffered mechanical issues.\textsuperscript{50} In addition to the incidents at sea, there have been many reported cases of cruelty in the importing countries. In only 2012 and 2013, there have been 30 reported breaches of Exporter Supply Chain Assurances System and the Australian Standards for the Export of Livestock.\textsuperscript{51} Notable cases include 20,000 Australian sheep that were brutally slaughtered in September 2012 under the order of Pakistan authorities. The shipment was originally intended for Bahrain but had been rejected due to animal health concerns.\textsuperscript{52} A more recent example involved footage of Australian cattle being tortured in the streets of Gaza. Cattle were filmed by civilians as they were roped and wrestled to the ground, stabbed in the face and throat, shot at with assault rifles, and had their throats sawn open with blunt knives.\textsuperscript{53} Animal protection groups have compiled detailed chronologies of many other examples.\textsuperscript{54} The prevalence of these cases demonstrate that serious animal welfare incidents within the trade are routine.

While there is no nationally collated data on animal welfare incidents within the Australian agricultural sector (which itself can probably count as a form of regulatory failure), regular reporting by animal protection groups, the media, and government, suggest, at least anecdotally, that such incidents occur on a regular basis.

5.4 Diminishing public trust and confidence

A key function of regulation is to promote community trust and confidence in the activity or service it is regulating so that ‘people can act with confidence in the conduct of others.’\(^{55}\) Whether it be in respect of business agreements, consumer safety, or international relations, trust underpins the proper functioning of the social order and it is the role of government to promote it.\(^ {56}\) Conversely, lack of trust or confidence can create social disharmony, deter cooperation and create conflict.\(^ {57}\) A significant influence for the development of the modern-day animal protection movement (as discussed in Chapter 3) was a lack of confidence in the willingness of livestock industries and government to adequately protect and provide for the welfare needs of farmed animals. The comprehensive regulatory regime outlined in Chapter 4 was largely the product of government’s attempt to address that loss of confidence.\(^ {58}\) Unfortunately, it has failed to achieve this objective. There are a number of signs that community confidence in the effectiveness of the farm animal welfare regulatory framework is waning. These are considered below.

5.4.1 Public attitudes towards farming

A 2012 study undertaken by rural sociologists Peter Parbery and Roger Wilkinson on behalf of the Victorian Department of Primary Industries found that the ‘humane treatment of animals’ was one of the three top issues of public concern about farming in Victoria, with the others being ‘environmental sustainability’ and the ‘provision of a good living for farmers’.\(^ {59}\) The study found that despite high levels of general support for farmers across all demographic segments, 32% of the 1,000 people surveyed held a ‘low level of trust’ that farmers would address animal welfare concerns without coercion.\(^ {60}\) The high level of general support for farming is consistent with Australia’s adulation for agrarian values and the farming way of life (discussed in Chapter 3). However, concerns about animal welfare and environmental issues are likely to

\(^{55}\) Freiberg, above n 3, 16.
\(^{56}\) Ibid, 13.
\(^{57}\) Ibid.
\(^{58}\) An independent review noted that the first Codes of Practice were developed to respond to growing concerns about animal welfare within livestock industries: Geoff Neumann, Review of the Australian Model Codes of Practice for the Welfare of Animals (2005) Geof Neumann and Associates 3.
\(^{59}\) Peter Parbery and Roger Wilkinson, Victorians' Attitudes to Farming (2012) Department of Primary Industries, Victoria 2.
\(^{60}\) Ibid, 28.
challenge such values-based support if they are not adequately addressed. Indeed, Williams and Martin believe that this is already happening:

The romantic notion of farmers as the backbone of society, caring for the land and being valued by townsfolk for their contribution to society is gradually being replaced by images of farming as an industrial enterprise retaining little of its historical image as caring stewards. Community trust in the stewardship performance of farmers has often been eroded, and this has had significant practical impacts on farming as the community seeks to replace trust-based relationships with those that formally enforce increasingly stringent standards of stewardship and limit freedoms of farmers.61

Parbery and Wilkinson warn that if community trust in farming is not strengthened agricultural industries may suffer from a lack of ‘social authorisation’ leading to further protest and critical activism.62 If public concerns are left to persist they could ‘intensify to the point of supporting disruptive action aimed at stopping socially unacceptable farm practices.’63

5.4.2 Increasing prevalence and legitimacy of direct action

Indeed, a telling sign of a loss of confidence in government’s performance in addressing a community concern is an increasing prevalence of direct action by individuals and private organisations in response. According to the *Encyclopaedia of Activism and Social Justice*, direct action is ‘the direct intervention into something in society according to activists’ own values, ideas, or needs, where perceived problems are directly redeemed or possibilities realised.’64 As discussed in Chapter 3, direct action within the animal rights context commonly takes the form of ‘open rescues’ and private investigations. The latter tactic has been of particular prominence in recent years possibly due to the greater accessibility of recording technology for surveillance, including the smart phone.65 Animal rights organisations such as Animals Australia and Animal Liberation have made private investigations a key component of their campaign

---

61 Martin and Shepheard, above n 2, vi.
62 Parbery and Wilkinson, above n 59, 4.
63 Ibid, 4.
agendas. Since 2003, Animals Australia’s campaign against the live animal export industry has featured dozens of investigations into the treatment of Australian livestock in foreign abattoirs, which have led to the suspension of the trade to significant markets including Egypt and Indonesia,66 government and parliamentary reviews,67 and widespread regulatory reforms.68 A recent joint investigation between Animals Australia and Animal Liberation involving the covert surveillance of live baiting within the greyhound racing industry led to the initiation of regulatory reviews in three states and the prosecution of over 60 individuals.69 There have been many other examples of similar investigations since just 2011.70 In fact, a new animal rights organisation was recently established with the sole aim of publicising the footage obtained from such investigations. Animal rights activist, Chris Delforce, created Aussie Farms in 2013 and has since published footage from investigations at dozens of intensive farming facilities around the country.71

It is common for such organisations to cite their lack of confidence in the government’s administration of animal welfare laws as a motivating factor for such actions. In submissions to a Senate inquiry into the Criminal Code Amendment (Animal Protection) Bill 2015 (Cth), Animals Australia and Animal Liberation Queensland expressed their frustration with government indifference to their complaints of cruelty in various industries. Animals Australia stated that every investigation they have conducted ‘has been driven by a compulsion to do so because of inaction on the part of industry and government.’72 Likewise, Animal Liberation Queensland, in justifying its investigations

---

68 Including the introduction of the Exporter Supply Chain Assurance System under the Export Control Act 1982 (Cth), discussed in Chapter 4 at 4.6.2.
70 See above nn 38-44.
72 Animals Australia, Submission to Senate Rural and Regional Affairs and Transport Committee Inquiry into the Criminal Code Amendment (Animal Protection) Bill 2015, 12 March 2015, 1. See also, Lyle Munro, ‘Strategies, Action Repertoires and DIY Activism in the Animal Rights Movement, Social Movement Studies’ (2005) 4:1 Journal of Social, Cultural and Political Protest 75, 82, noting
stated that ‘authorities are often unwilling or unable to act, especially when evidence only shows a relatively small number of apparently isolated incidents.’

Of course, the fact that some individuals and organisations choose to engage in such actions does not of itself indicate a loss of public confidence in the relevant regulatory framework and responsible authorities. These groups mostly represent the views of people who are atypically sensitive to animal protection issues. However, the way the broader community responds to such activism when it is documented in mainstream media and debated in public forums does provide some insight into public sentiment on such matters. While there is no published research examining the Australian public’s attitudes specifically to private investigative actions into animal cruelty, several recent gestures of public approval for the role played by animal activists would suggest that such actions are attracting an increasing degree of public support, and thereby, legitimacy. Prominent animal activists, who have engaged in private investigations involving trespass, and who are very open about their hard-line animal rights-based philosophies, have recently been honoured with some of the nation’s highest accolades. Lyn White, a well-known animal activist and campaign manager for Animals Australia, was the 2011 South Australian finalist for the Australian of the Year award for her services to animal protection. White rose to national prominence in 2011 for her investigation into the cruel treatment of Australian cattle exported to Indonesian. Despite the somewhat polarising nature of the live animal export debate in Australia, White has enjoyed significant positive media coverage, often being portrayed as courageous and heroic for her efforts in documenting and publicising such cruelty. In

the common frustration of many activists ‘being forced into militant forms of direct action as a consequence of official indifference to their more moderate claims’.


74 From the researcher’s own experience in following animal protection-related media over the past 15 years, there certainly appears to have been a marked shift in not only the amount of media coverage given to animal cruelty investigations but also to the way in which animal activists are portrayed. In the researcher’s perception, this has changed from a somewhat hostile approach, as documented in the 1990s (see Munro, above n 72, 75-76) to a more positive, or at least neutral, depiction of the organisations and individuals concerned.


76 See, Fergusen, above n 52.

2014, she was recognised as a Member of the Order of Australia for ‘significant service to the community as an animal rights and welfare advocate.’

Another example of the increasing legitimacy of activists played out in the 2015 NSW state elections when the executive director of Animal Liberation, Mark Pearson, was elected to the NSW Upper House after running as a candidate on behalf of the Animal Justice Party. Pearson’s involvement in direct action was well known. He had been arrested and charged by police on numerous occasions for his campaign activities, but evidently, this did not harm his perceived suitability for election to parliamentary office.

There are also examples of lesser known animal rights activists being publicly applauded. Hayley Cotton, a volunteer for Animal Liberation Queensland, was recently nominated for a *Pride of Australia Medal* for her role in uncovering live baiting in the greyhound racing industry through the use of covert surveillance. Praise for activist investigations has even come from one of the highest offices in the country. In tabling a Commission of Inquiry report into the greyhound racing industry, the Premier of Queensland, Annastacia Palaszczuk, congratulated Animals Australia and Animal Liberation for their respective efforts in exposing living baiting practices. The public acknowledgement of animal activists and their investigative efforts suggests that despite their illegal nature, there is a degree of sympathy for the cause in which they are employed.

However, this support is by no means universal. Segments of the community, particularly those from rural constituencies are strongly opposed to such actions and the philosophies upon which they are based. Rural media sources such as Fairfax

---


81 ‘The very fact that we are having an open discussion about this industry is thanks to Animal Liberation Queensland and Animals Australia prompting a joint police and RSPCA investigation followed by a hard-hitting report from the ABC and Four Corners which exposed the evidence which led to the commission. Today I place on record my thanks to my government, to the RSPCA and to the Queensland Police, and to the animal welfare groups for their action’: Queensland, *Parliamentary Debates*, Legislative Assembly, 2 June 2015, 877 (Premier Annastacia Palaszczuk).
Agricultural Media, News Corporation’s *The Weekly Times*, and ABC Rural (albeit to a lesser extent), often run pieces portraying activists in a less than positive light. Politicians representing rural communities have also proposed new laws designed to impede their investigations through prohibitions on publishing images obtained via unlawful means, or by imposing onerous mandatory reporting obligations upon activists once they have obtained footage of animal cruelty. However, consistent with the apparent growing public support for activist investigations, such laws have generally been received negatively by the community as an attempt to shut down debate and external scrutiny of livestock and other animal use industries. Such laws have also been strongly opposed by a range of professional and civil society groups including media organisations, state and national law societies, and veterinary bodies.

The increasing prevalence of animal activist investigative actions and the growing legitimacy of such action in the eyes of the community tends to suggest there is a degree

---

87 See, *Criminal Code Amendment (Animal Protection) Bill 2015* (Cth). For a discussion on how the Bill would impact private animal cruelty investigations, see RSPCA Australia, Submission to Senate Rural and Regional Affairs and Transport Committee Inquiry into the Criminal Code Amendment (Animal Protection) Bill 2015; 12 March 2015. At the time of writing (June, 2015) this Bill is still before the Australian Senate.
91 See, Australian Veterinary Association, Submission to Senate Rural and Regional Affairs and Transport Committee Inquiry into the Criminal Code Amendment (Animal Protection) Bill 2015, 12 March 2015; and Sentient, The Veterinary Institute, Submission to Senate Rural and Regional Affairs and Transport Committee Inquiry into the Criminal Code Amendment (Animal Protection) Bill 2015, 12 March 2015.
of dissatisfaction with the government’s current performance in protecting animal welfare and detecting acts of cruelty.

5.4.3 Increasing adversarialism between stakeholders and government

In addition to diminishing levels of confidence in government, there are indications that relations between key stakeholders are deteriorating and becoming less cooperative and more adversarial, thereby creating an increasingly hostile policy environment. While adversarialism has always marked the animal rights-based approach of engaging with the agricultural policy community, more moderate groups like the RSPCA have traditionally enjoyed a cooperative relationship with the farming sector and its representative organisations. However, in recent times even the RSPCA’s relationship with farming groups appears to have been strained and in some cases broken down completely. State and national farmers’ associations, including the NSW, Victorian, and National Farmers’ Federations have publicly attacked the RSPCA accusing it of becoming too ‘extreme’ in its animal protection policies and advocacy. In 2014, the NSW Farmers’ Association passed a motion at its annual conference to lobby the State Government to remove the statutory powers of RSPCA inspectors under the Prevention of Cruelty to Animals Act 1979 (NSW) claiming the organisation had ‘moved to the dark side’. The RSPCA has in-turn rejected the accusations and responded with accusing farmer organisations of losing touch with community views.

The relationship between the RSPCA and the Commonwealth Department of Agriculture also appears to be suffering as the animal welfare group recently raised concerns over diminishing levels of dialogue with the department. In May 2015, the Chief Scientist of the RSPCA, Dr Bidda Jones, told ABC media that there had been a ‘definite change in attitude on how the question of animal welfare is treated’ and that

---


93 Norris, above n 92.

‘there is now no structure for independent advice to go into government on animal welfare issues.’

The Federal Government’s decision in 2013 to withdraw funding for the Australian Animal Welfare Strategy (AAWS) (discussed in Chapter 4) and to abolish the various animal sector advisory committees that sat underneath it may have contributed to such breakdowns in relations. The Australian Live Export Council CEO, Alison Penfold, ‘expressed disappointment that the opportunity to meet formally and collaborate on key issues periodically, with the RSPCA, Animals Australia and industry stakeholders, was lost as a consequence of the government removing the $1 million Australian Animal Welfare Strategy.’ Penfold agrees there is now ‘too much of an adversarial approach to these issues.’ Deliberative forums such as the AAWS advisory committees played a vital role in bringing diverse stakeholders together on a periodic basis to discuss animal welfare issues of common concern. While agreement may not have been reached on every issue, the face-to-face dialogue nevertheless allowed stakeholders to better understand one another’s concerns and no doubt contributed to more constructive relationships. This is a key function of such deliberative forums and it is the reason why governments have a responsibility to facilitate their existence. Without them, stakeholders are more likely to act in isolation and advocate for their respective positions without considering the interests of other stakeholders. This increases the risk of misunderstandings and ultimately conflict.

5.4.4 Rise of alternative animal product technologies

Perhaps the greatest display of a loss of public confidence and trust in an industry, and certainly the most impactful, is the development of technologies that effectively make the industry redundant. History shows that when social or environmental concerns are not addressed, technology will often step in to provide a solution. A prominent contemporary example of this is the development of the renewable energy sector to replace the fossil fuel industries. An explosion of food technology companies with the

---

95 Ibid.
97 Ibid.
objective of developing alternatives to meat, dairy and egg products may expose livestock industries to a similar fate. Much of these technologies are focused on the use of plant-based proteins to mimic the flavour, texture and properties of meat, eggs, milk and cheese. However, some companies are taking a different route and are producing in-vitro meat grown in a cell culture – that is, actual meat just without the animal. Companies such as Beyond Meat, Muufri, Hampton Creek Foods, and Impossible Foods among others, have attracted millions of dollars in venture capitalist funding from the likes of Bill Gates, Google Ventures, Asia’s richest man, Li Ka-shing, and Obvious Corp, the company behind Twitter. In fact, the Dow Jones Venture Source ranked the latter two companies fourth and fifth, respectively, for overall environmental company venture funding in 2014.

One of the three primary drivers for the development of alternatives to livestock production is animal welfare. The other concerns are the environment and human health. As the CEO of Hampton Creek Foods, Josh Tetrick explains, ‘part of the reason you’re seeing all these [venture capitalists] get interested in this is because the food industry, not only is it massive, but like the energy industry, it is terribly broken in terms of its impact on the environment, health, animals.’ Similarly, Beyond Meat states that it is ‘dedicated to improving human health, positively impacting climate change, conserving natural resources and respecting animal welfare.’ The company, which has among its products, the ‘Beast Burger’, ‘South West Style Strips’ and ‘Feisty Buffalo Poppers’, has the ambitious target of reducing the world’s meat consumption by 25% by 2020. While this may be unlikely, what is certain is that the alternative

100 Beyond Meat <http://beyondmeat.com/>.
103 Impossible Foods <http://impossiblefoods.com/about/>.
108 Ibid.
animal product industry has arrived and judging by the size of its investments, looks certain to grow in the future.

The emergence of this industry is a clear sign that public confidence in animal welfare standards within livestock industries is suffering. Indeed, alternative meat companies often utilise images of industrial livestock production in the course of marketing their products. While the majority of these companies are based in the US (mostly emerging out of California’s Silicon Valley), the animal welfare concerns, which in-part led to their development are no different here in Australia.

If the purpose of government regulation is to generate community trust and confidence then Australia’s current farm animal welfare framework is in need of a rethink. Low levels of community trust in farmers, increasing public support and legitimacy for the private investigations of animal activists (despite often involving acts of trespass), degrading relations between key stakeholders, and the development of new technologies that threaten the very existence of livestock industries all point to a major problem with public confidence and trust, which the current regulatory framework has failed to adequately address.

5.5 Conclusion

As is clear from the issues discussed in this chapter the current regulatory framework for farm animal welfare is producing a number of poor regulatory outcomes. These outcomes are indicators of regulatory failings where the framework has failed to achieve its policy objectives. The indicators considered include the inadequacy of current farm animal welfare standards as measured against popular normative expectations, international standards, and legislative mandates; the prevalence of serious animal welfare incidents; and diminishing levels of public confidence and trust in the regulatory framework’s ability to address animal welfare concerns. These failings affect the ‘output’ legitimacy of the framework, the consequences of which will be considered in concluding Chapter 9.

The analysis conducted in this chapter will inform and give context to the subsequent consideration of ‘input’ legitimacy issues, particularly the assessment of regulatory

capture on behalf of departments of agriculture in Chapter 6. It will help to demonstrate how the public interest in the welfare of farmed animals – which animal welfare legislation is designed to serve – has been subverted by the interests of livestock industries represented through the departments of agriculture. This chapter also represents the final stage of the ‘scene-setting’ part of the thesis. The nature of the farm animal welfare regulatory problem has been canvassed and the government’s current attempts to address that problem including its failings has been reviewed. Part II will mark the start of the substantive investigation and critique of the key operative functions of the framework commencing with an examination of the extent to which responsible regulators may suffer from regulatory capture.
Part II

- Investigation and Critique
Chapter 6: Regulators, Agency Design, and Regulatory Capture

6.1 Introduction

Having identified the various forms of regulatory failure produced by the current farm animal welfare framework, it is now necessary to commence the inquiry into why this may be occurring. What are the factors behind the failure of the framework to develop farm animal welfare standards that accord with community expectations, international comparators and legislative mandates? Why has the regulatory framework failed to curb the apparent prevalence of significant animal welfare incidents within the livestock sector? And what are the reasons for the framework’s inability to maintain public trust and confidence in its capacity to adequately protect animals and provide for their welfare?

As canvassed in the introductory chapter to the thesis, a common diagnosis for such failings among political, academic, and NGO sources involves the alleged presence of conflicting interests on behalf of the responsible regulatory agencies. The nature of this allegation is that the stated ‘aim of defending and promoting agriculture and primary industry’ maintained by departments of agriculture ‘conflicts irreconcilably with the responsibility to protect the welfare of animals and it puts the [federal agriculture] minister in an invidious position.’ As a result, ‘the interests of animals have always come second to commercial interests.’ These issues have also been identified within Australia’s animal law scholarship. Researchers and practitioners in the field have long

---

2 Ibid.
criticised the ‘self-evident’ conflict of interest that arises when ‘[t]hose who are responsible for the maintenance of [the animal welfare] legal regime in its enforcement and formulation view themselves as the “friend of industry.”’

This perceived partiality is said to create a regulatory environment in which it ‘is almost exclusively those who have a stake in profiting from animals who continue to draw the line on what is necessary or unnecessary in the treatment of animals.’ While there has been quite widespread acceptance of this view within the literature, it would appear that the ‘self-evident’ nature of the conflict has removed any perceived need for further inquiry and scrutiny. This is a problem because other voices within the debate do not see the same self-affirming evidence. Indeed, it is common for leaders of livestock industries and their political representatives to assert precisely the opposite claim – that there is no such conflict of interest because animal welfare and productivity actually go ‘hand in hand’ and ‘a productive, profitable animal is a contented one.’

This chapter seeks to explore these claims to assess whether they have any validity in providing explanatory context to the identified regulatory failings. A theoretical frame of reference for the analysis is found in the theory of regulatory capture. Broadly conceived, regulatory capture theory concerns the private distortion of public purposes. It describes the process whereby a regulatory agency acts in the interests of the industry it is charged with regulating in a way that is inconsistent with the public interest the regulation is designed to serve. It is a concept closely associated with notions of conflicting interests and regulatory bias, and therefore provides useful insights into the key issues under examination.

Following an overview of the theory of regulatory capture, including a discussion of certain mechanisms of capture with particular relevance to the farm animal welfare context, this chapter will introduce the empirical component of the study. The primary empirical method used to investigate the potential presence of regulatory capture was a series of semi-structured interviews with the regulators responsible for the overall

---

4 McEwen, above n 3.
5 Dale and White, above n 3.
administration of animal welfare legislation in each state, territory and federal jurisdiction of Australia (with the exception of the ACT). However, other primary documentary sources including parliamentary Hansard, department annual reports and other government reports are also referred to where relevant. This research broadly explored four key issues relevant to the process of regulatory capture within the farm animal welfare context. These included:

1. The primary sources of pressure and incentives for regulators in the course of performing key animal welfare regulatory functions;
2. The regulators’ conception of, and relationship to, key stakeholders;
3. The regulators’ conception of animal welfare and its relationship with industry productivity; and
4. The regulators’ approach to animal welfare regulation within the livestock sector.

The results of this research will be discussed under these broad categories. The data provide broad support for the proposition that the current farm animal welfare regulatory framework is predisposed to regulatory capture. It indicates that the design of the framework gives rise to structural incentives for the departments to prioritise industry productivity over animal welfare, and that the regulators identify more strongly with the culture and interests of livestock industries than with those of animal welfare stakeholders and generally manifest an instrumental view of animal welfare. The data also indicate that the regulators predominately take a compliance based approach to enforcement that consist of co-regulatory arrangements, close interactions with the industry through the provision of advice and education, and negotiated approaches to compliance rather punitive responses. The chapter concludes with assessing the broader implications of these findings for the overall departmental approach to animal welfare responsibilities including its susceptibility to regulatory capture.

6.2 Regulatory capture theory

Regulatory capture is a theory familiar to a range of disciplines concerned with the performance of the State in serving the public interest. It can serve as a useful analytical tool for assessing government performance and explaining regulatory deficiencies. Capture theory relates to the private distortion of public purposes whereby a regulatory
agency acts in the interests of the individual, firm, or industry it is charged with regulating in a way that is inconsistent with the public interest the regulation is designed to serve. While the term ‘capture’ was not coined until the 1950s, the basic notion of private interest influence over public officials is said to be as old as democracy itself. Novak traces concerns about capture back to the writings of Plato and Aristotle, arguing that there is ‘[n]o older theme in the Western legal and political tradition than the one highlighted by capture.’ However, he does observe that early accounts of capture were more associated with traditional notions of corruption than the more subtle and nuanced versions of capture as it is understood today. While related to the field of public corruption, regulatory capture is distinct in the sense that the influencing forces it is concerned with are not as explicit, nor illegal, and the subsequent changes in regulatory behaviour brought about by such forces, are often not as conscious or deliberate as in the classic case of corruption. Regulatory capture is by nature insidious, and these factors can make it more difficult to identify and respond to.

It is common for the literature to attribute the development of our modern understanding of regulatory capture to George Stigler and his seminal 1971 article, *The Theory of Economic Regulation*. Stigler’s foundational analysis proposed that ‘as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit.’ However, Novak notes there were two notable expositions of the concept published before Stigler’s contribution. These included Samuel Huntington’s ‘precocious’ 1952 examination of the rise and fall of the US Interstate Commerce Commission which he attributed to the ever-present and pervasive influence of railroad interests. Three years later, Marver Bernstein took the analytical framework established by Huntington and applied it to a wider range of agencies in *Regulating*

---

11 Ibid.
14 Ibid, 3.
Business by Independent Commission. In doing so, Bernstein developed the influential ‘life cycle’ theory of agency capture, which posits that the behaviour of regulatory agencies changes as they proceed through different stages of growth. While agencies act with virility and regulatory enthusiasm upon their establishment, as they begin to mature they become passive in their dealings with industry until finally a point is reached when the agency becomes the protector of industry in a futile attempt to justify its continued existence.

The concept of regulatory capture has also been explored in Australian scholarship, proving to be a useful analytical tool for assessing the behaviour of government actors in a range of regulatory settings. In 1992, Makkai and Braithwaite investigated the effects of regulatory capture on the regulation of nursing homes finding some empirical support for Bernstein’s ‘life cycle’ theory. Various Australian environmental protection regulations have been subject to capture studies. A 1998 study of the enforcement of environmental protection laws in Queensland by Briody and Prenzler found the Environmental Compliance Division within the then Department of Mines and Energy to be suffering from regulatory capture and recommended the establishment of an independent Environmental Protection Agency to overcome the associated enforcement deficiencies. Turton analysed the administration of Queensland’s Clean

---

18 Makkai and Braithwaite, above n 17, 72.
19 Briody and Prenzler, above n 9.
Waters Act 1971 during the 1970-80s finding that the governance framework of the time had been impacted by regulatory capture.\(^{20}\) Likewise, a study by Marsden and colleagues found that regulatory capture was a cause of the Tasmanian Government’s Board of Environmental Management and Pollution Control approvals for local government councils to breach certain environmental protection requirements under the Environmental Management and Pollution Control Act 1994 (Tas).\(^{21}\) In a different regulatory sphere, Feaver examined the effects of regulatory capture on the administration of Australia’s federal anti-dumping legislation.\(^{22}\) In recognising the potential for regulations to be captured by special interests, Braithwaite and Ayres developed an influential regulatory model of ‘tripartism’ for guarding against the effects of capture.\(^{23}\) The theory emphasised the participation of NGOs and outlined a number of strategies for how they can be better integrated in regulatory processes.\(^{24}\) Tripartism will be considered in further detail in the context of reform options presented in Chapter 9.

A number of different mechanisms of capture have emerged from these studies, most of which relate to the nature of the relationship between the regulator and the regulated industry. Significant movement of key personnel between the regulatory agency and the industry – referred to as the ‘revolving door’ – has been found to influence regulatory behaviour.\(^{25}\) It can give rise to unhealthy relationships involving the granting of reciprocal privileges, particularly in circumstances where the regulator is seduced by the prospects of lucrative employment opportunities within the regulated industry. For instance, Leaver found evidence that US energy market regulators are more likely to review electricity supplier rates resulting in systematically lower energy bills for consumers when they are appointed for longer terms. This suggests that bureaucrats make ‘socially suboptimal decisions when future employment in the energy sector is more likely.’ However, most of the evidence of revolving door influences is not quantitative in nature but concerns individual incidents of conflicts of interests affecting regulatory decisions. For instance, a report by the US Office of Inspector General into the relationship between regulators within the Minerals Management Service and oil

\(^{20}\) Turton, above n 17.
\(^{21}\) Marsden et al., above n 17.
\(^{22}\) Feaver, above n 17.
\(^{23}\) Ayres and Braithwaite (1991) and (1992), above n 17.
\(^{24}\) Braithwaite Tripartism, (1991), above n 17.
\(^{25}\) Makkai and Braithwaite, above n 17.
and gas companies in 2007-08 found that one inspector who was responsible for overseeing the operations of an offshore oil company ceased issuing citations for noncompliance against the company once he had entered into employment negotiations with the company.\textsuperscript{26} Another identified mechanism of capture relates to capacity deficiencies, which make the regulator overly reliant upon the industry to provide the information or funds (through fees and levies) it requires to perform its duties is another identified mechanism.\textsuperscript{27} Capture has also been found to manifest through the existence of close ties with industry where regulators are required to maintain regular personal contact with industry representatives leading to mutual empathy, favouritism, and inappropriate regulatory concessions.\textsuperscript{28}

Capture theory has experienced somewhat of a resurgence in recent years, particularly in American scholarship due largely to the 2008 US financial crisis and the 2010 Deepwater Horizon oil spill in the Gulf of Mexico. In the aftermath of these events media and political commentators were quick to point to regulatory capture as a key causal factor in each of the disasters.\textsuperscript{29} US Senator Sheldon Whitehouse stated the following in a Senate hearing on agency capture:

We have seen the disasters that can ensue when an agency has been captured, from MMS [Minerals Management Service], whose failures and shocking behaviour led to the horrors of the oil spill in the Gulf, to the SEC [Securities and Exchange Commission], asleep at the switch as financial services companies


\textsuperscript{28} Grabosky and Braithwaite, above n 17, 205-7; Adams et al. (2007), above n 17, 3; Lawrence Baxter, “Capture” in Financial Regulation: Can We Channel it Toward the Common Good?” (2011) 21 \textit{Cornell Journal of Law and Public Policy} 175, 187.

created exotic and irresponsible financial products that took our economy to the brink of disaster.\textsuperscript{30}

As a response to the proliferation of summary capture diagnoses, a theme of the renewed scholarship has been a call for greater scrutiny on what in fact constitutes regulatory capture and what evidence is required to substantiate its existence. A prominent addition to the field in this respect is the volume edited by Daniel Carpenter and David Moss, \textit{Preventing Regulatory Capture: Special Interest Influence and How to Limit It}.\textsuperscript{31} In the introduction, Carpenter and Moss state that their intention is to ‘improve our understanding of capture, making it more robust, more thorough, and more practically useful to those who want to prevent capture.’\textsuperscript{32} To develop the conceptual structure of capture they propose the following definition:

\textit{Regulatory Capture} is the result or process by which regulation, in law or application, is consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry, by the intent and action of the industry itself.\textsuperscript{33}

This definition differs from the definition given to capture in past scholarship particularly in relation to the element of intent. Moss and Carpenter acknowledge the ‘high evidentiary bar’ set by this requirement and admit it may ‘lead us to under-diagnose capture’.\textsuperscript{34} However, they maintain that such an approach is warranted as it ‘testifies to the robust empirical standards that are needed for scholarly analysis to move beyond journalistic descriptions and claims of capture.’\textsuperscript{35}

While acknowledging the prevalence of specious claims of capture, and accepting the need for more rigorous conceptual and evidentiary foundations, it is difficult to reconcile the necessity for demonstrating an intent on behalf of industry to capture the regulation. Indeed, such a requirement would seem to rule out some of the most established forms of capture, including the ‘life cycle’ and ‘revolving door’ mechanisms

\textsuperscript{30} Evidence to US Senate Committee on the Judiciary Inquiry ‘Protecting the Public Interest: Understanding the Threat of Agency Capture’, 3 August 2010, 2 (Senator Sheldon Whitehouse).
\textsuperscript{31} Daniel Carpenter and David Moss (eds) \textit{Preventing Regulatory Capture: Special Interest Influence and How to Limit It} (Cambridge University Press, 2013).
\textsuperscript{32} Ibid, 6.
\textsuperscript{33} Ibid, 16.
\textsuperscript{34} Ibid, 17
\textsuperscript{35} Ibid.
of capture. While the intent of industry may certainly play a role in capturing regulators it cannot be said to be a precondition to capture. Regulation may be consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry independently of the intent of the industry itself. Other factors such as the age of the regulatory agency (life cycle), the transfer of key personnel between the regulator and industry (revolving door), discrepancies in the degree of information regarding the regulated activity (information asymmetries), practical features of compliance monitoring programs (close ties), and the sources of agency revenue (funding dependencies) may give rise to capture regardless of whether the relevant industry manifests an actual intention to draw the regulator away from serving the public interest.

The primary concern of capture analysis should be whether the regulation deviates from the public interest towards industry interests. Whether industry manifests an actual intent to bring about this deviation does not lessen the detriment caused to the public interest. Unintentional capture is still capture and requires an appropriate regulatory response. For these reasons, this thesis adopts a broader and more flexible definition of capture such as that proposed by Barry Mitnick in his 1980 text, *The Political Economy of Regulation*:

‘Capture’ is said to occur if the regulated interest *controls* the regulation and the regulated agency; or if the regulated parties succeed in *co-ordinating* the regulatory body’s activities with their activities so that their private interest is satisfied; or if the regulated party somehow manages to neutralize or ensure non-performance (or mediocre performance) by the regulating body; or if in a subtle process of interaction with the regulators the regulated party succeeds (perhaps not even deliberatively) in co-opting the regulators into seeing things from their own perspective and thus giving them the regulation they want; or if, quite independently of the formal or conscious desires of either the regulators or the regulated parties the basic structure of the reward system leads neither venal nor incompetent regulators inevitably to a community of interests with the regulated party.36

The notion of a structural reward system leading regulators to a ‘community of interests’ with the regulated industry reflects two additional mechanisms of capture not yet mentioned. These include the role of poor agency design in failing to produce the necessary incentives for regulators to pursue the public interest, and that of ‘cultural capture’ where the regulator adopts the industry’s worldviews with respect to the role and nature of the regulation it is administering. As the data analysis below will show, each of these mechanisms has particular significance for the farm animal welfare regulatory framework and will therefore be discussed in turn.

### 6.2.1 Poor agency design

The design of a government institution can influence its predisposition to capture. Poor agency design has been found to be a key contributor to capture, particularly when an agency is tasked with pursuing two conflicting objectives.\(^{37}\) It is certainly not uncommon for government departments – especially large conglomerate ‘super departments’ – to be delegated with responsibilities that may at times give rise to tensions and conflicts. The classic example is an agency that has the dual-fold role of both promoting an industry, in terms of its growth and productivity, while at the same time regulating the industry to serve a public interest, such as human safety, consumer protection, environmental conservation or animal welfare.

However, upon closer examination, acting as both ‘industry cheerleader’ and ‘industry policeman’ does not of itself create a conflict. Regulation may serve the interests of industry in creating a fair and stable environment in which to do business, and in guarding against external risks. Equally, industry productivity may in turn serve the public interest in terms of increased economic prosperity and rates of employment, and cheaper products and services for consumers. Where the difficulties arise is in the nature of the relationship between the perceived conflicting responsibilities, especially as their respective importance is considered against the backdrop of the agency’s overarching mission. If one objective is unduly prioritised over another it can affect

---

agency performance with regard to the subordinate responsibility. Biber has noted that agencies will systematically underperform on secondary goals that conflict with the achievement of the agencies’ primary goals. In particular, agencies will pursue short term economic goals that are easy to measure at the expense of more elusive social goals in the public interest.

It is important to point out here that institutional design of this nature is not constitutive of regulatory capture in itself. Agencies are often ‘pro industry’ because the very purpose of their existence is to facilitate the needs of an industry. They may be instructed by the responsible minister and the legislative mandates under which they operate to promote industry growth and productivity. This is not capture but ‘electorally sanctioned pro-business governance’. It is when industry-promoting agencies are delegated with responsibility for pursuing a public interest objective that conflicts with these economic goals that problems begin to arise. This is because such agencies are more inclined to adopt the norms and values of the industry they are designed to serve in their approach to the relevant conflicting public interest – a process referred to as ‘cultural capture’.

6.2.2 Cultural capture and the agricultural policy community

Cultural capture (sometimes referred to as ‘cognitive’ capture), is a process by which ‘those in charge of the relevant state entity internalise, as if by osmosis, the objectives, interests and perception of reality of the vested interest they are meant to regulate.’

Factors that induce the capture of cultural norms include common backgrounds and experience between industry representatives and regulators, and an industry with a social purpose with which the regulators identify. This can create difficulties in the policy formulation process because, as Kwak explains, ‘when people identify with groups or adopt ideas…it is considerably harder for those people to identify the sources of their choices,’ and they are not open to ‘rational argument about the public interest.’

Alternative viewpoints can become difficult for the regulator to

---

38 Biber, above n 37, 13.
39 Ibid, and Barkow, above n 37, 50.
40 Carpenter, above n 12, 66-67.
42 Baxter, above n 28, 182-3; Kwak, above n 27, 95.
43 Kwak, above n 27, 98.
conceptualise, and a form of ‘unconscious bias’ towards the interests and demands of the regulated industry may emerge. As Mitnick’s explanation provides, capture can manifest ‘quite independently of the formal or conscious desires of either the regulators or the regulated parties’ when ‘the basic structure of the reward system leads neither venal nor incompetent regulators inevitably to a community of interests with the regulated party.’ If regulators are more readily rewarded for delivering on measurable economic goals that align with the interests of the regulated industry, then it should come as no surprise when the agency adopts the industry’s norms and perspectives, and subsequently underperforms on other responsibilities that conflict with those goals.

The nature of the relevant policy community may also contribute to an agency’s susceptibility to cultural capture. The concept of a ‘policy community’ was developed within political science literature as an analytical tool for better understanding the process of policy-making. Policy communities are generally described as ‘relatively exclusive and closed to outsiders, have a cohesiveness reflected in frequent, high-quality interaction between participants, are long lasting entities, and are characterised by resource exchanges between members.’ They are said to be marked by three defining characteristics: differentiation (from other policy communities and the public), specialisation (in the subject matter of the policy area), and interaction (between members within the policy community). Agricultural policy communities have been described as ‘archetypal “closed” networks, which have a shared approach to policy and which exclude competing views from the process.’ They are widely recognised as ‘one of the clearest examples of a policy community in persistence, cohesion and exclusiveness.’

---

45 Mitnick, above n 36, 95-6.
47 Wyn Grant and Anne MacNamara, ‘When Policy Communities Intersect: The Case of Agriculture and Banking’ (1995) XLIII Political Studies 509.
49 Linda Botterill, ‘The Role of Agrarian Sentiment in Australian Rural Policy’ in Francesca Merlan and David Raftery (eds), Tracking Rural Change: Community, Policy and Technology in Australia, New Zealand and Europe (ANU E Press, 2009) 65.
50 Grant and MacNamara, above n 47, 510.
Martin Smith examined the UK agricultural policy community in the 1990s. Looking primarily at the relationship between the National Farmers’ Union and the Ministry of Agriculture, Fisheries, and Food (MAFF), Smith found that this agricultural policy community had two important internal structures for excluding unwelcome groups: the ideological and the institutional. The ideological structure is ‘the dominant set of beliefs which are shared by members of the agricultural policy community,’ while the institutional structures included MAFF, ‘which provides the community with a single decision-making centre with the authority to make agricultural policy’, and which, he noted, ‘has an interest in maintaining good relations with the farmers and in increasing agricultural expenditure.’ Additional institutional structures included the agricultural policy decision-making frameworks within the European Community. Smith detailed how agricultural policy was developed by the European Directorate General for Agriculture, which ‘sees its role as that of a farm support organisation’ that ‘has very close contacts with national and European farmers’ organisations’ but ‘very poor relationships with non-farm groups such as consumers and environmental groups.’ Final decisions on policy developed by the Directorate General of Agriculture were then determined by the Council of Agricultural Ministers, which, Smith noted, ‘see it as their role to win the best possible deal for their own farmers.’

Smith also identified the existence of primary and secondary communities within the broader agricultural policy community. The primary community, he explained, was made up of groups which ‘are intimately involved in policy making on a day-to-day basis’ while the secondary community consisted of groups who would be allowed conditional access with permission of the primary community on specific issues. Access was granted on the basis that such groups ‘follow the rules of the game set by the primary community and share their values on the direction of agricultural policy.’ If such groups ‘questioned the established agricultural agenda,’ they would be ‘ejected for being too extreme.’ As MAFF’s approach to environmental issues was ‘seen as being

52 Ibid, 31.
53 Ibid.
54 Ibid, 32.
complacent and narrow’, ‘with an overriding concern for the intensification of farming,’ there was little opportunity for environmental groups to provide input.55

Garner observed the same agricultural policy community dynamics at play when he examined the farm animal protection policy processes operating in Britain and the US in the late 1990s.56 His analysis found that these processes were controlled by closed agricultural policy communities in each country.57 However, Garner noted that the agricultural policy community in the US was more exclusive in nature than that operating in Britain, and subsequently, the protections afforded to farm animals in the US were seen to be inferior to those operating in Britain.58 Garner therefore found that the particular institutional structures operating within each policy process affected the substance of the policy outcomes.59 Garner identified that both the US Department of Agriculture and the British Ministry of Agriculture, Fisheries and Food were heavily influenced by livestock industry interests whether through close relationships with key industry bodies60 or through political subordination to agriculturally dominated congressional committees.61 Garner also makes a passing reference to the potential for such closed policy communities to give rise to regulatory capture:

The policy community model of decision-making does seem to provide one additional factor to the equation which provides greater resonance to the ‘capture’ critique of regulatory activity. Here, it might be suggested that relying on policy community actors to effectively enforce regulations they are not too keen on having in the first place, is doomed to failure.62

As will be discussed below and in Chapter 7, many of Smith and Garner’s findings are consistent with the dynamics of Australian agricultural policy community, particularly with respect to ideological and institutional exclusionary mechanisms. Such closed policy communities provide fertile ground for insider interest groups to capture the cultural norms and perspectives of governing departments.

55 Ibid, 31-45.
57 Ibid, 139-176.
58 Ibid, 139.
60 Ibid, 151-75
61 Ibid, 141-146
6.2.3 The ‘public interest’

The final aspect of regulatory capture to consider before going on to assess the extent to which it exists within Australia’s farm animal welfare framework, is the notion of the public interest. As the above discussion indicates, a key element of the capture thesis is a sustained regulatory shift away from ‘the public interest’ the regulation is designed to serve. Accordingly, understanding what is meant by ‘the public interest’ within a given regulatory context is critical to determining the extent to which an agency can be said to have drifted away from serving it, if it has at all. It is acknowledged that the notion of the public interest is ‘exceptionally indeterminate and amorphous’.63 As Carpenter and Moss note, in a pluralist society ‘there is no certainty in making a value claim about the common good.’64 What matters, they argue, is that an account of the public interest is offered and defended so that ‘readers and future researchers can engage appropriately with the argument.’

As discussed in Chapters 2 and 3, the ‘regulatory problem’ sought to be addressed by the farm animal welfare regulatory framework is ‘the impact of modern industrial farming methods on the welfare of animals.’65 ‘The framework’s fundamental objective is to strike an appropriate balance between the economic interests in using animals in the most productive way possible and the social and ethical interests of the public in ensuring the welfare of animals is not unduly compromised in the process. While a public interest case can be made on both sides of this debate, the public interest animal welfare regulation is designed to serve is clearly that of animal welfare. Economic interests may indeed be served by upholding acceptable standards of animal welfare but these are incidental to, and dependent upon, the public’s interest in animal welfare. Indeed, the treatment of farmed animals would not have economic and political implications if it were not for the objections expressed by concerned citizens.66

But perhaps the best guidance on the public interest intended to be served by animal welfare legislation can be found in the objects clauses of the legislation itself. All eight state animal welfare laws refer to the promotion of animal welfare, ‘humane treatment’

---

64 Carpenter and Moss, above n 31, 14.
65 Chapter 2 at 2.1.
66 See discussion in Chapter 3 at 3.1.
or ‘responsible care’ within their objects clauses\textsuperscript{67} or long title (for those that do not
have objects clauses\textsuperscript{68}), and six out of the eight refer to the prevention of cruelty.\textsuperscript{69} Only
Queensland’s Animal Care and Protection Act 2002 makes reference to what could be
considered economic interests. One of its intended objectives is to ‘achieve a reasonable
balance between the welfare of animals and the interests of persons whose livelihood is
dependent on animals.’\textsuperscript{70}

Further guidance may be found in the available sociological evidence on public
attitudes and expectations regarding farm animal welfare. Much of this evidence has
already been canvassed in Chapters 3\textsuperscript{71} and 5.\textsuperscript{72} It demonstrates that public concern for
the welfare of farm animals is increasing, fuelled by a shift from the traditional
utilitarian approach, emphasising the productivity and instrumental worth of animals, to
a more compassionate and empathetic ethic of care.\textsuperscript{73} Consequently, the public is
increasingly demanding improvements in farm animal welfare standards to meet their
evolving expectations.

In taking these factors into account, it is proposed that the Australian farm animal
welfare regulatory framework is designed to serve a dual-fold public interest in: 1)
protecting farm animals from cruelty; and 2) promoting farm animal welfare through
incremental, but sustained, improvements in welfare standards over time. This
conception of the public interest behind farm animal welfare law is supported by the
stated objects of the law itself and the available sociological evidence on public
attitudes to farm animal welfare.

\textsuperscript{67} Animal Welfare Act 2002 (WA) s 3(2)(a); Prevention of Cruelty to Animals Act 1979 (NSW) s 3(b);
Animal Care and Protection Act 2001 (Qld) s 3(a); Prevention of Cruelty to Animals Act 1986 (Vic) s 1(b); Animal Welfare Act 2000 (NT) s 3(a).
\textsuperscript{68} Animal Welfare Act 1993 (Tas) (‘Long Title’), Animal Welfare Act 1992 (ACT) (‘Long Title’);
Animal Welfare Act 1985 (SA) (‘Long Title’).
\textsuperscript{69} Animal Welfare Act 1993 (Tas) (‘Long Title’); Animal Welfare Act 2002 (WA) s 3(1)(b); Prevention
of Cruelty to Animals Act 1979 (NSW) s 3(a); Prevention of Cruelty to Animals Act 1986 (Vic) s 1(a);
Animal Care and Protection Act 2001 (Qld) s 3(c); Animal Welfare Act 2000 (NT) s 3(b).
\textsuperscript{70} Animal Care and Protection Act 2001 (Qld) s 3(b)(i).
\textsuperscript{71} At 3.2.
\textsuperscript{72} At 5.2.1.
\textsuperscript{73} Adrian Franklin, Bruce Tranter, and Robert White, ‘Explaining Support for Animal Rights: A
Comparison of Two Recent Approaches to Humans, Nonhuman Animals, and Postmodernity’ (2001)
9:2 Society & Animals 121-122; Nicole Mazur, Cecily Maller, Heather Aslin and Robert Kancans,
Services, Australian Government 21.
Having now set out the theory of regulatory capture and its various mechanisms, and proposed a model of the public interest against which to assess the regulatory framework’s performance, the empirical component of the research can now be examined.

6.3 Interviews with regulators

As the above account of regulatory capture indicates, it can be a difficult phenomenon to identify and diagnose. It is insidious by nature and is often a condition that develops ‘independently of the formal or conscious desires of the either the regulators or the regulated parties’. Thus, it is often only through the eyes of independent observers, following close scrutiny and analysis, that the signs and effects of regulatory capture can be identified. This is particularly so in cases of cultural capture where regulators may not even be aware of the fact they are operating within a closed policy community that harbours cultural norms and perspectives that are inconsistent with the values underpinning the relevant regulation. To simply ask a regulator directly whether they are captured by industry would of course be a futile – if not mildly offensive – exercise; the response would invariably be ‘no’. Instead, the researcher must inquire further into the background and dynamics of the policy community, into the nature of relationships between key stakeholders, into the views and perspectives on key policy issues, and into the primary sources of pressure and influence on their decision-making.

Such inquiry is best pursued via qualitative means. Regulatory capture is a complex social phenomenon, the intricacies and nuances of which would be difficult, if not impossible, to ascertain using quantitative methods. In contrast, qualitative methods are suited to investigating and understanding multifaceted social interactions, experiences, and world views. ‘They seek to unearth and understand social meaning from the perspectives of research participants who are enmeshed in their context.’ This was the objective of the empirical component of the research, to understand the views, perspectives, and experiences of the regulators responsible for the administration of the

---

74 Mitnick, above n 36, 95-96.
farm animal welfare framework. In particular, the research sought to explore the following key issues:

1. The primary sources of pressure and incentives for regulators in the course of performing key animal welfare regulatory functions;

2. The regulators’ conception of, and relationship to, key stakeholders;

3. The regulators’ conception of animal welfare and its relationship with industry productivity; and

4. The regulators’ approach to, and conception of, the role of animal welfare regulation within the livestock sector.

The best method to engage in such exploration was through the use of in-depth, in-person, semi-structured interviews. Semi-structured interviews aim to understand participants ‘on their own terms and how they make meaning of their own lives, experiences, and cognitive processes.’ They are effective at eliciting un-scripted truths. This was particularly important for attempting to ascertain the unconscious perspectives of government officers who are typically inclined to follow closely to government policy lines. It was important to go behind formal scripted policy speak to uncover the real meanings and perspectives of the regulators. Impulsive responses often elicit subconscious frames of thinking and this was certainly picked up in some of the interviews as will be discussed below. As the subject matter of the research could be construed as being politically sensitive, the researcher felt it was desirable for the interviews to be conducted in-person rather than over the phone to aid in building trust and rapport with the interviewees.

Ethics approval was obtained from the Macquarie University Ethics Committee. Strict conditions were placed on the research including a requirement for the anonymity of interviewees. The research project was deemed to be ‘high risk’ due to a perceived conflict of interest on behalf of the researcher. The perceived conflict arose out of the

---

77 Robert Yin, *Qualitative Research From Start to Finish* (Guilford Press, 2011) 135.
78 Ibid.
researcher’s part time employment with an animal protection organisation, RSPCA Australia. While RSPCA Australia did not provide any financial assistance for the research project, the results of the project were likely to ‘be of interest’ to the organisation due to its relevance to the development and implementation of animal welfare law and policy of which the RSPCA is involved. The nature of this interest and the associated perceived conflict of interest on behalf of the researcher were outlined in ‘Conflict of Interest Disclosure’ included in the ‘Information and Consent’ form that was sent to all prospective interviewees when contacted for participation in the project.

**Conflict of Interest Disclosure**

Mr Goodfellow is employed on a part-time basis by RSPCA Australia as a policy officer. Mr Goodfellow’s role involves the provision of advice on legislative and regulatory issues affecting animal welfare. This position is not, however, related to the research project. RSPCA Australia has a general interest in the regulation of animal welfare within the agricultural sector. RSPCA Australia frequently participates in animal welfare standard-setting processes within government, particularly at the Commonwealth level. The results of the research project, with respect to any conclusions and recommendations made concerning standard-setting and enforcement functions are likely to be of interest to RSPCA Australia in an operational sense. RSPCA Australia does not, however, possess any pecuniary interest in the research project. To confirm, RSPCA Australia is not providing any funding for, and is in no other way associated with the research project.

As the research was intended to examine the regulation of farm animal welfare legislation across the country, interviews with regulators from all state, territory and federal jurisdictions were sought. Potential interviewees were identified on the basis of their responsibility for the overall administration of animal welfare legislation in each jurisdiction. These individuals were mostly mid to upper level executive officers within their respective departments. Field inspectors were not included in the study as the focus was at a higher level within the policy decision-making structures of the framework. Future research including animal welfare field inspectors would be important for establishing the extent to which they experience capture influences. Past capture research on field inspectors would suggest that animal welfare inspectors
operate in an environment that is highly susceptible to capture given the remote locations in which many operate and their close and frequent contact with regulated parties.  

In total, 10 individuals were identified based primarily on their membership of high level intergovernmental animal welfare policy committees. This represented one person for each of the nine state, territory and federal jurisdictions with the exception of one state which maintained a shared administrative arrangement for animal welfare between two departments and therefore two individuals were identified for that jurisdiction. The prospective interviewees were contacted via email, which gave an overview of the research project and invited them to participate. The email attached the ‘Information and Consent’ form, which provided further detail about the project, and a list of the questions intended to be asked during the interviews. The list of questions is attached in Appendix 2. Of the 10 individuals contacted, eight agreed to participate in the study, although two of the eight individuals wished to provide written answers in lieu of participating in a semi-structured interview. In addition to these individuals, a former regulator from one of the jurisdictions proactively contacted the researcher upon hearing about the study to request participation. As the Ethics Approval for the research project was based on interviewing current regulators this request was denied pending the submission of an amendment to the Ethics Approval. This amendment was later granted by the Ethics Committee and the former regulator was formally invited to participate in the research project. This then equated to a total of nine individuals representing eight of the nine jurisdictions (with one jurisdiction being represented by both the current and former regulator). The only jurisdiction not represented in the study was the Australian Capital Territory (ACT). This did not have a significant bearing on the representative quality of the research project as the ACT has a very limited livestock sector and subsequently its government does not maintain a department of agriculture or equivalent.

The interviews were conducted during September and October 2013. The researcher travelled to the location of each interviewee and therefore visited each state and territory jurisdiction (the ACT was still visited to conduct an interview with the Australian Government representative in Canberra). Most of the interviews took place within the

---

80 Adams et al. (2007), above n 17, 6-9.
interviewees’ offices although two were conducted offsite at a location of the interviewee’s preference. All but one of the interviews were digitally recorded to facilitate data analysis. Interviewees were advised of the researcher’s intention to digitally record the interviews within the ‘Information and Consent’ form. However, one interviewee asked for the interview not to be recorded. The researcher instead relied on extensive handwritten notes to record this interview. The interviews ranged from between 40 minutes to 1 hour and 20 minutes in duration. The researcher found the interviewees to be generally open and comfortable with speaking their mind and answering all of the questions asked without hesitation. The researcher generally found the interviews to be positive and friendly experiences. Only one interviewee appeared apprehensive, often choosing to refer to pre-prepared notes to answer questions. Overall, the data collection stage ran smoothly and the researcher was pleased with the quality of information obtained through the interviews.

6.4 Data analysis

The Data analysis can be both inductive and deductive in nature in that it can be influenced by both the research objectives and the examination and interpretation of the raw data.\(^1\) The analysis of interview data was informed by the particular research objectives in terms of seeking to assess the framework’s susceptibility to regulatory capture, and by the insights gleaned directly from the interpretation of the raw interview data itself. Such hybrid approaches to data analysis involve an inherent tension between ‘1. The risk of “forcing” data into previous conceptual categories, that is, not being inductive enough; and 2. producing such a large volume of codes for empirical material that it hinders the categorisation and theoretical development process, that is, not being deductive enough.’\(^2\) This was acknowledged during the data analysis and kept at the forefront of the researcher’s mind in an attempt to arrive at an appropriate balance. Prior research on regulatory capture was used to guide the analysis and categorisation of data, particularly with respect to identifying certain mechanisms of capture such as cultural alignment and close ties with industry and sources of pressure and influence, but the analysis remained alive and open to coding and categorising new themes and issues that

---


emerged directly from the data, some of which are discussed below. Conversely, issues thought to be of relevance prior to the analysis that were subsequently found not to be supported by the data were discarded.

Data analysis commenced with the transcription of the interview audio files. The researcher transcribed the files personally to improve knowledge and familiarity with the data. Once all interview data were transcribed the researcher then commenced the process of coding. The transcripts from the two regulators who wished to give written responses to the questions were included in the coding process as if they were no different from the interview transcripts. Johnny Saldana’s approach to coding outlined in his book, *The Coding Manual for Qualitative Researchers*, was adopted for the data analysis. Saldana’s approach proposes an analytical process that commences with the initial coding of the data, followed by the creation of categories and themes, and concludes with the development of theory.

Saldana describes a code as a word or short phrase that ‘symbolically assigns a summative, salient, essence-capturing, and/or evocative attribute for a portion of language-based or visual data.’ Coding is a ‘method that enables you to organise and group similarly coded data into categories or “families” because they share some characteristic – the beginning of a pattern.’ It involves ‘classification reasoning plus your tacit and intuitive senses to determine which data “look alike” and “feel alike” when grouping them together’ in order to consolidate meaning and explanation. Ultimately, coding is an interpretive exercise. The precise codes chosen will depend on the researcher’s academic discipline and the theoretical and conceptual frameworks within which the research takes place. During the initial coding process the researcher was particularly looking for reoccurring themes, statements that directly or indirectly supported or contradicted initial assumptions, and interesting or surprising data generally. Initial coding of the 120 pages of interview data gave rise to 21 codes. These were further refined with subsequent coding and analysis to a total of 15 codes. The 15 codes were then grouped into four categories that broadly reflected the four key issues sought to be analysed. Saldana advises that grouping codes into categories facilitates the

---

84 Ibid, 3.
85 Ibid, 8-9.
86 Ibid.
87 Ibid, 4.
process of meaning-making: ‘qualitative codes are essence-capturing and essential elements of the research story that, when clustered together according to similarity and regularity – a pattern – they actively facilitate the development of categories and thus analysis of their connections.’\textsuperscript{88} The four categories developed from the data included:

1. Institutional design and incentives;
2. Conception of key stakeholders;
3. Conception of animal welfare; and

These categories appeared to adequately encapsulate the 15 codes. From these categories, four key themes were identified. Saldana provides that while codes and categories are about labelling information, a theme is an outcome of this process mixed with analytic reflection.\textsuperscript{89} Rossman and Rallis explain the difference as follows: ‘think of a category as a word or phrase describing some segment of your data that is explicit, whereas a theme is a phrase or sentence describing more subtle and tacit processes.’\textsuperscript{90} The major themes to emerge out of the coding and categorisation process were as follows:

1. The design of the regulatory framework produces structural incentives prioritising productivity goals over animal welfare;
2. Regulators identify more strongly with livestock industry stakeholders than with animal welfare stakeholders;
3. Regulators take a primarily instrumental view of animal welfare;
4. Regulators take a cooperative/partnership approach to animal welfare regulation within the agricultural sector.

These themes were developed following a period of considered reflection on the codes and categories and the interviews in general. They represent the culminated meaning of

\begin{flushleft}
\textsuperscript{88} Ibid, 8.
\textsuperscript{89} Ibid, 13.
\end{flushleft}
the 15 codes and four categories and are the primary take-home messages from the interviews.

The final stage in the data analysis process is the development of theory. This represents the culmination of transforming the real into the abstract and the particular into the general. As Saldana explains, ‘when the major categories are compared with each other and consolidated in various ways, you begin to transcend the “reality” of your data and progress toward the thematic, conceptual, and theoretical.’ Theory is the product of systematically interrelating key themes and concepts. The key causal relationship proposed between the themes above is that the structural incentives prioritising industry productivity over animal welfare create, or are at least a strong contributor towards, the regulators’ identification with livestock industry stakeholders, their instrumental view of animal welfare, and their cooperative approach to animal welfare regulation. In other words, theme 1 gives rise to themes 2, 3, and 4 as depicted in Figure 20 below.

Figure 20: Relationship between coding themes

---

91 Saldana, above n 76, 12.
92 Ibid, 11.
The ultimate theory derived from the themes and their interrelationship is that the design of the relevant regulatory frameworks, in delegating animal welfare responsibilities to departments of agriculture, accountable to agriculture ministers, gives rise to structural incentives for regulators to prioritise economic goals associated with productive and profitable primary industries over animal welfare goals. This, in-turn, creates a regulatory environment that is highly susceptible to cultural and regulatory capture. The key elements of this theory are expanded upon in the discussion below.

Figure 21 below depicts the overall interview data analysis including the transition from 15 codes and four categories to the development of the four themes and final theory.
Figure 21: Interview data analysis
Discussion

The discussion of the empirical data is divided into the four key issues examined through the interviews and the corresponding themes that emerged following the coding analysis. To ensure anonymity, statements from regulators will be referenced numerically from ‘Regulator 1’ through to ‘Regulator 9’ reflecting the order in which each regulator was interviewed by the researcher. Anonymity has also been protected by removing, paraphrasing or generalising references to specific information like the names of particular units within departments, certain programs or initiatives run by departments, or to industry or other stakeholder groups. Additionally, two of the regulators did not give permission to use direct quotations from their interviews regardless of anonymity. Extracts utilised from these interviews have therefore been rewritten in the researcher’s own words in a way that does not alter the meaning of what was said. In addition to data obtained through the interviews, this discussion will also include reference to primary documentary sources including parliamentary Hansard, departmental annual reports and other government reports where relevant.

6.4.1 Agency design and structural incentives

One of the key issues sought to be investigated through the interviews was the primary sources of pressure and influence for regulators in the course of performing key animal welfare regulatory functions such as standard-setting, implementation of law and policy, and enforcement. A particular topic for exploration included the nature of the bureaucratic environment in which such actions were performed and whether any sources of pressure or influence derived from the actual design and structure of the departments of agriculture and the regulatory framework as a whole. As discussed above, regulatory capture can manifest as a result of poor regulatory design where agencies are delegated with serving two competing objectives.\(^93\) Agencies will systematically underperform on secondary goals that conflict with the achievement of their primary goals.\(^94\) This is of particular concern when the primary goals are economic in nature and easy to measure, and the secondary goals are social in nature and difficult to measure.\(^95\)

\(^{93}\) See discussion at 6.2.1.
\(^{94}\) Biber, above n 37, 13.
\(^{95}\) Ibid; Barkow, above n 37, 50.
As outlined in Chapter 4, the administration of animal welfare legislation is delegated to the departments of agriculture in all jurisdictions, with the exception of the Australian Capital Territory (ACT) and South Australia.\(^{96}\) The ACT is the smallest geographical jurisdiction in mainland Australia and does not have an agriculture department. In South Australia, while the Department of Environment and Natural Resources has formal administrative responsibility for the State’s animal welfare legislation, officers from the Department of Primary Industries and Regions play a prominent role in the development of farm animal welfare policy.\(^{97}\)

Departments of agriculture exist to serve their respective agricultural sectors primarily through the promotion of profitable and productive primary industries. The prominence of these objectives is abundantly clear upon review of departmental mission statements and corporate documents. For instance, the stated mission of Commonwealth Department of Agriculture is to ‘lead the development of policy advice and provide services to improve the productivity, competitiveness and sustainability of agriculture, fisheries, forestry and related industries.’\(^ {98}\) The vision of the Queensland Department of Agriculture, Fisheries and Forestry is for ‘efficient, innovative, resilient and profitable agriculture, fisheries and forestry industries that thrive in the long term.’\(^{99}\) The Department’s goal is to ‘double Queensland’s agricultural production by 2040.’ The vision of Western Australia’s Department of Agriculture and Food is for ‘a progressive, innovative and profitable agriculture and food sector that benefits Western Australia.’\(^{100}\) The Department states that its role is to ‘assist WA’s $6 billion agriculture and food sector to be sustainable and profitable, with a clear focus on export-led growth.’\(^{101}\) Other department of agriculture documents evidence similar objectives.

This was certainly reinforced during the interviews particularly in response to questions concerning the role and objectives of the departments (questions 4-6). Regulators referred to the primary role of their respective departments as being one of promoting the growth and productivity of primary industries:

\(^{96}\) Table 3 in Chapter 4.
\(^{97}\) For instance, a representative from the Department of Primary Industries and Regions sits on the national intergovernmental Animal Welfare Task Group on behalf of South Australia.
\(^{99}\) Queensland Department of Agriculture, Fisheries and Forestry, Strategic plan 2013-17 (2013) 1.
\(^{100}\) Western Australian Department of Agriculture and Food, Annual Report 2013 (2013) 12.
\(^{101}\) Ibid.
The Department basically sees itself as supporting primary industries and regional communities. That’s their major vision I suppose, where they see themselves acting in that space.\textsuperscript{102}

The primary aim of the Department is to work in partnership with producers, industry bodies, community groups and related agencies to promote industry growth and ensure access to markets for animals, plants, and animal and plants products.\textsuperscript{103}

To support the growth and viability of existing and emerging primary industries.\textsuperscript{104}

The objectives, they change with governments you must realise, but basically they’re around the economic development of primary industries, it’s about making them more efficient, more innovative, more resilient, more profitable.\textsuperscript{105}

Broadly in the animal area it’s assisting the livestock industries to become profitable.\textsuperscript{106}

There’s an industry support and promotion role which primarily breaks down to making sure that industry’s voice is heard within government.\textsuperscript{107}

To protect and enhance productivity and market access.\textsuperscript{108}

These objectives on the part of departments of agriculture are of course entirely appropriate. Indeed, the departments were created precisely to serve these objectives. Promoting and sustaining profitable and productive primary industries is in the public’s interest, not least because it ensures affordable food supply for the population. As noted above, the difficulty arises when the same departments are delegated with serving a secondary public interest objective that conflicts with their primary objectives.

Several of the regulators noted a distinct tension between these overriding objectives of industry support and promotion, and their responsibilities in regulating animal welfare.

\textsuperscript{102} Regulator 2.
\textsuperscript{103} Regulator 6.
\textsuperscript{104} Regulator 6.
\textsuperscript{105} Regulator 5.
\textsuperscript{106} Regulator 3.
\textsuperscript{107} Regulator 7.
\textsuperscript{108} Regulator 9.
standards. Some regulators advised that this tension was managed within their respective departments by separating the competing responsibilities within different internal units or divisions:

You can’t send an industry out of business as part of your policy, so it is in many ways, working that fine line between, in some cases, between welfare and profitability and the ability of industry to adapt.\textsuperscript{109}

There potentially is a conflict of interest, but no matter what department it is you’ll have that conflict because the department, government will act as a whole.\textsuperscript{110}

The enforcement section must be quite separate to any cultural support part, we’re in very different divisions in this Department.\textsuperscript{111}

You would have a regulator from the [name of unit], and then you would have someone from the [name of different unit], and we often had very different views.\textsuperscript{112}

We have quite a separation of our policy or industry development areas, which is the [name of unit], from our compliance area which is called [name of different unit].\textsuperscript{113}

One regulator also advised that senior staff within a separate unit of the relevant department would not cooperate in the investigation of a livestock company for breaches of state animal welfare legislation due to their close working relationship with the company.\textsuperscript{114} This regulator believed there were forces within the department that would actively ‘protect’ the industry from the possibility of prosecution for animal welfare offences.\textsuperscript{115}

Government and parliamentary reviews of prominent cases where departments of agriculture have failed to adequately carry out their animal welfare regulatory

\textsuperscript{109} Regulator 5.
\textsuperscript{110} Regulator 5.
\textsuperscript{111} Regulator 1.
\textsuperscript{112} Regulator 4.
\textsuperscript{113} Regulator 3.
\textsuperscript{114} Regulator 4.
\textsuperscript{115} Regulator 4.
responsibilities have also identified the conflict between industry support and regulation functions. In 2011, the Northern Territory Parliament initiated an inquiry into the Department of Primary Industry and Fisheries’ failed investigation of a significant case of animal neglect on a university-operated cattle station in the country’s North. The inquiry heard that one of the Department’s veterinary officers, and inspectors under the Territory’s Animal Welfare Act 2000, was removed from the investigation following a request by a senior employee of the university. Notably, the Chief Veterinary Officer, Dr Brian Radunz, raised the issue of ‘tensions’ between the Department’s dual-fold industry development and regulatory roles when explaining the decision to remove the relevant officer:

Mr Elferink [Member of Parliament]: Does it concern you at all that a potential defendant in a prosecution was communicating to have investigators removed from the investigation process with your department?

Dr Radunz: I think you raise a good point that there is, there are tensions between our department being industry sort of developers to work with industry for a sort of production, and also for biosecurity in sort of having a…regulatory role for Livestock Act and other things. But there are tensions.

What is particularly interesting about Dr Radunz’s response is that the point of internal tensions between the Department’s development and regulatory roles was not raise by Mr Elferink’s question at all; rather, Dr Radunz implied it. His response suggests that he believed the reason for allowing the university employee, and potential defendant, to have such influence over the investigation was due in some way to the Department’s role in supporting the industry. (This case will be considered in further detail in Chapter 8).

Another government inquiry in the same year identified similar regulatory issues on behalf of the then Australian Quarantine and Inspection Service (AQIS) within the Federal Department of Agriculture in respect of its regulation of the live animal export

117 Evidence to Council of Territory Co-operation, Sub-committee – Animal Welfare Governance, Parliament of Northern Territory, Darwin, 3 August 2011, 28 (Dr Brian Radunz, Chief Veterinary Officer, Department of Primary Industry (NT)).
118 Now known as Biosecurity Australia.
trade. The inquiry reported evidence that regional AQIS officers had ‘difficulty separating their role as facilitators of exports from their responsibility as regulators.’

The strong focus on promoting and supporting the development of productive and profitable primary industries also appears to have made the departments of agriculture very receptive to the demands and directions of the agriculture ministers. Seven of the nine regulators made reference to ‘the Minister’ and ‘the Minister’s office’ when describing the sources of pressure and influence in making animal welfare policy decisions and performing regulatory functions (with the exception of decisions relating to enforcement matters). Many of the regulators referred to the fact that their decisions and functions were ultimately subject to the Minister’s approval and that the Minister’s particular perspective and attitude toward animal welfare issues were known to them:

If the minister of the day particularly thought one standard was not appropriate well we could do nothing about that.

At the end of the day, all we can do is put something up to the Minister but in fact nothing happens without their sign off. And that’s the reality of any of this stuff.

Well I guess then it comes down to a policy decision and that would have to be guided by the Minister’s office as to whether they wanted it or not.

Ultimately things are considered by the Minister and the Minister’s office so we’re aware of the broad attitude of the Minister so we take that into account.

What you’ve got to do is get that information and then present it to government and say this is what we think should happen and then it’s up to them, for government to decide and they’ll usually say well what does industry think about it.

---

120 Regulator 2.
121 Regulator 2.
122 Regulator 2.
123 Regulator 3.
124 Regulator 5.
I guess we take the view that we should be encouraging the continuous improvement of animal welfare outcomes on the ground. But our view is one view. There’s the view of the Minister, there’s the view of all of the interested players that influence the view of our Minister.\(^\text{125}\)

Departmental policy will be influenced by the elected government of the day and the applicable Minister.\(^\text{126}\)

In addition to influence from the agriculture ministers, the regulators also made frequent reference to the state livestock industry organisations. This influence was manifested in various ways. Reference was made to the livestock organisations’ influence on the Minister, who then conveyed those concerns through to the departmental staff.\(^\text{127}\)

Regulators also mentioned that animal welfare standards development processes were often beholden to the continued cooperation of livestock industry groups: ‘One of the problems that happened with the sheep and cattle animal welfare standards, moving them into animal welfare standards and guidelines from codes of practice is that on one particular issue the industry groups left the process and that just meant we didn’t get anywhere.’\(^\text{128}\) One of the regulators stated that the size and power of the relevant livestock industry within the state influenced the development of regulatory standards that applied to the industry. The larger and more powerful the industry, the less likely it is that the state government will enact animal welfare standards that apply to it.\(^\text{129}\) The regulator stated that ‘there’s still an awful lot of pressure from primary industries not to impose regulations.’\(^\text{130}\) Another regulator believed some senior staff within the department were ‘very much captured by industry’ due to receiving funding from the industry and that particular units within the department were ‘just like a branch of industry really.’\(^\text{131}\) This regulator stated that it was a very ‘close relationship that had grown up over a long period of time.’\(^\text{132}\) The regulator had also experienced pressure not to proceed with a prosecution of a livestock production company due to the

\(^\text{125}\) Regulator 7.
\(^\text{126}\) Regulator 9.
\(^\text{127}\) Regulator 5.
\(^\text{128}\) Regulator 7.
\(^\text{129}\) Regulator 1.
\(^\text{130}\) Regulator 1.
\(^\text{131}\) Regulator 4.
\(^\text{132}\) Regulator 4.
company’s close relationship with the department. This will be considered in further
detail below in the discussion of the regulators’ approach to animal welfare regulation.

The final factor identified as a source of pressure and influence on animal welfare
regulators related to funding and resources – specifically, a chronic lack funding and
resources. The true nature of a department’s priorities is perhaps best illustrated by its
allocation of funding and resourcing to programs and services falling under its portfolio
responsibilities. Animal welfare related services attract a fraction of one per cent of
most department of agriculture funding arrangements. Animal welfare services are not
specifically identified in most departmental operational expenditure records. In the few
cases where they are, it is in the context of promoting an industry’s ‘social licence to
operate’ or facilitating market access. Regulators referred to animal welfare as being
‘grossly underfunded’, ‘hopelessly under resourced,’ and ‘just one of those areas
that is underfunded.’ Some described a ‘lack of money’ as the ‘primary source of
pressure and influence in determining enforcement actions’ and the reason for
prosecutions failing or not proceeding.

All of the abovementioned sources of pressure and influence can be attributed to the
design and structure of the departments of agriculture and the regulatory framework as a
whole. The primary goal of the departments of agriculture is to promote the productivity
and profitability of primary industries. This gives rise to a distinct tension with their
accompanying roles in regulating animal welfare; a tension that is inevitable due to the
nature of the relationship between animal welfare and productivity (as canvassed in
Chapter 2). The departments’ subjection to agriculture ministers and their close
relationships with livestock industries serve to accentuate these tensions, the result of
which is a framework that fails to provide sufficient incentives for regulators to pursue
animal welfare goals consistent with the public interest underpinning the legislative
frameworks.

133 Regulator 4.
134 See for instance, Federal Department of Agriculture, Portfolio Budget Statements 2013-14 (2013) 56;
and Queensland Department of Agriculture, Fisheries and Forestry, Annual report 2012-13 (2013) 9.
135 Regulator 7.
136 Regulator 4
137 Regulator 7.
138 Regulator 1.
6.4.2 Conception of key stakeholders

Another factor relevant to the analysis of regulatory capture relates to the way regulators perceive the various stakeholder groups within a policy domain. This can provide insights to the nature of the regulator’s relationship with such groups and the value the regulator ascribes to the respective interests of different stakeholders when making policy decisions. It can also influence the extent of consultation and input particular stakeholders can have in regulatory processes such as policy and standards development. As discussed above, agriculture policy communities are widely recognised as ‘archetypal’ closed policy communities. They are marked by their close ties and cohesion with those perceived to share similar ideological views, and conversely, their exclusion of those who represent contrary viewpoints. Regulators in such policy environments are highly susceptible to cultural capture, the process of adopting cultural norms and worldviews of regulated parties that are contrary to the public interest values that underpin the relevant regulatory framework.

The interviews sought to examine the regulators’ conception of the livestock industries and animal protection groups (questions 25-28). The responses showed that regulators certainly had a thorough knowledge of livestock industry concerns and views about animal welfare and the prospects of further standards and regulations. The regulators stated that while some industry sectors were slower than others to embrace their animal welfare responsibilities, overall they felt industry groups were reasonably proactive and open to satisfying their obligations:

The [state/territory] cattle industry understands that animal welfare is an integral part of their responsibilities. I believe [the livestock industries] now take a more progressive approach partly because of the live export suspension in 2011. There are a couple of progressive identities within the industry groups who are involved in change-management processes and explaining the situation to people of the fringes that they can’t be putting the industry at risk.

---

139 Smith, above n 51.
140 Regulator 6.
141 Regulator 6.
I acknowledge that industry change won’t happen overnight but I was surprised at the progressiveness of their approach in [state/territory].

Often, sometimes industry’s got a better view of things than government in terms of, they know, they’re more aware of what’s happening in animal welfare maybe than some governments are in terms of the individuals.

I think that the farming, all farmers are well aware of animal welfare these days and I think nearly all of them are doing, are well disposed to improving or ensuring good welfare.

The [state/territory industry association] have actually put animal welfare firmly on their policy agenda.

Certainly our [livestock] industry has been really proactive.

One industry that’s responded particularly well has been the feedlot industry.

The regulators’ views with respect to the animal protection groups and their knowledge and credibility on animal welfare issues within the livestock sector was generally less favourable. Some regulators spontaneously referred to animal protection groups as ‘the activists’ and described their views as ‘extreme’. One regulator even used the term ‘ferals’ but this description was withdrawn almost immediately for being ‘a bit unfair.’ Many references were made to the respective knowledge and experience in livestock production issues on behalf of the key stakeholders and the general community. There was a general view that animal protection groups and people who were not farmers did not ‘understand the issues’ associated with animal welfare and livestock production:

---

142 Regulator 6.
143 Regulator 5.
144 Regulator 3.
145 Regulator 1.
146 Regulator 1.
147 Regulator 2.
148 Regulators 1, 2, 3, 9.
149 Regulator 2.
On the other side you’ve got mainly city-based animal welfare organisations who generally don’t have experience in managing animals but have got their views about things.¹⁵⁰

Bearing in mind some awareness of community views but also bearing in mind that the broader community doesn’t have much knowledge of agriculture.¹⁵¹

There is a large diversity of people and views within the “animal welfare community”, most with genuine concerns, but many with naive concepts, or unrealistic ideas.¹⁵²

Sometimes you get the ordinary policeman who doesn’t really understand the issues very well.¹⁵³

A lot of [rural police officers] actually have properties of their own so they understood the issues pretty well.¹⁵⁴

Now I know some people still think feedlots are an anathema but a lot of those people have probably never been to a feedlot either.¹⁵⁵

The following passage provides a general representation of the sentiment expressed by several regulators regarding the relative experience and credibility of the respective stakeholders:

I think there’s a range of attitudes that there are some that just think the activists should pack up their camp and depart and I think that sentiment probably is reasonably common because the activists tend not to have any animal handling experience and they are very much theoreticians and so it’s all very well to talk about what should be done, but someone’s got to actually do things and when you actual do things rather than just talk about them you find that your ideas do change. But I think that the farming, all farmers are well aware of animal welfare these days and I think nearly all of them are doing, are well disposed to improving or ensuring good welfare. Obviously in any population of people

¹⁵⁰ Regulator 3.
¹⁵¹ Regulator 3.
¹⁵² Regulator 9.
¹⁵³ Regulator 2.
¹⁵⁴ Regulator 2.
¹⁵⁵ Regulator 2.
you’re going to find a few exceptions but the vast majority believe that they’re doing the right thing by their animals without city-based folk telling them what to do.  

On the whole, the interviews revealed that regulators perceived the livestock industries to have greater knowledge, experience, and thus, credibility on farm animal welfare issues than the mainly ‘city-based’ animal protection groups. This perception is consistent with the closed nature of the agriculture policy community where those without direct experience in farming are treated as outsiders. This is likely to have an impact on the value ascribed to the representations made by the respective stakeholders in the course of developing policy and standards. As Chapter 7 will show, livestock industry stakeholders are afforded significantly more access and control over the process of developing farm animal welfare standards than that afforded to animal welfare stakeholders.

6.4.3 Conception of animal welfare

Exploring the regulators’ conception of animal welfare and its relationship to industry productivity was another key objective of the interviews. As outlined in Chapter 2, assessing an animal’s state of welfare involves a number of dimensions including the animal’s ‘basic health and functioning’, its ‘affective state’, and whether it is ‘living naturally’. Values-based positions can influence the priority given to each of these dimensions. Sociological evidence indicates that livestock industries generally adopt an instrumental view of animal welfare and emphasise the ‘basic health and functioning’ domain of an animal’s welfare as this indicator aligns with productivity goals. However, when it comes to the broader community, the ‘naturalness’ of an animal’s production environment (‘natural living’) and how the animal actually feels (‘affective states’) is likely to be of greater concern. The respective importance placed on each of these domains can lead to very different outcomes for animal welfare. The particular conception adopted by the regulators, and the extent to which such

---

156 Regulator 3.
157 Discussed in Chapter 3 at 3.4.
158 See Chapter 2 at 2.3.1.
159 Ibid.
160 Chapter 3 at 3.4.
161 Chapter 3 at 3.2.
conceptions are consistent with the public interest underpinning the farm animal welfare regulatory framework is relevant to the question of regulatory capture.

To explore this issue, the regulators were asked series of questions about animal welfare, including their conception of it, how they define it, how they would describe good and poor states of welfare, and how they perceive the relationship between animal welfare and on-farm productivity (questions 11-15). The first theme to stand out in the responses was the difficulty several of the regulators had in providing a definition of animal welfare. Eight out of the nine regulators interviewed were veterinarians, and three had PhDs in animal science fields, yet most found the concept of animal welfare difficult to explain often describing it as a ‘subjective’ and ‘emotional’ topic:

Yeah I thought about this a lot yesterday and I’ve always found it, even though I’ve worked in animal welfare for [several] years it’s something I can’t define.  

It was always really difficult because you’d say well there’s lots of different ways you can define it, it depends which way you look at it, so I’m sorry, I can’t give you a direct answer.

The veterinary side of me thinks, well that chook in a cage is actually a healthier bird than the barn hen or a free-range hen so that’s why I have the trouble, I think about it too hard and think about, there’s always a down-side, there’s a down-side to any, when we’re talking about production systems.

Animal welfare is an emotive subject.

[Animal welfare standards] must benefit the animal rather than just “feel good” to people.

[Animal welfare] should not be based on emotions.

Animal welfare’s a difficult area because it’s subjective, there’s no objective way of measuring animal welfare at the moment. So clearly you want the

162 Regulator 2.
163 Regulator 2.
164 Regulator 2.
165 Regulator 8.
166 Regulator 8.
167 Regulator 9.
animals to be as well treated as possible but people have different views and they bring subjectivity and emotion into the area and there’s a lot of debate as everyone knows about what are appropriate animal welfare practices at the current time.\textsuperscript{168}

[Animal welfare] is a complex and subjective area.\textsuperscript{169}

[Animal welfare is] a bit hard to really express in words.\textsuperscript{170}

[Animal welfare is] sort of a complex question…I’m not competent to individually describe the state of an animal.\textsuperscript{171}

When describing the role of animal welfare within the livestock industries, the regulators were quick to emphasise the instrumental benefits of ensuring good welfare standards. These benefits related to enhancing productivity, protecting trade and market access, competitiveness via improvements in marketing, and ensuring the sustainability of livestock industries:

So we don’t have a philosophical position on animal welfare but I think where the rubber hits the road is how much regard should governments give and should government departments give to animal welfare and I think to me it’s one of those things that unless the industry gets right it will be a lot smaller as an industry than it might otherwise be.\textsuperscript{172}

I guess from [the Department’s] perspective, given our primary strategic objectives, it is about sustainability of Australia’s agricultural industries, animal welfare is critical, getting right is critical to the long run survival of those industries.\textsuperscript{173}

We don’t compete well in the context of the lowest common denominator, bottom of the market produce. We promote our products as being high quality and for a lot of consumers they think welfare provenance is part of that. So from

\begin{itemize}
\item \textsuperscript{168} Regulator 3.
\item \textsuperscript{169} Regulator 3.
\item \textsuperscript{170} Regulator 3.
\item \textsuperscript{171} Regulator 7.
\item \textsuperscript{172} Regulator 7.
\item \textsuperscript{173} Regulator 7.
\end{itemize}
that point of view, animal welfare can be quite consistent with supporting that image.\textsuperscript{174}

To protect and enhance productivity and market access of the [state/territory] livestock industries by minimising the impact of animal diseases and safeguarding animal welfare.\textsuperscript{175}

Well one issue is about maintaining trade, in terms of having a good reputation for Australia and things like Indonesia.\textsuperscript{176}

Animal welfare is an area where if we want people to take it seriously we have to, we have to come up with some benefits.\textsuperscript{177}

Notably, none of the regulators associated the role of animal welfare regulation with any kind of ethical foundation. For instance, there were no references to protecting animals because they are ‘sentient beings’ and linking that to any kind of ethical sentiment. All of the justifications for protecting animal welfare were framed in instrumental terms.

While some regulators pointed to the productivity benefits of protecting animal welfare, most of the regulators recognised that there was some conflict between these factors. Almost all of the regulators had a considered understanding of the relationship between animal welfare and productivity. Many of the regulators accepted that good animal welfare can lead to productivity benefits but rejected the ‘mantra’ proposed by livestock groups that productivity and animal welfare go ‘hand in hand’:

It’s an argument that’s often used that an animal is more productive if its welfare is good and I don’t think that is entirely true. I think an animal can still produce well in systems where people would regard its welfare as not fantastic.\textsuperscript{178}

The mantra that the industry has is that of course that we’ll also be interested in animal welfare because if you don’t have a happy and healthy animal you don’t

\textsuperscript{174} Regulator 1.
\textsuperscript{175} Regulator 9.
\textsuperscript{176} Regulator 5.
\textsuperscript{177} Regulator 2.
\textsuperscript{178} Regulator 2.
get the production values that you’re after and therefore we’ll look after it. And
so there’s this quite intrinsic relationship between productivity and animal
welfare, but I think where the debate comes in is actually, you can have a very
productive animals, but they might actually not be very happy, but they can still
produce, put on lots of weight, put on lots of meat etc etc, but they might be
unhappy so I think that’s where that tension comes in. On a very base level it is
a varied relationship between welfare and productivity but the definition of
animal welfare and how much, what we call happiness, it’s not a very technical
term but how relaxed and comfortable the animals should be.179

Productivity cannot be used as a measure of welfare. At either end of the
livestock welfare spectrum there would be an effect on productivity economics.
Good welfare can improve productivity, but animals can also be productive and
not be in a good state of welfare.180

It’s a mixed relationship, so sometimes productivity leads to good welfare, in
terms of feeding them appropriately, maintaining their freedom, getting a vet out
to treat them, providing housing because you get production out of that. But
there are times when production doesn’t do that because people work on
marginal costs, marginal benefits, it may be worthwhile shoving extra hens into
a cage and their welfare, and individual productivity may go down but in
relationship to the total property, the production unit may go up. So it’s like
stocking densities which are a welfare issue, because it makes economic sense to
actually stock animals together but it has an adverse impact on their welfare that
is not reflected in their productivity so you get high productivity but low
welfare.181

There is some linkage or correlation between animal welfare and productivity.
Improvements in farm animal welfare can often improve productivity. Good
nutrition is correlated to productivity, and conversely, malnutrition will impact
on welfare and productivity (growth rate, milk production, fertility etc). Disease
is directly correlated with animal welfare and productivity. Disease prevention

---

179 Regulator 7.
180 Regulator 6.
181 Regulator 5.
will improve animal welfare and usually improve productivity or at least not impede it. Intensive farming systems are often used to improve productivity. Intensive farming systems can often enhance animal welfare through good disease prevention programs, good nutrition and shelter, minimising the impact of extremes of weather and protecting animas from predators. However, intensive farming systems can sometimes impact on animal welfare in situations of over-crowding, disease, and mechanical or management failures. However this can also apply to any farming system.182

This was a surprising finding considering the regulators’ otherwise close alignment with industry views and interests. Only one regulator broadly accepted the proposition that productivity was a good indicator of welfare, however, this regulator still acknowledged exceptions to the claim:

Broadly, if animals are in a reasonable state of welfare then they will produce. I do know you can get exceptions where animals will still produce but be not in such a great state of welfare. That’s the broad situation, if animals are, I guess if their stressed then they’re going to be diverting nutrients into coping with the stress rather than producing something whether it’s meat, milk or eggs, or fibre, so I think that relationship is broadly true.183

Overall, interview questions regarding the regulators’ conception of animal welfare revealed that while they had difficulty conceptualising and providing an operational definition of animal welfare, they nevertheless had a good understanding of the interaction between animal welfare and industry productivity, and acknowledged the conflicting nature of the relationship despite industry claims to the contrary. This could be said to provide evidence the regulators are not in alignment with the views and perspectives of the livestock industries on every issue, but rather, they form their views independently regardless of whether they conflict with those of industry. However, while the regulators may have a different opinion on this point of science, their perspective of the overall role of animal welfare within the agricultural sector is not inconsistent with that of the livestock industries. When asked about the role of animal welfare regulation, the regulators were quick to emphasise instrumental benefits of

182 Regulator 9.
183 Regulator 3.
enhancing productivity, protecting trade and market access, increasing competitiveness, and ensuring the sustainability of livestock industries. Morris found similar views on behalf of the Ministry of Agriculture and Forestry in New Zealand where officials viewed ‘animal welfare primarily as an issue of market access.’\textsuperscript{184} This view may be understandable given the nature of the regulators’ position in having to deal with the day-to-day implementation of the law in ‘the real world’, but the absence of any reference to the ethical or social values upon which animal welfare legislation is based was nevertheless a notable omission. It suggested that the regulators viewed the legislation within a frame of industry productivity – that animal welfare was simply a means to achieving productivity and other instrumental goals, and was not an end in itself.

\textbf{6.4.4 Approach to animal welfare regulation}

The final issue to be explored through the interviews was the regulators’ approach to animal welfare regulation, particularly in terms of the regulatory models and styles adopted and the mechanics of different regulatory processes including standards development and enforcement. These issues were explored mainly through questions 7-10, 16, 19, and 22. An agency’s approach to regulation can influence its susceptibility to regulatory capture. Adams and colleagues have noted that risks of regulatory capture are higher with non-punitive, collaborative approaches to regulation where the regulator maintains close ties to industry and engages in a form of negotiated compliance.\textsuperscript{185} This model of regulation is what Grabosky and Braithwaite describe as the ‘compliance approach’, which focuses on the provision of education and advice to encourage and facilitate adherence to the law in contrast to its counterpart, the ‘deterrence approach’, which emphasises the imposition of punitive measures for non-compliance.\textsuperscript{186} Determining whether an agency is compliance or deterrence orientated can be gauged by reference to two intersecting variables: first, the form or design of the regulation (is it arm’s length command and control regulation, co-regulation, meta-regulation or self-regulation?); and second, the approach to enforcement, particularly in its response to incidents of non-compliance (does it respond with punitive sanctions at first instance,

\textsuperscript{184} Michael Morris, ‘The Use of Animals in New Zealand: Regulation and Practice’ (2011) 19 Society & Animals 368, 371.
\textsuperscript{185} Adams et al. (2007), above n 17, 7.
\textsuperscript{186} Ayres and Braithwaite (1992), above n 17, 25.
with education and persuasion, or a combination of both in responsive regulation?). Regulatory styles and enforcement will be considered in further depth in Chapter 8.

The regulators’ responses to questions about their approach to animal welfare regulation was consistent with features of a compliance-based model. In terms of regulatory design, several regulators described what could be considered a co-regulatory approach, in which regulatory functions are ‘shared’ between the regulator and the industry itself. A particular feature of the co-regulatory model described included the divesting of inspection responsibilities to industry quality assurance (QA) programs. Instead of physically attending the relevant facility with their own inspectors, the departments of agriculture would simply audit the reports of the QA auditors.

I’d say in a word, [our approach to regulation] is shared. It’s a system that requires lots and lots of interaction with industry in relation to [name of regulatory framework].

[The regulatory approach] must be consultative and in partnership with the industries.

What we’re trying to do is encourage industry to take up, to self-manage, to actually have their own auditing programs around welfare. That’s where we’re trying to go, we’re trying to get industry to self-regulate with us overseeing the handling of complaints.

This is not statutorily recognised, but as a policy thing, what we say to the [livestock] industry is if you’ve got a QA program that deals with the things that we’re interested in, we’ll recognise that and we won’t necessarily go on.

---

187 See Figure 24, Chapter 8; Grabosky and Braithwaite, above n 17, 228; and Adams et al. (2007), above n 17, 2.
188 Regulator 7.
189 Regulator 7.
190 Regulator 8.
191 Regulator 5.
192 Regulator 5.
We say you submit your auditing program and we’ll see if it meets our criteria. But there’s no statutory protection for them for us not to audit or to treat them any differently, but that’s just an agreement.193

We have made an offer to [livestock company], I think they were in the [name of auditing program] and we said look if you’re willing to share with us the auditor’s reports, we can tick you off, cause they asked us about it, cause it’s up to them to approach us, we’re quite happy to entertain that idea.194

We’re going to work more with auditing the auditor’s simply because of a lack of resources.195

While in some jurisdictions the incorporation of the industry QA programs into agency’s compliance monitoring program is via ‘agreement’ or ‘policy’, in Victoria, it is statutorily recognised. The *Livestock Management Act 2010* (Vic) provides for the legislative recognition of an industry QA program by establishing a process for authorising the program as an ‘approved compliance arrangement.’196 Following authorisation, all members of the QA program are exempt from the requirement in section 7 to conduct a ‘systematic risk assessment,’197 and will not be subject to inspection by government as they will ‘be deemed to comply in the first instance’ and the inspectorate will instead ‘focus its activity on those operators that are “not approved” and that are considered to represent a higher compliance risk.’198 The Government’s oversight of the QA program will be limited to assessing the reports of third party auditors.199 The process of deferring substantive regulatory responsibility to industry and engaging in detached high-level oversight of the industry’s performance in regulating itself is known within regulatory studies literature as ‘enforced self-regulation’ or ‘meta-regulation’.200 The desirability of adopting this model for the regulation of farm animal welfare is considered in Chapter 8.

193 Regulator 5.
194 Regulator 1.
195 Regulator 1.
196 *Livestock Management Act 2010* (Vic) pt 3.
197 Ibid, s 10.
199 Ibid.
200 See Freiberg, above n 56, 33-34.
In addition to the meta-regulatory design of the framework’s implementation, the regulator’s appeared to strongly favour an educational approach to enforcement and revealed a general reluctance towards opting for prosecution of cases of non-compliance:

The department also provides much communication and educational material about animal welfare legislation, regulations and codes of practice, and now welfare standards and guidelines.\textsuperscript{201}

The department also promotes animal welfare through the publication and communication of information, consultation with parties affected by legislation, education, advice and technical assistance.\textsuperscript{202}

Education is the the most desirable approach.\textsuperscript{203}

One of the main sources of pressure on regulatory staff is the pressure they put on themselves wanting to help the farmer “get through”. Many livestock welfare problems are due to human welfare problems, example mental illness, family issues, marriage breakdown or financial stress. Regulatory staff may be reluctant to put additional stress on the farmer to the detriment of the welfare of the livestock, trying to assist the farmer through what they hope is a short term problem.\textsuperscript{204}

I’m very much in the compliance based approach camp. But I recognise that depending on the circumstance, if there’s overt cruelty then you go straight to a prosecution mode but in the main I think it’s certainly a lot cheaper and it’s more effective if you can work with individuals and industry to achieve good animal welfare outcomes in a cooperative and constructive manner rather than trying to beat people over the head, because then you get a resistance and we’ll only do as much as the inspector requires us to do, whereas the other approach is you bring industry along with you and bring about a positive change of attitude.\textsuperscript{205}

\textsuperscript{201} Regulator 9.
\textsuperscript{202} Regulator 9.
\textsuperscript{203} Regulator 6.
\textsuperscript{204} Regulator 6.
\textsuperscript{205} Regulator 9
\textsuperscript{206} Regulator 3.
Calling for people to be prosecuted for cruelty tends to make industry fairly
defensive, so it’s a matter of trying to work with industry to provide some
reassurance that they can make some changes that are reasonable but it’s not
going to be open slather.\textsuperscript{206}

The general hesitation towards prosecution as a response to non-compliance was also
clearly demonstrated by the Northern Territory’s Department of Primary Industry and
Fisheries in the case involving the university-operated cattle station referred to above.
The Chief Veterinary Officer of the Northern Territory recommended against
prosecution despite the matter involving the starvation of between 200 to 800 cattle and
being described as one of the worst cases of animal cruelty in Australia’s history.\textsuperscript{207}
During the subsequent parliamentary inquiry, Dr Brian Radunz stated that the focus of
the investigation was on the welfare of the remaining cattle and that prosecution was
considered to be a ‘much lower priority’, and that ‘whether to prosecute or not was a
minor point.’\textsuperscript{208} He also stated that he could not recall any prosecutions under livestock
related legislation within his 40 years with the Department.\textsuperscript{209}

Two regulators also made reference to operational arrangements with different
authorities that served to effectively absolve the department of prosecutorial
responsibilities for animal welfare offences. One of the regulators stated that the
purpose of the operational agreement was to allow the department to avoid ‘prosecuting
farmers.’\textsuperscript{210} Similarly, the other regulator stated that it was done to ‘divorce ourselves
from [prosecutions]’ so that the departmental officers could instead act as ‘the good
guys’ through education.\textsuperscript{211}

One regulator experienced pressure not to proceed with a prosecution of a livestock
production company due to the company’s close relationship with the department.\textsuperscript{212}
The regulator stated that the alleged cruelty offence was characterised by others within

\textsuperscript{206} Regulator 3.
\textsuperscript{208} Evidence to Council of Territory Co-operation, Sub-committee – Animal Welfare Governance,
Parliament of Northern Territory, Darwin, 3 August 2011, 15 (Dr Brian Radunz, Chief Veterinary
Officer, Department of Primary Industry (NT)).
\textsuperscript{209} Ibid.
\textsuperscript{210} Regulator 4.
\textsuperscript{211} Regulator 2.
\textsuperscript{212} Regulator 4
the department as a ‘management problem’, which was apparently distinguishable from an offence of cruelty.\textsuperscript{213} Issues to do with the characterisation of animal welfare offences are considered in further detail in Chapter 8.

The above responses show that animal welfare regulators within the agricultural sector adopt a compliance based approach to enforcement. The respective merits of this approach within the farm animal welfare context is the subject of inquiry in Chapter 8. The significance of the analysis for present purposes relates to its relevance to regulatory capture. Compliance based approaches to enforcement that consist of co-regulatory arrangements, close interactions with the industry through the provision of advice and education, and negotiated approaches to compliance rather punitive responses have been identified for their susceptibility to regulatory capture.\textsuperscript{214}

### 6.5 Implications for departmental approach to animal welfare responsibilities

So what are the overall implications of these findings for the way in which departments of agriculture approach their animal welfare regulatory responsibilities? First, it means the departments have conflicting responsibilities. The promotion of profitable and productive primary industries conflicts with the promotion and protection of farm animal welfare. As discussed in Chapter 2, measures designed to promote welfare will often limit what a producer can do with an animal, placing restraints on the pursuit of greater productivity.\textsuperscript{215} When these conflicting responsibilities are considered against the backdrop of the departments’ overarching missions and reasons for existence, it is clear which will be valued more highly and given greater priority.

The structure of the reward system for departments of agriculture, influenced in no small part by their subjection to ministers for agriculture, is geared towards achieving the economic goals of improving industry productivity and profitability. To be clear, there is no problem with this objective on behalf of departments of agriculture. This is the reason for their existence, and ministers for agriculture are well within their

\textsuperscript{213} Regulator 4.
\textsuperscript{214} Adams et al. (2007), above n 17, 7.
\textsuperscript{215} Technological developments do have the potential to overcome this dilemma and create ‘win-win’ solutions in which welfare can be improved without reducing productivity. However, these developments are currently context specific and do not have the wider cross species/management system application necessary to fundamentally alter the conflicting nature of the relationship between welfare and higher levels of productivity.
ministerial rights to assist in promoting this pro-industry agenda. As discussed at 6.2.1 above, this is not regulatory capture but a form of ‘electorally sanctioned pro-business governance.’ The regulatory problems arise when industry-promoting agencies, like departments of agriculture, are delegated with responsibility for administering public interest statutes, like animal welfare laws, that conflict with their industry promoting agendas. This is because the departments will inevitably identify more with the values and interests of livestock industries than the public interest underpinning the animal welfare legislative framework. Consequently, the departments conceptualise animal welfare in instrumental terms, where welfare is valued primarily in terms of its contribution to productivity. This highly instrumental approach to animal welfare reflects the traditional utilitarian attitude to animals that has been found to be more prevalent among farmers and primary producers than within the broader Australian community.\(^\text{216}\) Consistent with the closed nature of agriculture policy communities, alternative viewpoints that reflect different values and attitudes towards animals are largely excluded or at least not given equivalent consideration. This can also lead regulators to under appreciate risks within the environment they are regulating as their views are partial to one perception of reality.\(^\text{217}\) The balance of the empirical evidence and relevant primary documentary sources indicate that the departments of agriculture have absorbed the norms and perspectives of the livestock industries in their approach to administering animal welfare legislation amounting to a case of cultural capture.

As Chapters 7 and 8 will demonstrate, this capture of cultural norms and perspectives has influenced the approach the departments take to the development of animal welfare standards and to the implementation and enforcement of such standards. It has resulted in systematic underperformance with respect to their animal welfare regulatory responsibilities where the public interest in ensuring farm animals are protected from cruelty, and in improving welfare standards over time, has been routinely subordinated to the interests of increasing industry productivity and profitability. When considered in light of the regulatory failings these deficiencies have created (Chapter 5), a strong case for the existence of regulatory capture emerges.

\(^{216}\) See Chapter 3 at 3.4.

Figure 3 below depicts the proposed causal relationship between the stages of this capture process. This will be reintroduced in the concluding chapter for further discussion in light of the analysis undertaken in Chapters 7 and 8, and the implications for the framework’s legitimacy.

![Causal relationship between stages of capture process within Australia’s farm animal welfare regulatory framework](image)

**Figure 22:** Causal relationship between stages of capture process within Australia’s farm animal welfare regulatory framework

### 6.6 Conclusion

Regulatory capture is an insidious condition affecting the performance of government agencies in serving the public interest. It is difficult to identify because in most cases it occurs unconsciously without the knowledge of the regulated industry or of the regulator. It can arise simply if ‘the basic structure of the reward system leads neither venal nor incompetent regulators inevitably to a community of interests with the
The animal welfare regulators interviewed for this study were far from venal or incompetent. Rather, they were well qualified, experienced, and on the whole appeared to take much pride in their animal welfare responsibilities. But despite their best intentions, these regulators operate within an institutional framework that imposes significant limitations on what they can do to protect and promote the welfare of farmed animals. These limitations derive from institutional conflicts between the goals of promoting productive and profitable primary industries on the one hand and the welfare of farmed animals on the other. The departments’ subjection to agriculture ministers and their close relationships with livestock industries serve to accentuate these tensions. The culmination of these influences gives rise to ‘a community of interests’ with the livestock industries in which regulators are obliged to view animal welfare primarily through the prism of productivity and alternatives viewpoints are largely excluded. On the whole, the framework fails to provide sufficient incentives for the regulators to pursue animal welfare goals consistent with the public’s interest in protecting farm animals from cruelty and improving welfare standards over time. When considered in light of the regulatory failings outlined in Chapter 5, and the deficiencies in standard-setting and enforcement processes to be considered in Chapters 7 and 8 respectively, a strong case for the existence of regulatory capture is established.

---

218 Mitnick, above n 36, 95-96.
Chapter 7: Animal Welfare Standard-Setting

7.1 Introduction

The setting of standards intended to govern the conduct of others is one of the core functions of a regulatory regime. Standards are the established rules, norms or criteria that individuals, firms or industries are expected to follow in the course of carrying out a particular activity. They are provided ‘in order to specify clearly what is acceptable and what is unacceptable practice.’ Standards are usually developed by a responsible authority following considered deliberation and negotiation among the individuals and groups who participate in, or are affected by, the activity. The process for developing such standards, particularly its perceived fairness, will influence the extent to which the regulated parties accept and agree to abide by the standards as well as their views on the legitimacy of the decision-making authority.

Having recognised this, governments within liberal democratic societies have promoted the notion of participatory democracy to allow stakeholders and the broader community the opportunity to participate in government decision-making processes. Australia’s process for developing farm animal welfare standards incorporates participatory mechanisms including the provision of deliberative forums for key stakeholders, and opportunities for public comment on proposed drafts. The challenge for regulators in this policy space is formidable, for decision-making requires the incorporation of ‘various and often conflicting social, ethical, economic, and production management

---

value judgements with the available science in a way that does not stifle innovation or require frequent alteration.'

Informed and legitimate decisions can only be reached through the integration of expert advice and stakeholder and public representations.

This Chapter analyses the effectiveness and legitimacy of Australia’s current approach to developing farm animal welfare standards. It first discusses issues of procedural legitimacy theory including and the findings of a highly relevant prior study assessing the legitimacy of the farm animal welfare standards development process in Canada. It will then outline the relevant Australian standards development framework before going on to explore the pivotal role played by animal welfare science in this process with reference to four case studies.

The analysis will show that Australia’s current process for developing farm animal welfare standards suffers on procedural fairness grounds due to: 1) the perception of bias that emerges from the degree of control exerted by institutions that identify more strongly with the values and interests of one key stakeholder over another; and 2) the existence of actual bias demonstrated by the nature of the science relied upon by the regulators to develop animal welfare standards and to make final decisions on controversial husbandry practices. The science used is commissioned and funded by the very livestock industries that will be subject to the standards under consideration and is undertaken by researchers with close ties to the industries. The ‘basic health and functioning’ dimension of animal welfare (discussed in Chapter 2) is prioritised and other dimensions of welfare such as ‘affective states’ and ‘natural living’ are dismissed as ‘hypothetical’ or merely ‘perceived’ concerns. This leads to conclusions that are at odds with equivalent international research that takes a more integrated approach to welfare assessment. As Sorensen and Fraser note, animal welfare assessment criteria ‘need to be widely accepted as valid indicators of animal welfare by the citizens of the jurisdiction.’

If it is not, the legitimacy of the standard-setting process will be impacted as the views of animal protection stakeholders and the broader citizenry at large are excluded. This outcome is consistent with the closed nature of the agricultural policy

---


community, which ultimately leads to the endorsement of standards that do not meet community expectations.

### 7.2 Procedural fairness and legitimacy theory

Perceptions of procedural fairness in formal decision-making processes shape people’s views about the legitimacy of the decision-making body and the decisions it makes. If people perceive the process to be unfair, whether due to bias on behalf of the decision-maker, or because they have not had an adequate opportunity to have their say, it can affect their willingness to accept the decision and to engage with future decision-making processes. As Murphy and Tyler state, ‘fair procedures communicate respect and value; unfair procedures communicate disrespect, marginality or even exclusion from a valued group.’

Difficulties in the policy formulation process can arise when decision makers identify more strongly with the values and interests of one key stakeholder over another. As Kwak explains, ‘when people identify with groups or adopt ideas…it is considerably harder for those people to identify the sources of their choices,’ and they are not open to ‘rational argument about the public interest.’

Alternative viewpoints can become difficult for the regulator to conceptualise and a form of ‘unconscious bias’ towards the interests and demands of the regulated industry may emerge.

Animal law scholar, Peter Sankoff, argues that the quality of formal deliberative opportunities provided to the public for the purposes of engaging with government decision-makers on the development of animal welfare standards impacts the degree of protections subsequently afforded to animals. He states that formal government standard-setting processes:

---

7 Discussed in Chapter 6 at 6.2.2.
8 Discussed in Chapter 5 at 5.2.1.
9 Tyler, above n 2, 811.
10 Murphy and Tyler, above n 2, 653.
11 Ibid.
14 Sankoff, The Animal Rights Debate and the Expansion of Public Discourse
must guarantee participation in all deliberative and decisional processes relevant to legislation and must do so in a way that provides each person with equal chances to exercise the communicative freedom to take a position on criticisable validity claims. Equal opportunities for the political use of communicative freedoms requires a legally structured deliberative praxis in which the discourse principle is applied.¹⁵

Sankoff’s analysis of deliberative mechanisms operating under the Canadian and New Zealand animal welfare standard-setting frameworks found that the greater deliberative opportunities provided by the New Zealand approach resulted in superior standards of animal welfare in that jurisdiction.

Bradley and MacRae have also examined deliberative processes under the Canadian animal welfare standard-setting framework.¹⁶ However, their study was more focused on how the deliberative process impacted the legitimacy of the standards development framework itself as opposed to the substantive protections afforded to animals within the subsequent standards produced. They found that the narrative choice adopted by standards-developers to refer to farm animals and their welfare impacted the way different audience groups perceived the legitimacy of the process.¹⁷ If the narrative choice aligns with a particular audience’s expectations the process is more likely to be considered legitimate by that group. Conversely, if the narrative choice conflicts with an audience’s expectations the perceived legitimacy is more likely to be questioned.

A particular narrative analysed in the Canadian study related to the way animal welfare was defined by decision makers. This was held to be important as the definition adopted by decision makers ‘establishes the problem that is to be addressed, determines the range of acceptable regulatory tools, and indicates which stakeholders are the appropriate rule-makers.’¹⁸ The researchers found that membership of the key bodies responsible for standards development (the National Farm Animal Care Council and the Code Development Committee) was ‘industry-dominated’¹⁹ and that these stakeholders tended to ‘support a biological functioning understanding of welfare’ contrary to

¹⁶ Bradley and MacRae, above n 2.
¹⁷ Ibid, 19.
¹⁹ Ibid, 31.
consumers who ‘identify more with the natural states understanding.’ Bradley and MacRae expressed concern that ‘if industry is determining which welfare scientists to consult, or which to include on Council, one dimension of welfare may be elevated above others.’ The study also found that dominant members of the policy community tended to use economic language to refer to animals and therefore ‘those who want to participate in the policy conversation may be precluded from discussing the non-productive aspects of the animals’ lives.’ This is consistent with the exclusionary devices employed by agricultural policy communities discussed in Chapter 3. The researchers concluded, that if ‘animal agriculture is to preserve consumer trust, it must not only speak about animals in a way that accords with consumer understandings, but also address the same problems that consumers perceive.’

Many of the findings of Bradley and MacRae’s study resonate with the following analysis of the standard setting process operating in Australia, particularly with respect to the control exerted by industry-dominated institutions and tendency to adopt animal welfare science that aligns with economic interests.

### 7.3 The standard-setting framework

In an attempt to achieve national consistency, Australia’s standards development process is coordinated at a national level with cooperation from all jurisdictional governments. Management of the process is vested in Animal Health Australia (AHA), ‘a not-for-profit public company established by the Australian, State, and Territory governments and major national livestock industry organisations’. AHA’s membership includes the Australian Chicken Meat Federation, Australian Dairy Farmers, Australian Egg Corporation, Australian Pork Limited, the Cattle Council of Australia, and other peak industry bodies. It exists to promote ‘a robust national

---

20 Ibid, 30.
21 Ibid.
22 Ibid, 35.
23 Ibid, 38.
animal health system that maximises competitive advantage and preferred market access for Australia’s livestock industries.\textsuperscript{26}

In 2009, AHA created a national business plan for the standards development process (Business Plan), which addresses funding, priority setting, membership of writing and reference groups, and outlines the various stages of the process.\textsuperscript{27} The Business Plan makes clear that control over the process is largely vested within three institutions – AHA, the national Animal Welfare Committee, consisting of representatives of the state and territory departments of agriculture (now referred to as the Animal Welfare Task Group), and the relevant livestock industries. These institutions set the priorities for what standards are to be developed, provide the funding for the process, determine whether there is need for scientific research, and commission such research if it is deemed to be required.\textsuperscript{28}

Once the priorities have been set, AHA is responsible for establishing a standards writing group, which is made up of representatives from the three institutions mentioned above, ‘relevant independent science representation, invited consultants’ and an ‘independent chair’.\textsuperscript{29} Leading animal welfare groups, RSPCA Australia and Animals Australia, have decided not to participate in the writing groups as they have both formed the view following past experiences that their involvement will have no substantive impact on the drafting process.\textsuperscript{30} These groups do, however, participate within the stakeholder reference group, which consists of a broader range of stakeholders. The stakeholder reference group is responsible for reviewing and providing comment on the draft standards produced by the writing group. Draft standards will generally go back and forth from the writing group to the stakeholder reference group two to three times before a public consultation draft is settled.\textsuperscript{31} In addition to the public consultation draft, AHA and the writing group will prepare (usually with the assistance of a consulting firm) a public consultation Regulatory Impact Statement. The public consultation standards and Regulatory Impact Statement are then published and the public are given

\textsuperscript{26} Animal Health Australia, above n 24.
\textsuperscript{27} Animal Health Australia, above n 4.
\textsuperscript{28} Ibid, 4-8.
\textsuperscript{29} Ibid, Attachment A.
\textsuperscript{30} Personal correspondence with the researcher from RSPCA Australia staff member, 28 January 2013, and Glenys Oogjes, Executive Director, Animals Australia, 30 March 2012.
90 days in which to provide comment. Following the close of the public consultation period, AHA, the writing group, and the stakeholder reference group will consider the public submissions and set about producing a final draft of the standards for consideration by jurisdictional governments. The process of seeking government approval will see the standards referred through a succession of intergovernmental agriculture committees of ascending superiority until they are finally submitted to a meeting of jurisdictional agriculture ministers. Agriculture ministers will then consider the proposed standards for endorsement and implementation in each state and territory jurisdiction. Each stage of the process is set out in Figure 23 below.

32 Such meetings were previously undertaken under the name of the Standing Council on Primary Industries (SCoPI) but the Australian Government abolished this Council in 2013 as part of its budgetary reforms: see Anna Vidot, ‘Federal Government Scraps Animal Welfare Advisory Group’ ABC Rural (online), 8 November 2013 <http://www.abc.net.au/news/2013-11-08/animal-welfare-committee-scraped/5079284>. SCoPI meetings have now been replaced with ad hoc meetings under the Agriculture Ministers’ Forum or AGMIN.
Figure 23: Process for developing Australian Animal Welfare Standards and Guidelines$^{33}$
The economic interests of livestock industries are heavily represented throughout the standards development process whether directly through the industries’ own representatives or indirectly through the agency of the AHA, department of agriculture officials and committees, or the agriculture ministers. Agricultural institutions have control over priority setting, funding, the commissioning of scientific research where it is deemed by these institutions to be necessary, and the final decisions as to what standards will be endorsed and incorporated into law. The process is by all accounts an agricultural policy process in which animal welfare representatives and the broader community may provide their input. However, the extent to which such input has a substantive impact on the drafting process is questionable in light of the dominance exerted by agricultural interests.

Animal protection representatives have previously expressed their concern over the unbalanced nature of the deliberations. The Executive Director of Animals Australia, Glenys Oogjes, has observed that:

Whilst consensus is sought in the meetings of such reference groups, the reality of the dynamics of the process is that the livestock industries have an (unofficial) power of veto in decision making – if they determine that they cannot or will not accept a particular Standard, invariably the proposed Standard is varied (watered down) or becomes merely a Guideline.34

The RSPCA has also expressed its dissatisfaction with the current process. It has consistently raised concerns over the role of AHA on the basis that given its membership, ‘it cannot be considered an independent body in [the standards development] process’.35 An independent review of the standards development process undertaken in 2013 by PricewaterhouseCoopers (PWC Review) reported on these concerns stating that animal welfare groups believed ‘that AHA, as an organisation is more closely aligned with industry positions, and therefore may not be sufficiently independent in the process.’36 The RSPCA has also developed an official policy

33 Animal Health Australia, above n 4, Attachment B. References to the ‘AWWG’ (Animal Welfare Working Group) should now be interpreted as the Animal Welfare Task Group.
36 PricewaterhouseCoopers Review, above n 31, 2.
position on animal welfare standard setting highlighting the need for ‘independent and impartial governance’:

RSPCA Australia believes that independent and impartial governance in this context requires the standards development process to be led by a government institution that does not possess organisational objectives and priorities that are, or could reasonably be perceived to be, in conflict with the objectives of promoting and protecting animal welfare through sustained improvements to existing practices.37

In addition to the concerns of animal protection stakeholders, the PWC Review also found that the current process ‘lacks full consideration of broader community views and expectations on animal welfare.’38 It recommended that the ‘gap in understanding of community expectations’ be ‘addressed through focused social science research.’39

The deficiencies identified with the current standard setting process are indicative of an exclusionary agricultural policy community approach to decision making where alternative or ‘outsider’ viewpoints are difficult for the decision-makers to conceptualise and incorporate. The most significant example of this relates to the nature of the science relied upon in the standards development process. Consistent with the Canadian experience discussed above, the agricultural institutions that dominate Australia’s standard setting process will tend to prioritise basic health and functioning states of welfare that align with economic interests over those of affective states and natural living.

7.4 The role of science

Science plays a key role in the development of Australia’s animal welfare standards. The Australian Animal Welfare Strategy and the standards development Business Plan emphasise the need for animal welfare policy to be underpinned by contemporary scientific knowledge.40 It is a condition that government, livestock industries, and

---

38 PricewaterhouseCoopers Review, above n 31, ii.
39 Ibid, iii.
animal protection organisations all agree on. The nature of the science however including its funding, production, and the type of animal welfare assessment applied, is a matter of further contention. In particular, animal protection organisations and animal welfare scientists have raised concerns over the degree of control exercised by livestock industries in the production of such science and the consequences this has for the conclusions drawn, particularly when such science is expected to inform the development of national animal welfare standards.

7.4.1 Industry influence over the development of animal welfare science

According to the last audit of animal welfare research in 2009/10, Australia invested approximately $14.279 million in primary industries related animal welfare research, development, and extension (RD&E). The funding derived primarily from industry, government, and university sources in similar proportions of $5,195,000, $4,707,000, and $4,377,000, respectively. Much of the RD&E expenditure is coordinated through collaborative forums hosted by industry-specific Cooperative Research Centres, the Commonwealth Scientific and Industrial Research Organisation (CSIRO), and university centres such as the Animal Welfare Science Centre and the Centre for Animal Welfare and Ethics at the University of Queensland.

The $5,195,000 of industry funding is managed mostly by livestock industry Research and Development Corporations (RDCs). The role of industry RDCs is to ‘invest in R&D and innovation to improve the productivity and delivery of high quality products in order to underpin the competitiveness and profitability of Australia’s agricultural, fish and forestry industries’. The Commonwealth Department of Agriculture is responsible for administering the legislation that governs RDCs. The RD&E expenditure of the RDCs is funded through industry levies that are matched dollar for dollar.

41 See, PricewaterhouseCoopers Review, above n 31, i; Australian Farm Institute, Designing Balanced and Effective Farm Animal Welfare Policies in Australia (2015) iii.
dollar by the Commonwealth Government. Prominent livestock RDCs include Meat and Livestock Australia, LiveCorp, Dairy Australia, Australian Wool Innovation, Australian Egg Corporation, and Australian Pork Limited. In addition to RD&E activities, many of these organisations are responsible for industry marketing and representation functions.

The degree of influence and control exerted by some RDCs over animal welfare research (despite the matched contribution of public funding) has raised concerns within the scientific community. The Director of the Centre for Animal Welfare and Ethics, Professor Clive Phillips has noted the following about the co-funded RDC research process in relation to live animal exports:

[ES]entially all funding for research into the welfare of animals that are exported live is administered by industry body Meat and Livestock Australia (MLA) for the exporters’ organisation LiveCorp.

The industry body determines the type of work that is conducted, who does the research, how it is conducted and how it is reported.

Under contracts with MLA or LiveCorp, researchers working for them cannot release any information about the project to anybody without permission of industry representatives. In practice that means that reports are drafted by the researchers and edited by the industry body before release. Delays in publication can be lengthy, up to one year.

Phillips also raised the concern that, due to funding pressures, ‘some [researchers] may be tempted to undertake work that has the objective of confirming that the status quo does not damage animal welfare, so that the industry does not have to modify its practices to meet community expectations of high welfare standards.’ Similar pressures were identified in the Bradley and MacRae study, which found that scientists

---


50 Ibid.
were reluctant to act as advocates of animal welfare due to concerns about career security and the ‘necessity of working with industry’.  

These concerns have been partly supported by subsequent empirical research conducted by van der Schot and Phillips into incidences of ‘publication bias’ within animal welfare scientific literature.  

The research found that authors’ assessment of animal welfare tended to support the interests of the funding agency. The data showed that the effects of new treatments in improving animal welfare were rated lower if the research was funded by industry, as compared to government, or charitable organisations. Van der Schot and Phillips warn that this ‘may retard progress in animal welfare development in the animal production industries in particular’, and that in light of the ‘changes in research funding towards more industry sponsorship, this has the potential to undermine the benefits arising from research in animal welfare.’

In a further qualitative study involving two case studies of the co-funded RDC animal welfare research model, Phillips and Petherick identify unsupported conclusions that are favourable to the industry funding body, which, they argue, provides evidence that ‘researchers do experience a conflict of interest that may influence the integrity of the research.’ They find that the co-funded model allows industry to ‘influence experimental design, conduct and reporting through advisory committees and industry management staff attached to the research.’

There are a number of examples of standard-setting processes whereby industry has influenced the development of the science upon which the standards were based. In each of the examples, the basic health and functioning approach to assessing animal welfare was employed in favour of other assessment criteria resulting in conclusions that aligned with the relevant industry’s economic interests.

### 7.5 Case studies

Below are four case studies of how animal welfare science commissioned and funded by industry, or undertaken by researchers with close ties to industry, has influenced the

---

51 Bradley and MacRae, above n 2, 30.
53 Ibid, 957.
54 Phillips and Petherick, above n 42, 127.
development of animal welfare standards. They each relate to controversial animal husbandry practices that have been heavily criticised by animal protection stakeholders and attracted significant community concern.

7.5.1 The welfare of sows in individual stalls

The welfare of breeding sows in intensive piggeries (discussed in Chapter 2 at 2.4.1) has been a topic of intense debate within the animal welfare policy space for over two decades. Scientific review and advice has played a pivotal role in the way various jurisdictions have dealt with the issue. In 1997, the European Union Scientific Veterinary Committee conducted a landmark review of scientific literature on the welfare of intensively reared pigs (the European review) and concluded that ‘since overall welfare appears to be better when sows are not confined throughout gestation, sows should preferably be kept in groups.’ 56 This report led to a European Council directive in 2001 that mandated a prohibition on the use of sow stalls across all EU member states by 2012. 57 In 2001, an Australian research team from Melbourne University’s Animal Welfare Centre (now Animal Welfare Science Centre) was funded by the Pig Research and Development Corporation (now known as Australian Pork Limited) to conduct a review of scientific literature relating to the welfare implications of sow stalls and group housing (the 2001 Australian review). This review took a different approach to welfare assessment to the one adopted in the European review and came to very different conclusions on the respective welfare merits of individual sow stall versus group housing production systems. The 2001 Australian review explicitly adopted a ‘functional or homeostasis’ approach in preference to the ‘feelings, preference and nature’ approaches to welfare assessment stating that the homeostasis approach ‘currently offers science the best assessment of welfare.’ 58 While the European review found that the welfare of sows was compromised even in the best stall-housing systems, the Australian review found that both individual and group housing can achieve similar

degrees of animal welfare. The Australian review concluded that there was ‘no scientific evidence’ to support a recommendation against housing sows in stalls.\(^5\)

Weaver and Morris have provided a detailed critique of the 2001 Australian review stating that ‘the authors relied solely on anatomical and physiological data such as cortisol concentration, immune response, and production efficiency’ and that ‘underlying this is an assumption that welfare can be reduced to physiology.’\(^6\) The Australian Farm Institute further explained the divergence in approach between the two reviews:

The difference between the two reviews lay in the weight the respective teams gave to “affective states” versus “biological functioning.” In the European review, “the effect of fear and the behavioural and physiological consequence of lack of control, especially frustration” were seen as a cause of suffering which compromised welfare. In the Australian review, those facts were acknowledged but were deemed not to impact welfare sufficiently as “the (negative) effects on fitness variables growth, reproduction, injury and health” were not noticeable.\(^7\)

The 2001 Australian review was referred to in a subsequent review of the Australian Model Code of Practice for the Welfare of Animals: Pigs in 2006.\(^8\) The Regulatory Impact Statement for the review dismissed the European Commission directive prohibiting the use of sow stalls on the grounds that it was based on ‘a question of personal ethics, not science.’\(^9\) The Regulatory Impact Statement went on to endorse the continued use of sow stalls for the entire 16 weeks of pregnancy until 2017 at which time the maximum confinement period would be reduced to six weeks during each pregnancy.\(^6\)

---

\(^5\) Ibid, 21.


\(^7\) Australian Farm Institute, Designing Balanced and Effective Farm Animal Welfare Policies in Australia (2015) 27.


A further Australian study conducted in 2007 by the same research group (the 2007 Australian study), and again funded by Australian Pork Limited, came to similar conclusions and has been heavily relied upon by the pork industry to justify the continued use of stalls. This research was similarly criticised on the basis that it gave too much weight to physiological indicators such as cortisol concentrations. In criticising the science on sow welfare assessment produced by the Animal Welfare Science Centre, Caulfield remarks on the broader issue of industry funding and influence:

Part of the problem is that the funding for this sort of science is controlled to a significant extent by the pig industry. Any Australian scientist wanting to make a mark in pregnant sow housing research is obliged to seek industry funding and collaboration in order to support their research. The necessarily large scale of the trials, time consuming nature of behaviour and physiological measurements make it extremely unlikely that this work will be undertaken without industry support, under the current government funding arrangements.

He noted that during the 2006-08 period in which the 2007 Australian study was conducted, the Animal Welfare Science Centre received over $400,000 in funding from Australian Pork Limited. Caulfield concludes by commenting on the perception of bias this can create:

Whether or not there is actual bias, where a scientist is reliant to a significant extent on pork industry funding for his or her research, a reasonable person could possibly take the view that the scientist may not be able to be an objective reviewer of sow stall housing science.

---


66 Australian Pork Limited has however committed to a voluntary phase-out of individual sow stalls by 2017 but this decision is based primarily on consumer concerns not animal welfare science: Malcolm Caulfield, Science and Sense: The Case for Abolishing Sow Stalls (2012) Voiceless 13, citing Andrew Spencer, Australian Pork Limited CEO, quoted in 'Pledge to End Sow Stalls, Tasmanian Country, 26 November 2010.

67 Ibid, 16 and 29.

68 Ibid, 22.

69 Ibid,15.

70 Ibid, 22.
When regard is had to the narrow approach industry-funded pig welfare research has taken to welfare assessment and particularly its divergence from credible international research on the same topic, the perception of bias is accentuated.

### 7.5.2 The welfare of chickens in battery cages

The contribution of science to the equally contentious animal welfare issue of battery cage egg production largely mirrors the scientific input to the sow stall debate. In 1996 the European Union Scientific Veterinary Committee produced a landmark report assessing the welfare of laying hens in different production systems.\(^{71}\) As with its review of science regarding the welfare of pigs, the Committee took an integrated approach to welfare assessment which included observations on productivity, health, physiology and behaviour.\(^{72}\) The review strongly endorsed the welfare benefits of hens having nesting facilities and litter for foraging to improve their psychological wellbeing.\(^{73}\) It was highly critical of the battery cage system stating ‘it is clear that because of its small size and its barrenness, the battery cage as used at present has inherent severe disadvantages for the welfare of hens.’\(^{74}\) The review concluded by acknowledging that while there was no ideal system, enriched cages and non-cage systems were to be favoured on welfare grounds:

> At present there is no ideal commercial system for laying hens from a welfare point of view. Further development is necessary in all systems, but enriched cages and well designed non-cage systems have already been shown to have a number of welfare advantages over battery systems in their present form.\(^{75}\)

As with its review on pig welfare science, the Scientific Veterinary Committee’s layer hen welfare review led to action by the European Commission, and in 1999 a directive to prohibit battery cage egg production by 2012 was passed.\(^{76}\)

A year later in 2000, the Australian Primary Industries Ministerial Council (now known as AGMIN), passed a resolution that ‘research and development, based on furnished

---

\(^{73}\) Scientific Veterinary Committee, above n 71, 41.  
\(^{74}\) Ibid, 108.  
\(^{75}\) Ibid, 104.  
\(^{76}\) Morris, above n 72, 501.
cages that include perches, nests, litter and abrasive strips, and non-cage alternatives such as barn and free range be conducted in Australia by 2005, with the expectation that if the research is successful industry will implement such systems.\textsuperscript{77} To ‘help put some of these resolutions in perspective’, two of the lead researchers from the Animal Welfare Science Centre that conducted the 2001 Australian review on pig welfare science, undertook a review of the science relating to the welfare impacts of different layer hen housing systems.\textsuperscript{78} Barnett and Hemsworth adopted the same approach to welfare assessment prioritising the biological functioning or homeostasis indicators over others. While acknowledging the ‘conservative nature’ of this approach, they justified their decision on the basis that ‘those conditions that create biological dysfunction are the most serious for animals’.\textsuperscript{79} It focuses on measuring the magnitude of the animal’s biological responses to its environment and the consequences of these responses particularly for the animal’s ‘ability to grow, reproduce and remain healthy.’\textsuperscript{80} As with their previous reviews, the researchers differed significantly from the conclusions of the European Union Scientific Veterinary Commission. They provided no opinion on whether cage or non-cage systems of production were preferable on welfare grounds and found that while the literature supported the provision of perches for hens to increase bone strength, ‘there was no similar evidence for the incorporation of nest boxes or dust baths’\textsuperscript{81} despite the extensive behavioural studies cited in the European hen welfare review.

Morris later provided a familiar critique, stating that the homeostasis method has weaknesses ‘relating to the impossibility of reducing subjective feelings to physiology’ and that ‘deprivation has to be extreme before physiological measurements can pick it up.’\textsuperscript{82} He makes the observation that the problems identified with respect to non-cage systems, such as increased mortality rates, are strongly related to how the system is managed, whereas the welfare problems associated with cage systems, particularly behavioural deprivation, are inherent to the system of production itself.\textsuperscript{83} Morris also argues that the Barnett and Hemsworth layer hen welfare review heavily influenced

\textsuperscript{78} Ibid.
\textsuperscript{79} Ibid, 616.
\textsuperscript{80} Ibid, 620; see also Barnett and Hemsworth, above n 58, 1.
\textsuperscript{81} Barnett and Hemsworth, above n 77, 622.
\textsuperscript{82} Morris, above n 72, 507.
\textsuperscript{83} Ibid, 501.
New Zealand’s National Animal Welfare Advisory Committee in the development of the *Code of Welfare for Layer Hens 2004* (NZ), which continued to endorse the use of barren battery cages.\textsuperscript{84}

Despite recommendations that the Australian Model Codes of Practice for the Welfare of Animals be reviewed every five years,\textsuperscript{85} the *Model Code of Practice for the Welfare of Animals: Domestic Poultry* has not been reviewed since 2002.\textsuperscript{86} It continues to endorse the use of barren battery cages without any environmental enrichment features.

### 7.5.3 Maximum time off liquid feed for dairy calves during transport

A contentious issue that arose during stakeholder reference group meetings for the development of the *Australian Animal Welfare Standards and Guidelines for the Land Transport of Livestock* concerned the maximum time dairy calves (commonly referred to as ‘bobby calves’) could be deprived of liquid feed during transport to slaughter. The relevant standard at the time was s.5.11.2 of the *Model Code of Practice for the Welfare of Animals: Cattle*, which stated that ‘bobby calves being transported or awaiting sale or slaughter should not be deprived of appropriate liquid feed or water for more than 10 hours.’ The dairy industry wished to extend the 10 hour limit to 30 hours as ‘more farms could be included in the collection run and cost/calf would decline.’\textsuperscript{87} Animal protection stakeholders objected to the proposal and the matter was referred to a meeting of the Primary Industries Ministerial Council in 2009. The Ministerial Council resolved to direct Animal Health Australia to commission a scientific study on the welfare impacts on calves of a 30 hour time off feed limit to inform a resolution to the disagreement.\textsuperscript{88} As a result, Dairy Australia, the representative body of the dairy industry and proponent of the 30 hour time limit, funded researchers from the Animal Welfare Science Centre to conduct the study.\textsuperscript{89}

\textsuperscript{84} Ibid, 506.
\textsuperscript{87} Phillips and Petherick, above n 42, 135.
\textsuperscript{89} Oogjes, above n 34, 17.
The study examined the impacts of 30 hours feed deprivation on 60 calves subjected to different durations of transportation (no transport, six hours, and 12 hours). It found that there were substantial changes in metabolite levels of calves between 24 to 30 hours after their last feed and that 12% of the calves had plasma glucose levels below the lower reference limit, significantly more than the 2.5% anticipated by chance. Despite these findings the researchers concluded that ‘30 hours with good practice in other aspects of calf management and transport was suitable as the maximum time off feed limit for bobby calves.’

Researchers from the Centre for Animal Welfare and Ethics at the University of Queensland, Professor Clive Phillips and Dr Carol Petherick, have provided a detailed critique of the Dairy Australia study and believe the justification for the 30 hour limit is unfounded. Their interpretation of the study’s data suggests that the calves began to feel hunger soon after three hours from their last feed when plasma glucose began to decline and that such hunger increased gradually for the next 15 hours and then rapidly over the final 12 hours. Additionally, Phillips and Petherick point to increased levels of 3-hydroxy butyrate between 18 to 30 hours after feeding which they interpret as further evidence of under-nutrition in the calves. They also found that increases in creatine kinase in calves transported for 12 hours provided evidence of ‘muscular exertion (probably stepping movement to counteract truck movement), fatigue and possible muscle damage.’

Phillips and Petherick believe the study ‘demonstrates that a defence using mean values for welfare measures that are within a reference range does not prevent individual animal’s welfare being compromised.’ This is particularly important in light of the qualifications made by the study’s researchers in recommending a 30 hour limit. Crucially, 30 hours without liquid feed was only deemed ‘suitable’ as a maximum time if there was ‘good practice in other aspects of calf management and transport’. The

---

91 Ibid, 2; and Phillips and Petherick, above n 42, 136.
92 Fisher et al., above n 90, 2.
93 Phillips and Petherick, above n 42, 139.
94 Ibid, 136.
95 Ibid.
96 Ibid.
97 Ibid, 137.
study was based on 60 healthy calves from a single well-run farm ‘where the operators were aware of the study and the need to provide adequate colostrum, good shelter accommodation and feed prior to the study.’ The 30 hour time off feed limit recommendation is based on ideal conditions of calf health and management yet it is intended to apply as a general standard for all calf transport.

After receiving the results of the Dairy Australia study, Animal Health Australia prepared a Regulatory Impact Statement for a proposed 30 hour time off feed standard and distributed it for public comment in December 2010. It concluded that ‘research indicates that the proposed standard is reasonable as an outer “legal” limit for time off feed for bobby calves, when combined with appropriate calf management and transport practices.’ This recommendation was made despite the fact that data from the study indicated that healthy calves, transported under ideal conditions, experienced increasing levels of hunger from 3 to 30 hours, muscular exertion and fatigue. In justifying its recommendation, the Regulatory Impact Statement reveals, albeit unintentionally, the conception of animal welfare adopted when it advised that ‘the ethical questions and value judgements of hypothetical animal “hunger” and “discomfort” are beyond the scope of the RIS’. Hunger and discomfort are states of subjective experience relating to the ‘affective states’ domain of animal welfare. The Regulatory Impact Statement’s dismissal of these factors suggests that it adopted a strictly ‘basic health and functioning’ approach to the assessment of welfare impact.

Oogjes argues that the approach to the bobby calf standard is an example of the current standards development process simply seeking to appeal to the ‘lowest common denominator’ as ‘it will continue to accommodate even those who market bobby calves interstate and are termed “outliers” by Dairy Australia.’ RSPCA Australia expressed similar concerns in a submission during the public consultation phase of the process stating that the proposed standard was ‘maintaining the status quo’ and ‘justifying the continuation of poor practices that are detrimental to animal welfare’ rather than

---

98 Oogjes, above n 34, 17.
99 Primary Industries Ministerial Council, above n 88.
100 Ibid, iii.
101 Ibid, 22.
102 Oogjes, above n 34, 18.
seeking to improve industry practice. In response, the authors of the Public Consultation Report stated:

There is no scientific evidence to suggest that accommodating atypical operational difficulties experienced by some producers by setting an upper limit of 30 hours would be at the expense of ‘actual’ welfare outcomes.

The assessment of what is reasonable in this RIS is based on objective scientific evidence and cost/benefit analysis – not subjective perceptions about possible community preferences.

The emphasis on ‘actual welfare outcomes’ and ‘objective scientific evidence’ is intended to distinguish the authors’ approach from what they believe are ‘subjective perceptions’ of welfare as opposed to concerns based on different conceptions of science. In other words, concerns about the affective states of hunger and discomfort are excluded from consideration for being ‘hypothetical’, ‘subjective’ or ‘perceived’.

As per the standard-setting process, the proposed standard was then referred to the Primary Industries Ministerial Council for endorsement. However, following its October 2011 meeting, the Ministerial Council reported that it could not reach a unanimous agreement on the proposed standard. Consequently, the 30 hour limit has not been implemented as law in state and territory jurisdictions. Nevertheless, industry groups determined to proceed with the 30 hour limit:

All industries involved in the bobby calf supply chain (that is dairy farmers, livestock agents, calf buyers and transporters and calf processors) have agreed to implement a national industry standards that sets a limit of 30 hours [time off feed] for calves aged 5 to 30 days being transported without mothers.

While the law does not provide expressed authorisation for depriving dairy calves of liquid feed for 30 hours, equally, it does not expressly prohibit it. The 10 hour standard

---

104 Ibid.
contained in the *Model Code of Practice for the Welfare of Animals: Cattle*, is simply a recommendation and is not enforceable. The dairy industry is therefore able to continue depriving bobby calves of liquid feed for up to 30 hours during transport to slaughter with little apprehension of legal consequence.

### 7.5.4 Live animal export stocking densities

The final animal welfare standard-setting case study to be considered concerns the issue of sheep and cattle stocking densities aboard live animal export vessels. Maximum stocking densities are currently set by the *Australian Standards for the Export of Livestock* (the ASEL) (discussed in Chapter 4 at 4.6), however, they are based on practical experience, not empirical scientific evidence.\(^{107}\) To improve returns per shipment, exporters attempt to load as many animals as possible, subject to mortality rates.\(^{108}\) However, high stocking densities have consequences for animal welfare beyond mortality rates. These include insufficient space to perform normal behaviours of feeding, drinking, and lying (particularly on long-haul voyages of 7-21 days), higher concentrations of ammonia with consequent irritation to mucosal surfaces, and increased production of heat and humidity elevating risks of heat stress.\(^{109}\)

Having identified multiple flaws in the regulatory framework governing the live export trade, a key recommendation of the 2011 Farmer Review (discussed in Chapter 4 at 4.6.2) was for a full review of the ASEL to be conducted as a priority.\(^{110}\) A steering committee consisting of jurisdictional department of agriculture officers, and representatives from the live export industry, the veterinary profession and the RSPCA, was established to undertake the review.\(^{111}\)

In anticipation of the review of stocking density standards, Meat and Livestock Australia commissioned research into the welfare impacts of different stocking densities (the MLA study).\(^{112}\) The research measured weight fluctuations, percentage of time

---

\(^{107}\) Phillips and Petherick, above n 42, 129.
\(^{108}\) Ibid.
\(^{109}\) Ibid, 131.
spent lying, and mortality rates at three different stocking densities (current ASEL requirements, 10% less than ASEL, and 10% greater).\footnote{Phillips and Petherick, above n 42, 131-133.} The researchers found that there were negligible differences on each of these measures at the different stocking densities. They concluded that ‘current ASEL stocking densities are appropriate based on the animal welfare indicators applied in these investigations’ and that ‘the research outputs presented in this report will enable the Live Export Industry to objectively defend the current ASEL space allowances.’\footnote{Ibid, 130.}

Phillips and Petherick have also provided a critique of this research. First, they argue that the selection of measures used in the MLA study are ‘insufficiently comprehensive to allow an objective assessment of welfare.’\footnote{Phillips and Petherick, 133.} Second, they find that the differences in stocking densities measured were small as compared to other equivalent studies and had ‘limited biological relevance.’\footnote{Phillips and Petherick, 131.} Third, they argue that the conditions under which the animals were monitored were not representative of ordinary industry practice in that the pens were smaller than usual (facilitating greater ease of access to food and water), the voyages were conducted at times which avoided the hottest conditions (reducing potential levels of heat stress), and the shipment for cattle was a six-day short-haul voyage, which is not comparable to 30-plus day long-haul voyages.\footnote{Phillips and Petherick, 132.} Thus, they conclude the MLA study is not applicable to voyages during the hotter months of the northern hemisphere summer or to long-haul voyages, yet the study ‘will be used to support current stocking density standards, which are not dependent on voyage type.’\footnote{Ibid.}

The review steering committee later submitted its report to the Commonwealth Department of Agriculture in May 2013. The report noted that the steering committee had received conflicting scientific papers on the issue of stocking densities, which included the MLA study, and could not reach an agreement on whether current ASEL maximum stocking densities were appropriate or whether they needed to be reduced.\footnote{Federal Department of Agriculture, above n 111, 15.} Essentially, this places the decision in the hands of the Federal minister for agriculture, who, at the time of writing (February 2015), is the Hon. Barnaby Joyce, an ardent
proponent of Australia’s live export industry. Despite the Farmer Review recommending the ASEL be reviewed as a matter of priority, the Commonwealth Department of Agriculture is yet to act on the 2013 ASEL review report.

7.6 Implications for the legitimacy of the standards development process

The control exerted by agricultural institutions over the development of farm animal welfare standards gives rise to serious questions of procedural legitimacy. The economic interests of livestock industries are heavily represented throughout the process whether directly through the industries’ own representatives or indirectly through the agency of the AHA, department of agriculture officials and committees, or the agriculture ministers. Agricultural institutions have control over priority setting, funding, the commissioning of scientific research where it is deemed by these institutions to be necessary, and the final decisions as to what standards will be endorsed and incorporated into law.

The framework for creating farm animal welfare standards can therefore be described as an agricultural policy process. Responsible authorities technically comply with the formal requirements of regulatory impact analysis and public consultation but animal protection representatives and the broader community are by no means equal participants in the process and their views are not given the same weight as those of the livestock industries. In reality, their input is largely tokenistic. As Kwak advises, when decision-makers identify more strongly with one key stakeholder over another it becomes considerably harder for them to identify the sources of their choices and alternative viewpoints are difficult for them to conceptualise and take into account. It can create a form of unconscious bias towards the interests of the regulated industry.

When regard is had to the way in which science has been developed and utilised to inform the setting of animal welfare standards, concerns of bias are accentuated. The science used is often commissioned and funded by the very livestock industries that will be subject to the standards under consideration and is undertaken by researchers with

---

121 Kwak, above n 12, 98.
122 Lippmann, above n 13, 120-121.
close ties to the industries. Conceptions of animal welfare that align with economic interests are prioritised over those that do not. Concerns over the affective states of animals are dismissed as being ‘hypothetical’, ‘perceived’, or ‘subjective’ in nature. This leads to conclusions that are at odds with equivalent international research that takes a more integrated approach to welfare assessment. But more importantly, it results in standards that fail to meet community expectations.

Sorensen and Fraser note that animal welfare assessment criteria ‘need to be widely accepted as valid indicators of animal welfare by the citizens of the jurisdiction.’ ¹²³ If it is not, the legitimacy of the standard-setting process will be impacted as the views of animal welfare stakeholders and the broader citizenry at large are excluded – ‘fair procedures communicate respect and value; unfair procedures communicate disrespect, marginality or even exclusion from a valued group.’¹²⁴ This outcome is consistent with the closed nature of the agricultural policy community.¹²⁵

Following their analysis of the Canadian farm animal welfare standards development process, Bradley and MacRae recommended that ‘standard-setters should consult as much literature as possible to engage the range of philosophies in welfare science.’¹²⁶ New Zealand’s National Animal Welfare Advisory Committee appears to have accepted this position. Having previously relied on science prioritising the ‘basic health and functioning’ approach to welfare assessment of layer hens for instance, the Committee has now ‘concluded that both methodologic approaches [‘welfare indicators’ and ‘motivational priorities’] and all 3 categories [biologic function, affective state, and natural state] must be taken into account to define adequately the minimum and the preferred welfare requirements of a hen.’¹²⁷ Australian rural sociologists Parbery and Wilkinson also see the value in taking an integrated approach to addressing what they have found to be a loss of public confidence (partly as a consequence of poor legitimacy) in the animal welfare credentials of Victorian farmers. They advise that building trust requires ‘investment in new scientific research, designed such that the evidence it produces is persuasive to stakeholders with contrasting values and

¹²³ Sorensen and Fraser, above n 6, 2.
¹²⁴ Murphy and Tyler, above n 2, 653.
¹²⁵ Discussed in Chapter 6 at 6.2.2.
¹²⁶ Bradley and MacRae, above n 2, 31.
¹²⁷ O’Hara and O’Connor, above n 5, 207.
Such ‘socially robust’ science, they argue, is developed by allowing all stakeholders to be involved in ‘making necessary subjective judgements about research priorities, methods and analytic approaches’:

In addition to helping to reconcile the views of different stakeholders, such engagement will demonstrate to concerned segments of the public that the agricultural industry takes public concerns seriously, respects the views of other stakeholders, and is actively seeking to identify, understand and solve potential problems. The greater social robustness of the resulting scientific knowledge would make it more persuasive for segments of the public that hold active critical views on agriculture and have low trust in agricultural stakeholders as sources of information about farming issues.

Australia’s current approach to the development of farm animal welfare standards fails to demonstrate that the agricultural industry or the responsible regulators take public concerns seriously, respect the views of other stakeholders, and are actively seeking to identify, understand and solve animal welfare problems. Under this approach the legitimacy of the standard setting process and the responsible regulators will continue to suffer.

7.7 Conclusion

This chapter has provided a critical account of Australia’s current approach to setting standards for the welfare of farm animals. It demonstrates that the current approach suffers from procedural legitimacy concerns primarily on two key grounds: 1) the perception of bias that emerges from the degree of control exerted by institutions that identify more strongly with the values and interests of one key stakeholder over another; and 2) the existence of actual bias demonstrated by the nature of the science relied upon by the regulators to develop animal welfare standards and to make final decisions on controversial husbandry practices.

The science relied upon by decision makers prioritises conceptions of animal welfare that align with economic interests and productivity goals but not with community expectations. The scientific conceptions of animal welfare favoured by animal

protection stakeholders and the broader community are dismissed as ‘hypothetical’, ‘perceived’ or ‘subjective’ concerns distinct from ‘actual’ welfare outcomes or ‘objective’ science. This exclusionary approach is consistent with the closed nature of the agricultural policy community and a regulatory framework that is designed to serve a competing economic interest.

The exclusion of alternative views from the standard setting process communicates disrespect and marginality, and consequently reduces the legitimacy of the process and the final standards in the eyes of key stakeholders and the broader community. As Chapter 5 explained, this has led to diminishing levels of public trust and confidence in livestock industries, responsible regulators, and the farm animal welfare regulatory regime as a whole.

Regulatory reform is required to create a more inclusive and democratically legitimate approach to governing animal welfare standard-setting, including reforms to the funding and governance models for the development of animal welfare science upon which such standards are to be based. These reforms will be considered in Chapter 9.
Chapter 8: Implementation and Enforcement

8.1 Introduction

The degree to which animals experience the modest benefits afforded to them by animal welfare laws largely depends on the manner in which they are implemented and enforced. This is the subject of the present chapter. Following a brief introduction to regulatory styles, this chapter will apply theories of regulatory law to the current and foreshadowed approach to animal welfare regulation and enforcement in Australia. While it is difficult to formulate general principles regarding enforcement arrangements in the eight different State, Territory and Federal jurisdictions, it is possible to broadly identify two distinct approaches to enforcement based upon different contexts of animal use. The approach taken to regulating the treatment of animals used for the production of food and fibre is a distinctively ‘compliance’ orientated approach to enforcement favouring the provision of education and advice to encourage and facilitate adherence to the law. In contrast, the approach taken to regulating the treatment of animals kept for companionship or otherwise as ‘pets’, is distinctively ‘deterrence’ orientated with a focus on the imposition of punitive measures for non-compliance. While this thesis is not concerned with the regulation of companion animals, the contrast in enforcement approach provides a point of comparison, which facilitates the identification of deficiencies within the farm animal context.

After exploring the different features and justifications for the dichotomous approach to enforcement, this chapter will engage in a critical analysis of the compliance approach within the agricultural sector. An agency’s approach to regulation can influence its susceptibility to regulatory capture. Adams and colleagues have noted that risks of regulatory capture are higher with non-punitive, collaborative approaches to regulation where the regulator maintains close ties to industry and engages in a form of negotiated
This analysis will present evidence of regulatory capture with respect to particular examples of failed enforcement responses to animal welfare breaches. It is argued that in the pursuit of improved efficiencies and cost savings, policy makers have developed a regulatory system that fails to account for key features of the regulatory environment and mischaracterises the nature of animal welfare offences. Within this system, breaches of animal welfare standards are conceived of as nothing more than technical rule violations, or simple ‘side effects’ of business operations. The approach to enforcement adopted by government recommends that non-compliance – ‘however serious’ – be responded to with ‘dialogue’ in the first instance and only after repeated incidents of non-compliance should the regulator impose punitive sanctions. It is concluded that this approach to enforcement creates a system that excuses animal mistreatment and implicitly accepts the management of animal cruelty rather than its prohibition. As with the regulators’ approach to standard-setting, their approach to enforcement is equally unlikely to meet broader community expectations regarding how animal welfare offences should be dealt with and therefore contributes to the regulatory framework’s legitimacy problems.

8.2 A brief introduction to regulatory styles

Debates within the field of regulatory theory concerning the design of regulatory policy and effective approaches to law enforcement have traditionally been concerned with two opposing forms of regulation distinguished on the basis of their punitive orientation. On one side is a form of regulation geared towards punishment with the intention of deterring those subject to the regulation (‘regulatees’) from engaging in non-complying behaviour. On the other side are persuasive forms of regulation focused on cooperation and the provision of advice and education. The debate no longer takes an all or nothing approach as the deficiencies of a pure ‘punish and deter’ or ‘advise and persuade’ strategy have now been well documented. In recognition of the complexities of modern regulatory problems, scholars now propose a more nuanced approach in which the two traditional forms are included along a continuum of regulatory styles.


This approach provides greater flexibility for regulators in designing enforcement strategies with an appropriate mix of punishment and persuasion mechanisms to achieve desired policy outcomes. A number of theories have been developed to guide this process. Those relevant to the animal welfare context will be considered in further detail below.

Much of the evolution in regulatory theorising about enforcement can be attributed to the foundational work of Grabosky and Braithwaite in analysing the regulatory styles of 96 Commonwealth, State and Local Government agencies in the 1980s. From their analysis, Grabosky and Braithwaite developed a regulatory typology for government agencies depicted in the Figure 24 below (incorporating adaptations from Adams and colleagues and the author).

![Figure 24: Typology of regulatory styles](image)

4 Adams et al., above n 1, 2.
The graph provides for two intersecting variables. The axis from left to right indicates an agency’s punitive orientation in terms of the degree to which the agency is inclined to resort to the imposition of sanctions upon a non-complying regulatee. The vertical axis is concerned with the form of the regulation. At the top of the axis we see what is commonly referred to as ‘command and control’ regulation, typified by the use of prescriptive rules accompanied by penalty provisions and enforced in a top-down adversarial fashion. It will often, but not always, take the form of criminal legislation. At the bottom of the axis we see more cooperative forms of regulation usually involving co-regulatory or self-regulatory arrangements administered in partnership with the relevant industry or firm. This form of regulation often takes the form of administrative legislation and licensing regimes. A significant feature of this vertical variable concerns the proximity between the regulator and regulatee. Cooperative forms of regulation are often designed precisely for their ability to foster ongoing relationships between the industry or firm and the regulator, while ‘command and control’ forms of regulation are typically enforced at arm’s length and do not seek to establish any form of ongoing relationship with the regulatee.

Most regulatory agencies sit somewhere within the second or fourth quadrants. This is not surprising as ‘command and control’ forms of regulation are almost by their nature enforced in a punitive manner, while cooperative forms of co-regulation or self-regulation are almost always enforced using non or less punitive means. The diagonal line on the graph reflects this spectrum, between what are commonly referred to as ‘deterrence’ and ‘compliance’ strategies of enforcement. Examples of typical deterrence orientated enforcement agencies are police forces, customs agencies and taxation agencies, where regulatory interactions are usually adversarial in nature and there is little to no prior or ongoing relationship with the regulated individuals and companies. Examples of more compliance directed agencies would include departments of mines or utility regulators where there is frequent contact with regulated companies and an ongoing relationship is fostered. Grabosky and Braithwaite’s study found that Australian business regulators were overwhelmingly compliance orientated.

---

6 Adams et al, above n 1, 2-4.
7 Grabosky and Braithwaite, above n 3, 228.
8 Also referred to as ‘legal’ and ‘social’ forms of regulation: Kagan, above n 2, 221.
9 Grabosky and Braithwaite, above n 3, 1.
Ultimately, effective regulatory design, with the appropriate mix of punishment and persuasion strategies, will be context specific. Above all, it must be based on a thorough analysis of the regulatory environment. A proper appreciation of the nature of the regulated activity and the competing interests involved is fundamental for designing the right regulatory tools for the particular regulatory problem. The extent to which current approaches to animal welfare regulation achieve this will be considered below.

8.3 The dichotomous approach to animal welfare law enforcement

Animal welfare regulation in Australia reflects both compliance and deterrence orientated approaches to enforcement, depending upon the context of animal use. While there are nuances, it is possible to identify a distinct difference in the approach taken to regulating our treatment of animals kept for companionship and for those we use for commercial or other instrumental purposes such as for the production of food and fibre. The proceeding discussion will refer to these broad groupings, respectively, as the ‘domestic’ and ‘agricultural’ realms of animal use. As will be shown, the enforcement approach to regulating the treatment of animals in the domestic realm has a distinctively deterrence orientated character, while the approach to animal use within the agricultural realm is more compliance based. Animal welfare regulation, perhaps reflecting the need to take a contextually specific approach, has evolved over the years, so that while it may be possible to situate the different enforcement approaches on either side of the compliance–deterrence spectrum, each has at least some elements of the other.

Consistent with the distinction in enforcement approach is the distinction in the form of legislation governing each realm. Animal welfare appears on the surface to be regulated primarily through one legislative framework governed in each jurisdiction by a State or Territory animal welfare Act. However, due to the operation of wide-ranging exemptions and defences for acts done in accordance with the provisions of subordinate legislation such as regulations, industry codes of practice, and standards and guidelines

10 See, Freiberg, above n 5, ch 3.
11 Ibid.
12 Animal Care and Protection Act 2001 (Qld); Animal Welfare Act 1985 (SA); Animal Welfare Act 1992 (ACT); Animal Welfare Act 1993 (Tas); Animal Welfare Act 1999 (NZ); Animal Welfare Act 2002 (WA); Animal Welfare Act (NT); Prevention of Cruelty to Animals Act 1979 (NSW); Prevention of Cruelty to Animals Act 1986 (Vic).
we effectively see two separate, yet related, legislative frameworks emerge. The treatment of animals in the domestic realm is regulated primarily by the general criminal provisions of the primary animal welfare Acts, while the treatment of animals in the agricultural realm is regulated primarily by the prescriptive provisions of subordinate legislation made under those Acts. The exemptions and defences for acts done in accordance with the provisions of the subordinate legislation are considered necessary as some of the procedures and husbandry arrangements outlined in those instruments would otherwise be likely to breach the general prohibitions on animal cruelty set out in the animal welfare Acts.

Finally, it is important to note that the domestic/agricultural basis for the distinction in regulatory approach and legislative form, is not made primarily on the basis of animal species but on the form of use to which the animal is put. It is possible for those species of animal typically considered ‘farm animals’ to occupy the domestic realm as ‘pets’. Equally, it is possible for those species of animal typically considered to be ‘pets’ to occupy a non-domestic or commercial realm (examples include the use of cats and dogs in scientific research, greyhound racing, or commercial cat and dog breeding) where they are legally exploited in ways that compromise their welfare despite the fact they are members of a species with the otherwise privileged status of ‘companion animals’.

8.3.1 A deterrence approach to animal welfare law enforcement within the domestic realm

The substantive provisions of the primary animal welfare Acts are criminal in nature. They establish offences that must therefore be proved to the requisite standard, ‘beyond reasonable doubt’. Most offence provisions are framed in terms of prohibitions on particular forms of conduct and are accompanied by penalty provisions usually providing for maximum fines and terms of imprisonment, and in some cases, penalty infringement notices (or ‘on-the-spot’ fines). These provisions are enforced primarily by inspectors from the relevant State or Territory Royal Society for the Prevention of

13 Discussed in Chapter 4 at 4.4.5.
14 See discussion in Chapter 4 at 4.4.5 and Chapter 5 at 5.2.3.
15 Animal Welfare Act 1985 (SA) s 13(3); Animal Welfare Act 1993 (Tas) s 8(2); Animal Welfare Act 2002 (WA) s 19(2) and (3); Prevention of Cruelty to Animals Act 1979 (NSW) s 4(2); Prevention of Cruelty to Animals Act 1986 (Vic) s 9(1); Animal Care and Protection Act 2001 (Qld) s 18(2); Animal Welfare Act 2000 (NT) s 9(2) and (3); and Animal Welfare Act 1992 (ACT) ss 7, 7A and 8.
16 See for instance Animal Welfare Act 1985 (SA) s 15A.
Cruelty to Animals (RSPCA) organisation.\(^{17}\) However, police are also appointed as inspectors in most jurisdictions and provide a supplementary enforcement role, usually in cases of emergency and matters involving acts of aggravated cruelty.\(^{18}\) In addition, departments of agriculture in most jurisdictions provide for the appointment of some personnel (usually animal health or ‘stock’ inspectors) as inspectors under welfare legislation. While their primary concern is livestock, they may at times attend to domestic animal welfare matters, particularly in remote rural areas where RSPCA inspectors may not be available.

Animal welfare enforcement within the domestic realm is overwhelming reactive in nature. RSPCA inspectors throughout Australia attend to approximately 50,000 animal welfare complaints each year.\(^{19}\) The vast majority of these responses will constitute the first interaction with the regulatee and, in many cases, the only interaction. In more serious cases of neglect or cruelty, inspectors will impose punitive sanctions, which may include the seizure of animals, the issuance of penalty infringement notices, and in very serious cases, the initiation of prosecution proceedings that can result in criminal convictions, fines, the forfeiture of animals, orders prohibiting the defendant from having any further custody of animals, and terms of imprisonment. RSPCA Australia\(^{20}\) statistics for the 2013/14 financial year reveal that inspectors investigated 58,591 complaints, laid 904 charges against 261 defendants, and finalised 236 prosecutions.\(^{21}\)

These features reflect a predominately deterrence orientated approach to enforcement. Criminal provisions enforced in a top-down manner, the absence of any pre-existing or ongoing relationship between regulator and regulatee, and a readiness to resort to punitive sanctions are all classic elements of a command and control legal regime. This may be considered an appropriate strategy for regulating the treatment of animals within the domestic realm for both practical and normative reasons. First, the sheer size of the regulated community precludes the development of any genuine relationships between

\(^{17}\) The exception is the Northern Territory where no RSPCA inspectorate exists. In NSW the Animal Welfare League also plays an enforcement role through the employment of three inspectors.

\(^{18}\) Police involvement is encouraged further through the introduction of animal cruelty provisions within traditional criminal legislation. See for instance, Crimes Act 1900 (NSW) s 530, establishing the offence of ‘serious animal cruelty.’


\(^{20}\) RSPCA Australia is the national federated body of State and Territory RSPCA organisations.

regulators and regulatees. Second, the volume of complaints received necessitating reactive enforcement responses severely limits the resources available for more proactive forms of monitoring via routine inspections programs. However, even if resources were not an issue, it is highly unlikely that such compliance activities would be tolerated within the domestic realm as the perceived intrusion upon personal privacy and property rights would be considered too great for parliaments to authorise. Third, animal treatment within the domestic realm, which falls below the standards prescribed by law, is considered by the broader community to be morally wrong. There is no element of ‘social legitimacy’ deriving from economic or commercial interests that may muddy the moral waters. The immorality of neglecting animals or treating them in a manner that causes them harm within the domestic context is clear. Society deems such behaviour to be criminal and expects punishment accordingly. Indeed, much of the broader community’s public engagement in animal welfare matters occurs in the context of calling for greater or ‘tougher’ punishment for those who ill-treat animals in this context.

While the enforcement approach within the domestic realm is predominately deterrence orientated some compliance strategies are still utilised, the most common of which is the ‘animal welfare direction’. Detection of offences will usually be responded to with punitive sanctions; however, in less serious cases the legislation provides inspectors with a power to issue statutory directions to persons responsible for an animal to provide for the animal’s welfare in a stated way. Directions will often relate to matters such as the provision of veterinary treatment, improved living conditions, and increases in the quantity or quality of food provided to the animal. Verifying compliance with a direction will usually require an inspector to revisit the property, which may result in the formation of a relationship with the regulatee albeit for a limited time. Animal welfare directions may be described as a compliance mechanism as they are designed to secure conformity with the law, circumventing the imposition of punitive sanctions.

24 See, Chapter 4 at 4.4.4.
However, non-compliance with a direction will in most cases result in the imposition of punitive sanctions and possible seizure of the animal(s) concerned.

The use of animal welfare directions is consistent with the extensive community education activities undertaken by RSPCA organisations.\textsuperscript{25} State and Territory RSPCA branches consider education to be a core element of their role and significant resources are dedicated to this object.\textsuperscript{26} While many of these education activities relate to broader welfare principles (such as the ‘five freedoms’) rather than legal compliance \textit{per se}, awareness of such principles contributes to achieving greater levels of compliance.

The approach to animal welfare enforcement within the domestic realm is predominately deterrence orientated, interspersed with some elements of a compliance approach. This may be an appropriate mix of strategies considering the practical and normative features of the regulatory environment.

\textbf{8.3.2 A compliance approach to animal welfare law enforcement within the agricultural realm}

In contrast to the deterrence approach in the domestic realm of animal use, the agricultural context is approached by regulators in a predominately compliance orientated fashion. As noted above, despite the appearance of a single legislative framework for animal welfare in each jurisdiction, in practice, two different regulatory regimes are operating concurrently. The treatment of animals in the agricultural context is not primarily governed by the criminal provisions of State and Territory animal welfare Acts but by the prescriptive provisions of subordinate legislation in the form of regulations, industry codes of practice, and standards and guidelines. As discussed in Chapter 4, compliance with these prescriptive standards gives rise to exemptions and defences from the duties and prohibitions contained in the primary Acts. However, it is important to note that if the treatment of animals in this context falls significantly below these standards, the general criminal provisions of the animal welfare Acts may still

\textsuperscript{25} Three of the seven key objectives of RSPCA Australia relate to the provision of education and advice, including: ‘To educate the community with regard to the humane treatment of animals’; ‘To engage with relevant stakeholders to improve animal welfare’; and ‘To sustain an intelligent public opinion regarding animal welfare’: RSPCA Australia, \textit{Policies} (2011) \textless http://kb.rspca.org.au/76\textgreater  5.

apply as the defendant will not be able to rely on the defence of compliance with a code of practice.

As shown in Chapter 4, the precise legal status of the various subordinate animal welfare instruments currently varies depending upon the jurisdiction. These inconsistencies are now being addressed through a nationally coordinated transition from the predominately voluntary ‘Codes of Practice for the Welfare of Animals’ to mandated standards prescribed in the ‘Australian Standards and Guidelines for the Welfare of Animals’ (Standards and Guidelines).\(^\text{27}\) An equivalent transition has been foreshadowed in New Zealand.\(^\text{28}\)

Government policy documents and publications by government officers indicate that a ‘co-regulatory’ model will be the preferred approach for implementing the mandatory Standards.\(^\text{29}\) This was also confirmed by interview data.\(^\text{30}\) Co-regulation is a form of regulation that involves government and industry developing cooperative arrangements where both play a formal role in regulatory processes to achieve compliance.\(^\text{31}\) The co-regulatory model envisaged for the Australian agricultural sector anticipates a significant role for industry quality assurance (QA) programs in verifying compliance with the Standards.\(^\text{32}\)

Industry QA programs are generally owned and operated by the industry’s representative organisation. In the case of the egg industry for instance, Australian Egg Corporation Limited (AECL) operates the QA scheme Egg Corp Assured, which requires any egg producers who wish to display the scheme’s logo on their products to engage third party auditors trained by AECL to undertake an annual audit of their products.\(^\text{32}\)

\(^{27}\) See discussion in Chapter 4 at 4.5.2.


\(^{30}\) See Chapter 6 at 6.4.4.

\(^{31}\) Freiberg, above n 5, 31.

\(^{32}\) Edge and Bailey, above n 29; Edge, Hemsworth and Barnett, above n 29, and Vandegraaff, above n 29.
facilities. The audit covers a range of issues in addition to animal welfare, including labelling, food safety, biosecurity and environmental management. Other livestock industries have equivalent QA programs.

The proposed co-regulatory model intends to formally recognise industry QA programs by imposing lower levels of government monitoring and intervention on facilities that are part of such schemes. The former Chief Veterinary Officer of South Australia, Dr Robin Vandegraaff, explains the intended arrangements as follows:

The new Standards and Guidelines will be consistent with the relevant requirements of industry QA programs. It is expected that peak industry bodies will work with jurisdictional governments in a ‘co-regulatory’ environment to establish a primary role for industry QA audit processes to monitor and enforce compliance with standards, with governments maintaining overview (audit) of industry QA systems and intervening directly in animal enterprises only for agreed confirmatory audits (including on farms not on QA) and in response to specific incidents of serious non-compliance with standards.

Victoria is the most advanced jurisdiction in terms of its development of this co-regulatory model. In 2010 the Victorian Government enacted the Livestock Management Act for the purpose of consolidating ‘regulatory oversight for a number of livestock related issues, including animal welfare, biosecurity, chemical standards and traceability’. As further Standards and Guidelines are developed and incorporated under the Act, the primary legislative responsibility for the welfare of farm animals will be removed from the Prevention of Cruelty to Animals Act 1986 (Vic). The Livestock Management Act provides for the legislative recognition of an industry QA program by establishing a process for authorising the program as an ‘approved compliance

34 Ibid.
36 Vandegraaff, above n 29, 9.
37 Edge and Bailey, above n 29, 1.
arrangement.’ Following authorisation, all members of the QA program are exempt from the requirement in s.7 to conduct a ‘systematic risk assessment,’ and will not be subject to inspection by government as they will ‘be deemed to comply in the first instance’ and the inspectorate will instead ‘focus its activity on those operators that are “not approved” and that are considered to represent a higher compliance risk.’ The Government’s oversight of the QA program will be limited to assessing the reports of third party auditors. The Act does not prescribe who is to conduct the audits or at what frequency. These matters are left to the Minister’s discretion.

The process of deferring substantive regulatory responsibility to regulatees and engaging in detached high-level oversight of the regulatee’s performance in regulating itself is a form of regulation known as ‘enforced self-regulation’ or ‘meta-regulation’. Gunningham explains that meta-regulation involves:

placing responsibility on the regulated organisations themselves (usually large organisations) to submit their plans to the regulator for approval, with the regulator’s role being to ‘risk-manage’ the risk management of those individual organisations. The goal is to induce companies themselves to acquire the specialist skills and knowledge to self-regulate, subject to external scrutiny. Accordingly the regulator’s main intervention role is to oversee and audit the plans put in place by the regulated organisation. Where it finds inadequacies it may invoke a responsive approach.

Meta-regulation is also a prominent feature of the regulatory frameworks for live animal export. Live export companies are vested with significant self-regulatory responsibilities such as ensuring compliance with their Exporter Supply Chain Assurance System (see Chapter 4 at 4.6). Their performance in ensuring compliance is overseen by the Commonwealth Department of Agriculture.

These meta-regulatory arrangements are administered and enforced primarily by State and Territory departments of agriculture. RSPCA organisations play a role in

38 *Livestock Management Act 2010* (Vic) pt 3.
39 Ibid, s 10.
40 Edge and Bailey, above n 29, 18.
41 Ibid.
42 *Livestock Management Act 2010* (Vic) s 19.
43 See, Freiberg, above n 5, 33-34.
44 Gunningham, above n 2 at 175.
enforcement within this context in a number of jurisdictions, however, this role is limited to the provision of inspectors to undertake on-the-ground enforcement. RSPCA organisations do not play a role in administering the legislation in the sense of licensing facilities, approving QA programs, issuing permits and other administrative functions. These roles are all performed by the responsible government departments outlined in Table 6 below.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Administering department</th>
<th>RSPCA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Qld</td>
<td>Department of Agriculture, Fisheries and Forestry</td>
<td>No</td>
</tr>
<tr>
<td>NSW</td>
<td>Department of Primary Industries</td>
<td>Yes</td>
</tr>
<tr>
<td>ACT</td>
<td>Territory and Municipal Services</td>
<td>Yes</td>
</tr>
<tr>
<td>Vic</td>
<td>Department of Environment and Primary Industries</td>
<td>No</td>
</tr>
<tr>
<td>Tas</td>
<td>Department of Primary Industries, Water and Environment</td>
<td>Yes</td>
</tr>
<tr>
<td>SA</td>
<td>Primary Industries and Resources South Australia, and Department of Environment and Natural Resources</td>
<td>Yes</td>
</tr>
<tr>
<td>WA</td>
<td>Department of Agriculture and Food</td>
<td>Yes</td>
</tr>
<tr>
<td>NT</td>
<td>Department of Primary Industry and Fisheries</td>
<td>No</td>
</tr>
<tr>
<td>Cth</td>
<td>Department of Agriculture</td>
<td>No</td>
</tr>
</tbody>
</table>

Table 6: Responsible institutions for animal welfare law enforcement in agricultural realm

Departments of agriculture have sought to limit the jurisdictional responsibilities of RSPCA inspectors with respect to livestock in several jurisdictions. Memorandums of Understanding between State RSPCA’s and departments of agriculture in Queensland and Victoria provide that any complaints relating to ‘commercial livestock’ (over 10 sheep, cattle, pigs, or over 500 poultry) will be referred on to the Department for
investigation. Similar arrangements appear to be in place in Western Australia where the Department of Agriculture and Food’s website specifically refers to the RSPCA’s role in companion animal compliance:

The RSPCA receive and investigate complaints of animal cruelty and take the lead in the area of companion animal welfare. The Western Australian Government supports the RSPCA in its work pursuing companion animal welfare compliance and responsible pet ownership through a funding grant.

While no wholesale restriction of RSPCA jurisdiction exists in the State of New South Wales, there are additional requirements placed on inspectors with respect to dealing with ‘stock animals’. Inspectors are required to seek advice from the Department of Primary Industries before charging a person in relation to an offence of failing to provide a stock animal with sufficient food, drink, or shelter. Similarly, ‘seizure and disposal’ of stock animals, in the absence of an associated prosecution, can only be authorised by the Director-General of the Department, and this can only occur after a convoluted process of establishing, and receiving advice from a ‘Stock Welfare Panel’.

A review of the publicly available enforcement policies for departments of agriculture reveals the adoption of a mixture of strategies that reflect prominent theoretical models

---

48 Prevention of Cruelty to Animals Act 1979, Part 2B.
of enforcement. It would appear the most influential of these theories within the animal welfare context is that of ‘responsive regulation’, a foundational theory formally developed by Ayres and Braithwaite in 1992.\(^{50}\) Responsive regulation was devised in a bid to transcend the inflexible approach of adopting either ‘deterrence’ or ‘compliance’ as a stand-alone strategy. As the authors explain, ‘[t]o reject punitive regulation is naïve; to be totally committed to it is to lead a charge of the Light Brigade. The trick of successful regulation is to establish a synergy between punishment and persuasion.’\(^{51}\) Ayres and Braithwaite argue that the implementation of this synergy should be guided by the motivations and capabilities of the regulatees because what may evoke a positive response in one regulatee may cause defiance in another. To assist in this process, regulatory theorists have developed different categories of regulatees based on their particular ‘motivational postures’.\(^{52}\) One grouping of motivational postures includes the categories of ‘leaders’, the ‘incompetent’, ‘reluctant compliers’, and the ‘recalcitrant’.\(^{53}\)

To guide regulators in applying a responsive regulatory approach in practice, Ayres and Braithwaite developed a diagrammatical representation of the concept in the form of an ‘enforcement pyramid’. Figure 2 depicts an adaption of the enforcement pyramid used in the Commonwealth Department of Agriculture compliance strategy.

---

\(^{50}\) Ayres and Braithwaite, above n 2.

\(^{51}\) Ibid, 25.


The pyramid is divided into stages of the regulatee’s attitude to compliance (a reflection of the regulatee’s ‘motivational postures’), and the line to the right side of the pyramid recommends the corresponding enforcement response. Ayres and Braithwaite argue that regulators should assume virtue on behalf of regulatees and concentrate their compliance activities at the base of the pyramid with the provision of advice and education. Should non-compliance be detected, the first response should always be to engage in dialogue with the regulatee. Braithwaite argues that dialogue should be the first response ‘however serious’ the non-compliance. It is only after dialogue fails to elicit compliance that enforcement responses should begin to escalate up the pyramid with the imposition of more punitive sanctions. Thus, the responsive regulation

55 Ayres and Braithwaite, above n 2.
57 Ibid.
approach is premised upon an ongoing relationship between regulator and regulatee with a ‘tit for tat’ style of interaction.58

The responsive enforcement strategy has been expressly adopted as the preferred approach by multiple government departments responsible for animal welfare.59 It has also been proposed as the national model for the enforcement of the new Standards and Guidelines.60

In summary, a compliance orientated approach to animal welfare law enforcement has been implemented within the agricultural realm of animal use. The cooperative arrangements featuring significant delegation of regulatory responsibilities to industry demonstrate government’s support of meta-regulation as a means of achieving compliance. Combined with a responsive approach to enforcement, focused first and foremost on the provision of education and advice, this regulatory framework is indicative of a classic compliance approach with an emphasis on persuasion over punishment.

There are a number of practical and theoretical reasons for why this approach may be considered appropriate for the non-domestic realm. The first, and most significant from the perspective of governments, relates to cost and resources. Consistent with other areas of regulation, government departments within the animal welfare context are continually searching for more efficient and cost-effective ways of achieving compliance.61 Deferring on-the-ground inspection responsibilities to industry is intended to reduce costs for government.62 In contrast, a command and control based approach favouring prosecution for non-compliance is very costly and time-consuming.

---

62 Edge, Hemsworth and Barnett, above n 29, 1025-1026.
This is especially due to the inherent difficulties of meeting criminal standards of proof for what may be described as offences of *mismanagement* rather than cruelty.\(^63\)

Second, meta-regulation is recognised for its ability to foster innovation and a culture of compliance among regulatees.\(^{64}\) Bloom notes that ‘[c]o-regulation empowers those subject to regulation to find the most appropriate ways for their activities to be performed in compliance with the required operational outcomes and standards that government either sets or negotiates with industry.’\(^{65}\) This is said to lead to more efficient and effective compliance outcomes as regulatees are in the best position to tailor-fit compliance strategies to their particular operations.\(^{66}\)

Finally, a compliance approach is said to be a more appropriate fit for the non-domestic context as subjecting the conduct of lawful business operations to the moral stigma of the criminal law may be seen as excessive and unfair.\(^{67}\) Kagan observes that most regulatory rule violations ‘are not committed as ends in themselves, but occur as side-effects of legitimate, socially valuable business operations.’\(^{68}\) He states that in cases of technical violations, which do not result in immediate tangible harm to others, ‘regulators, judges, and regulated businesses often think it unfair to subject a businessperson or firm to the moral obloquy and harsh sanctions of the criminal law.’\(^{69}\)

These factors provide the context for why governments are pursuing the compliance-based approach to enforcement within the agricultural realm. But will this approach be effective? Will it achieve adequate levels of compliance, and will such compliance be achieved in a way that is acceptable to the broader Australian community? These questions will be explored below.

---


\(^{66}\) Edge and Bailey, above n 29, 11.

\(^{67}\) Ibid, 10; and Bloom, above n 65, 30.

\(^{68}\) Kagan, above n 2, 222.

\(^{69}\) Ibid.
8.4 A critical perspective of the compliance approach

While there may be good practical and regulatory policy reasons for taking a compliance approach to enforcement within the agricultural realm, the government’s current and foreshadowed implementation of this approach is flawed. In the pursuit of improved efficiencies and cost savings, government policy makers have designed a system that fails to account for key features of the regulatory environment and mischaracterises the nature of animal welfare offences. In turn, these failures raise questions of legitimacy, especially in relation to the adequacy of accountability mechanisms within the animal welfare framework and of enforcement responses to incidents of noncompliance.

8.4.1 The nature of the regulatory environment

Effective regulatory design is dependent upon a thorough analysis of the regulatory environment. A proper appreciation for the nature of the regulated activity and the competing interests involved is fundamental for designing the right regulatory tools in order to address the particular regulatory problem and achieve the desired outcomes.

A significant feature of the animal welfare regulatory environment is the inherent vulnerability of the intended beneficiaries of the regulation. Animals have no means of asserting their interests. They have no ability to communicate their concerns and lack of legal and political personality. Accordingly, they cannot file legal complaint in response to wrongs committed against them, nor can they vote to support those who represent their interests. These vulnerabilities are accentuated within the agricultural context due to the instrumental nature of the relationship between the animal and the person responsible for the animal’s care and welfare. The purpose for which the animal is used will often directly conflict with the animal’s welfare. This conflict will be greater in some contexts than in others, but it is certain to manifest itself in some way in all. Indeed, the very purpose of animal welfare regulation is to manage these conflicts;

---

70 See, Freiberg, above n 5, Chp 3.
71 Ibid; and Bloom, above n 65, 10.
72 See Chapter 3 at 3.1.
to set minimum standards of care and to prevent what may otherwise descend into completely unrestrained forms of exploitation.

In the context of farming, particularly large scale farms, this conflict is significant. Chapter 2 of this thesis outlined many of the practical examples of this conflict in practice. The ability of animals (generally with the assistance of antibiotics) to continue producing despite being in poor states of welfare, combined with the influence of market forces demanding greater and greater levels of production efficiency, create an environment in which animal suffering becomes a market externality. This conflict demonstrates that in addition to the inherent vulnerabilities experienced by animals in having no means of asserting their interests, those responsible for their welfare within agricultural settings may also possess financial incentives to act in a manner that is contrary to their interests.

These incentives may also be relevant to the motivational postures of producers to animal welfare regulation. It is notable that no research has been conducted in this area to-date. However, research undertaken by Bartel and Barclay regarding the motivational postures of Australian farmers to environmental regulations reveal a number of findings that may have relevance to the animal welfare context. Analysis of data collected from a mail survey of 5,235 farmers found a low level of compliance associated attitudes and a high level of defiance associated attitudes indicating that environmental laws had ‘extremely poor acceptance amongst the regulatees.’ Bartel and Barclay observed that the results compared unfavourably to equivalent studies in the field of tax compliance where far fewer identified as opposing the system. The study found that postures of defiance were linked to greater social distance from government and the values advanced by the legislation. It also revealed that many farmers ‘would prefer fewer incursions into on-farm management’ and suggested that their disagreement with law and government ‘may reflect a preference for absolute private property rights evident in other areas of agriculture.’ In addition, Bartel and Barclay noted that the ‘laws may also be perceived as derived from the interests of city people, and unfairly impacting on

74 See Chapter 2 at 2.3.2.
76 Ibid, 166.
77 Ibid.
78 Ibid, 168.
79 Ibid, 166.
those living on the land." As animal welfare regulation directly impacts on-farm management and is often perceived to be more a concern of ‘city folk’ than those in the country, it is likely that farmers hold similar attitudes toward animal welfare law and regulation. This emphasises the need for equivalent motivational posture research to be conducted in the context of animal welfare regulation.

The culmination of these factors gives rise to a regulatory environment of high risk. The inherently vulnerable nature of animals, combined with a context of instrumental use and a possible culture of defiance to animal welfare law, creates an environment conducive to non-compliance. Despite these features and the absence of any research regarding the motivational postures of the regulatees, the compliance-orientated regulatory approach favoured by government is premised upon an assumption of industry commitment to animal welfare. Gunningham explains that for meta-regulation to be successful it requires ‘highly sophisticated and motivated regulated organisations to develop and implement [risk management] strategies successfully and to regulate themselves effectively.’

Similarly, the starting point of the responsive regulatory approach to enforcement is to ‘assume virtue’ on behalf of regulatees with respect to their commitment to compliance, and in the event non-compliance is detected – ‘however serious’ – it should be responded to in the first instance with dialogue. The nature of the regulatory environment and the research on motivational postures referred to above raise concerns as to whether the requisite features for meta-regulation and responsive approaches to enforcement are actually present within the agricultural context of animal use.

The high-risk nature of the regulatory environment necessitates the establishment of strong oversight and accountability mechanisms. But instead, departments of agriculture are delegating the delivery of significant regulatory functions to industry itself, including the preponderate share of on-the-ground inspection services. This raises concerns regarding the accountability and integrity of the system. QA programs are owned and operated by the industry. The industry and its members pay for the program and the individual inspections. To maintain legitimacy in the eyes of the community, a

80 Ibid, 168.
81 This is also supported by the findings of research commissioned by the Federal Department of Agriculture into community attitudes to animal welfare roles and responsibilities: TNS Social Research, *Attitudes Towards Animal Welfare: A Research Report* (2006) 21-25.
82 Gunningham, above n 2, 191.
program of independent government inspection must operate in conjunction with QA schemes. Membership of a QA scheme should not absolve a facility of the possibility of government inspection. Routine government inspection regimes should continue for both non-QA and QA approved facilities. Baldwin and Black warn that if facilities identified as ‘low-risk’ are not supplemented by other monitoring programs, ‘such as those of random inspection’, this can ‘under-deter the lower level risk creators, the “forgotten offenders” who escape prioritisation. The overall effect of regulation is then not to reduce risk, but to substitute widely spread risks for lower numbers of larger risks.’

This may be a symptom of the tendency for departments of agriculture to under appreciate risks of noncompliance within the agricultural sector due to their strong identification with the industry’s perception of reality.

8.4.2 The nature of animal welfare offences

A further concern raised by the compliance approach relates to the implied assumptions it makes about the nature of animal welfare offences. One of the justifications proffered for the compliance approach is based on the premise that animal use in agricultural realm occurs in the course of ‘socially valuable business operations’ and that most regulatory violations ‘are not committed as ends in themselves’ but ‘as side-effects’ of those operations. In addition to this departments of agriculture have adopted a responsive regulatory enforcement strategy which recommends that serious cases of non-compliance be met with dialogue and punitive sanctions only entertained following continued and repeated non-compliance.

Applying this approach to enforcement in an animal welfare context suggests that breaches of animal welfare standards are no different to typical regulatory rule violations or ‘side-effects’ of business operations. Such a characterisation is unlikely to align with broader community views on animal welfare and expectations regarding how breaches of welfare legislation should be dealt with. Concern for the welfare of animals, including farm animals, has grown substantially in recent years as canvassed in Chapter 3. These changing attitudes have perhaps most convincingly been displayed through community responses to a number of recent high profile controversies concerning farm

83 Baldwin and Black, above n 58, 66-67.
85 See for instance, Edge and Bailey, above n 29, 10 referring to Kagan, above n 2.
86 Braithwaite, above n 56, 483-484.
animals. The most prominent of these, the 2011 exposé of Australia’s live cattle export trade to Indonesia, resulted in unprecedented levels of public engagement, with thousands of people attending demonstrations, signing petitions, and contacting politicians and government departments to express their concerns.87

The standards developed to govern the treatment of animals in the agricultural sector represent minimal standards of care and in many cases fall below what is deemed acceptable by society.88 As Chapters 2 and 4 illustrate, the protections they afford are very modest indeed. Conduct that falls below these standards will in most cases result in harm and for the many animals already enduring it, increased levels of harm. While a responsive approach to enforcement may recommend that non-complying conduct be met with dialogue and the provision of further advice, the broader community is likely to expect more. As Gunningham points out, there may ‘be circumstances where the regulator cannot credibly maintain [the responsive] strategy in the face of threats to its legitimacy (in terms of political risk and/or community pressure)’89 because ‘political needs and community expectations together shape both what is seen as harmful and what is an adequate response.’90 In the eyes of the community, animal treatment falling below minimum standards and resulting in harm (including reductions in acceptable states of welfare) is unlikely to be placed in the category of technical rule violations or ‘victimless’ crimes. In other words, animal mistreatment will not be considered to be an offence of malum prohibitum, or wrong because it is prohibited, but malum in se, that is, wrong in and of itself. And the community will expect a response commensurate with this perception. Under the responsive approach, animal welfare breaches are met with dialogue in the first instance and further regulatory action is only entertained if the regulatee responds in a defiant manner by repeating or continuing the non-complying behaviour. Applied in this way, the ‘tit for tat’ approach to enforcement effectively creates a system that excuses animal mistreatment and implicitly accepts the management of animal cruelty rather than its prohibition.

87 The Federal Department of Agriculture received 284,415 items of ministerial correspondence during the 2011-12 financial year; a 556 per cent increase from the previous year. Over 97 per cent of this correspondence related to the live export trade: Federal Department of Agriculture, Annual Report 2011-2012 (2012) <http://www.daff.gov.au/about/annualreport> 37.
88 Chapter 5 at 5.2.1.
89 Gunningham, above n 2, 200.
90 Ibid, 199 quoting Haines, above n 64, 36.
Evidence of this approach to enforcement can be found by looking to the Commonwealth Department of Agriculture’s regulation of the live animal export trade. In 2012 and 2013 alone there have been 30 reported breaches of the Exporter Supply Chain Assurance System and the Australian Standards for the Export of Livestock.\(^91\) Several of these reports have been substantiated by the Department’s own investigations, yet no fines, licence revocations, or even licence suspensions have been imposed. The Department’s only response has been to impose ‘extra conditions’ on the approval of the exporter’s next consignment.\(^92\) These conditions may relate to increased staffing levels to monitor livestock in foreign feedlots while they await slaughter and other operational arrangements to improve traceability. However, the additional conditions effectively amount to a tax, which exporters treat as the cost of doing business. They have a very limited deterrent effect and as a consequence significant welfare incidents and breaches of the regulations have become routine to the point where they are now simply accepted as part of the trade. When questioned about the inevitability of further welfare incidents on national radio, the Commonwealth Agriculture Minister simply stated that ‘the trade will be watched over and regulated to the best of our ability but we can never make promises that…there will never be another drama in this sector. We’re going to manage these issues as they occur.’\(^93\) This seeming attitude of tolerance to animal welfare incidents has been a cause of much concern to the Australian public and several Federal parliamentarians who have been very vocal in calling for stronger penalties within the live animal export trade.\(^94\)

This managerial approach to dealing with animal welfare offences was also clearly demonstrated by senior officers of the Northern Territory Department of Primary Industry and Fisheries when responding to a major case of animal neglect at a university-operated cattle station in Northern Australia. The 2009 incident resulted in

---

the death of between 200-800 cattle and was described as one of Australia’s worst cases of animal cruelty.\textsuperscript{95} Despite an Ombudsman inquiry finding that the deaths were caused by neglect and that the Territory’s \textit{Animal Welfare Act 2000} had been breached,\textsuperscript{96} no prosecution was ever initiated as investigating officers did not feel it was warranted. In giving evidence to a subsequent parliamentary inquiry, the then Chief Veterinary Officer, Dr Brian Radunz, stated that the focus of the investigation was on the welfare of the remaining cattle and that prosecution was considered to be a ‘much lower priority’, and that ‘whether to prosecute or not was a minor point’.\textsuperscript{97} This was not, however, the view of another attending veterinary officer, Dr John Eccles, who thought that prosecution was warranted. Dr Eccles was relatively new to the Department but was nevertheless a senior veterinary officer with 12 years prior experience with the Australian Quarantine and Inspection Service. Despite this, Dr Eccles’ views on prosecution were not supported by the Chief Veterinary Officer and he was subsequently removed from the investigation. When questioned about this removal, Dr Radunz stated that ‘it was done to take the heat out of the conflict, to have another person doing the investigation, another person who was experienced and skilled’.\textsuperscript{98} Dr Eccles was replaced by another veterinary officer who, Dr Radunz informed, ‘had been in the [area] for about five or six years’, and who presumably did not express the same views about the necessity for prosecution.

In justifying his approach to the investigation, Dr Radunz likened the cattle deaths at the station to the ‘normal death rate’ that occurs on cattle stations in Australia’s Northern regions.\textsuperscript{99} He subsequently concluded: ‘I cannot support a teaching facility being prosecuted when other properties with similar situations would not be considered for prosecution.’\textsuperscript{100} This view suggests that incidents of mass cattle starvation were not

\textsuperscript{96} Northern Territory Ombudsman, \textit{Report of Investigation into the Treatment of Cattle and Horses at Charles Darwin University Mataranka Station} (2010) 5.
\textsuperscript{97} Evidence to Council of Territory Co-operation, Sub-committee – Animal Welfare Governance, Parliament of Northern Territory, Darwin, 3 August 2011, 11-15 (Dr Brian Radunz, Chief Veterinary Officer, Northern Territory Department of Primary Industry).
\textsuperscript{98} Evidence to Council of Territory Co-operation, Sub-committee – Animal Welfare Governance, Parliament of Northern Territory, Darwin, 30 June 2011, 15 (Dr Brian Radunz, Chief Veterinary Officer, Northern Territory Department of Primary Industry).
\textsuperscript{99} Evidence to Council of Territory Co-operation, Sub-committee – Animal Welfare Governance, Parliament of Northern Territory, Darwin, 3 August 2011, 5 (Dr Brian Radunz, Chief Veterinary Officer, Northern Territory Department of Primary Industry).
\textsuperscript{100} Ibid.
unusual within the Northern Territory and were simply accepted by the Department as the industry norm. The lack of enforcement culture within the Department was also made apparent when Dr Radunz stated that he could not recall any prosecutions under livestock related legislation within his 40 years in the Department.\(^{101}\)

Further insight into the Chief Veterinary Officer’s approach to animal welfare issues was revealed in questioning about his views on the difficulties of managing cattle stations and its relevance to what would amount to a prosecutable offence under the *Animal Welfare Act*:

**Dr Radunz:** What happened on the Station was that there were fires the year before, there’s a failed sale of a large number of animals, so therefore there’s a much larger number of animals there than would be prudent. There’s probably a situation of the property being overstocked. All that can be done is to manage the balance between the feeding the animals and then, if necessary, humanely destroying the animals which either are too poor to walk out to feed or there aren’t sort of enough funds to actually feed those animals. Feed those animals for a whole year.

**Mr Elferink [Parliamentary representative]:** So if I understand you correctly, an active case of cruelty, somebody taking a steel pipe, for example, to a cow would represent an act of cruelty, but an act of neglect would not?

**Dr Radunz:** I think neglect would be not to destroy animals which are in too poor condition that they can’t stand up or they can’t walk.\(^{102}\)

Dr Radunz’s response implies that allowing cattle to starve to the point of disability is not sufficient to amount to a case of neglect. Rather, it is only when the responsible person then fails to destroy the animals that neglect can be established. Curiously, this is precisely what occurred at Mataranka Station but Dr Radunz nevertheless argued against the case for prosecution.

The Department’s response to this incident was a classic example of a regulator adopting the norms of the regulated industry in its approach to administering a public interest statute. As the subsequent wide-spread public condemnation, as the significant

\(^{101}\) Ibid, 8.

\(^{102}\) Ibid, 12.
media coverage,\textsuperscript{103} Ombudsman\textsuperscript{104} and Parliamentary inquiries\textsuperscript{105} evidenced, this approach was completely out of step with community expectations and the public interest in animal welfare that underpins the Northern Territory’s \textit{Animal Welfare Act}. The Northern Territory example is emblematic of enforcement problems across jurisdictions. The significant divesting of inspection responsibilities to industry despite the high risk nature of the regulatory environment, the restrictions on RSPCA jurisdiction, and the characterisation of animal welfare breaches as ‘technical rule violations’ that need to be ‘managed’, creates an enforcement system that often excuses cases of animal mistreatment within the agricultural sector. It represents a deviation from the public’s interests and expectations in protecting farm animals from cruelty.

\section*{8.5 Conclusion}

Regulation of animal welfare is a complex undertaking, reflecting the multifaceted, politically-charged field of managing our relationships with animals. In rising to this challenge, policy makers must strive to get the balance right, not only between mechanisms of punishment and persuasion but between the values of efficiency and legitimacy. This chapter has contrasted the approaches to enforcement operating in the domestic and agricultural settings of animal use. It has been argued that the regulators’ current and projected approach to animal welfare regulation within the agricultural realm over emphasises efficiency and cost savings objectives to the detriment of other values such as accountability and legitimacy. Delegation of most inspection responsibilities to industry and the adoption of an enforcement strategy that takes a dialogic approach to dealing with noncompliance fails to reflect key features of the high risk regulatory environment and mischaracterises the nature of animal welfare offences. Conceptualising animal welfare offences as ‘technical rule violations’ or ‘side effects’ of business operations and seeking to \textit{manage} animal mistreatment, rather than prohibit it, is an approach that is likely to be out of step with community views, which are becoming increasingly sensitive to the way farm animals are treated. The case studies referred to above where departments of agriculture have sought to manage serious cases of noncompliance through the imposition of further conditions and education rather than

\textsuperscript{103} See for example, Prue Adams, ‘Sorry Saga’ \textit{ABC Landline}, 27 July 2011, \texttt{<http://www.abc.net.au/landline/content/2010/s3276556.htm>}; and Murdoch, above n 95.

\textsuperscript{104} Northern Territory Ombudsman, above n 96.

imposing punitive sanctions demonstrate how this approach operates in practice. This seemingly ‘soft’ approach to enforcement, when exposed, has generated significant community concern and this compounds the legitimacy issues faced by the regulatory framework.

To improve the legitimacy of the farm animal welfare regulatory framework in the eyes of the Australian community, compliance monitoring and inspection regimes, and sanctions for noncompliance, should be equivalent to the high risk nature of the regulatory environment and the perceived seriousness of the offending conduct. Reform options to this end are considered in concluding Chapter 9.
Chapter 9: Conclusions and Recommendations for Reform

9.1 Introduction

This thesis has explored the nature of animal welfare regulation within the Australian agricultural sector. Part I established the regulatory scene. It set out the scientific, economic, and socio-political context of the regulatory problem that arises from the impacts of industrialised animal agriculture on the welfare of animals. It canvassed the social and ethical values underpinning the public’s growing sensitivity to the treatment of farmed animals and considered the views and characteristics of the two key stakeholders in the process – the livestock industries and the animal protection community. The government’s current attempts to address this regulatory problem through various laws and statutory instruments was then set out and critiqued. The resulting analysis identified an inherent double standard in the way the legislative framework deals with equally sentient species of animal in different contexts of use. Finally, for the regulatory scene-setting part of the thesis, the outcomes of the government’s current attempts to regulate the welfare of farmed animals were considered. This analysis identified three distinct indicators of regulatory failure in the production of inadequate animal welfare standards, the prevalence of significant animal welfare incidents, and in the diminishing levels of public confidence in the performance of the regulatory framework.

Part II of the thesis then embarked on a process of investigating the potential causes of these regulatory deficiencies with the specific aim of exploring the veracity of claims that departments of agriculture suffered from conflicting interests with respect to their role in regulating the welfare of farm animals. The theory of regulatory capture was used as an analytical frame of reference for the examination. Data from interviews with responsible regulators was analysed to inform the investigation. This analysis found that animal welfare regulators within departments of agriculture are subjected to structural
incentives to prioritise industry productivity goals over animal welfare goals, identify more strongly with the views and interests of the livestock industries over those of animal protection stakeholders, have an instrumental view of animal welfare, and adopt cooperative approaches to animal welfare regulation within the livestock industries. Together, these factors were found to give rise to a community of interests between the responsible regulators and the livestock industries, which featured an alignment of cultural norms and worldviews about animal welfare that diverged from those underpinning the public interest in animal welfare legislation. Finally, the thesis undertook a critical assessment of the two key regulatory functions of standard-setting and enforcement. Legitimacy issues were identified with each. The process for setting farm animal welfare standards was found to be exclusionary in approach whereby only conceptions of animal welfare that aligned with economic goals were adopted and those that did not were dismissed as ‘subjective’ or ‘hypothetical’ in nature. Departmental approaches to the implementation and enforcement of such standards were found to under appreciate the high risk nature of the regulatory environment and to mischaracterise the nature of animal welfare offences. Each of these regulatory process resulted in outcomes that excluded or diverged from community expectations.

Now having set out the failings of the current regulatory regime and proposed a case for why they are occurring, this Chapter will consider the reforms that are necessary to address the identified deficiencies. To focus the reform proposals, an overall conclusion on the state of farm animal welfare regulation in Australia including its legitimacy deficiencies will first be presented. The key reforms required to improve the legitimacy of the framework will then be proposed under the categories of ‘governance’, ‘policy and standards development’, and ‘enforcement.’

9.2 Legitimacy implications of regulating animal welfare through the paradigm of productivity

The overall conclusion to be draw from the research presented in this thesis is that the welfare of farmed animals in Australia is regulated through a paradigm of industry productivity. The departments delegated with responsibility for governing the development of farm animal welfare policy and standards, and for overseeing the administration and enforcement of farm animal welfare law possess institutional objectives that conflict with these obligations. As detailed in Chapter 2, the promotion
and protection of farm animal welfare conflicts with the economic goals of promoting livestock industry productivity and profitability. This conflict materialises in the form of structural incentives for the departments of agriculture to prioritise industry productivity goals over those of farm animal welfare. Key personnel responsible for the administration of farm animal welfare laws, such as the regulators interviewed for this study, operate within an institutional setting that imposes significant limitations on what they can do to protect and promote the welfare of farmed animals. The departments’ subjection to agriculture ministers and their close clientele-like relationship with livestock industries accentuate these tensions. As a consequence, farm animal welfare is viewed in instrumental terms and valued only to the extent it contributes to industry productivity goals.

When regard is had to the way this approach to animal welfare affects the departments’ regulatory performance in meeting policy objectives and serving the public interest underpinning animal welfare law, a strong case of the existence of regulatory capture emerges. As outlined in Chapter 6, the regulatory capture alleged is not of an overt or deliberate kind but instead manifests unconsciously due to the structure of the departments’ reward system giving rise to a community of interests with the livestock industries. This induces the instrumental conceptions of animal welfare that lead the departments to diverge from community expectations regarding how farm animal welfare should be protected. This is seen in the establishment of standard-setting processes that are largely controlled by agricultural institutions and based on science that adopts a narrow conception of animal welfare consistent with industry productivity goals. It also leads to the development of enforcement policies that delegate inspection responsibilities to industry and treat animal welfare offences as technical rule violations. These regulatory processes have produced the poor outcomes of inadequate animal welfare standards that fail to meet community expectations, the prevalence of serious animal welfare incidents, and diminishing levels of public confidence and trust considered in Chapter 5. The causal relationship between these various factors (as presented in Chapter 6) is illustrated in Figure 22 below.
This approach to regulating the welfare of farm animals suffers from a number of legitimacy problems. Fundamentally, the framework is undemocratic. It is governed by institutions that adopt a conception of animal welfare that diverges from that of the public. As noted in Chapter 3, there has been a significant change in attitudes and values towards animals since the 1970s, where the traditional utilitarian or instrumental view of animals has been shifting more towards a post-material ethic of care and compassion. These normative values are not given expression within the current framework as it is designed to protect the closed and exclusive nature of the agricultural policy community.

On input legitimacy grounds the framework offends many of the key components for effective deliberative engagement. The political choices regarding the welfare of farmed animals made within the framework cannot be said to reflect the ‘will of the people’ and do not derive from the authentic preferences of the Australian community. The deliberative process for farm animal welfare decisions is not ‘free from strategic behaviour and domination through the exercise of power’ and does not provide all stakeholders with equal opportunities for participation and to influence the outcomes of the process.\(^1\) Rather, agricultural institutions dominate and control the process including...

---

the final decisions made via the Agriculture Ministers’ Forum. The responsible
authorities may technically comply with the formal requirements of regulatory impact
analysis and public consultation but animal protection representatives and the broader
community are by no means equal participants in the process and their views are not
given the same weight as those of the livestock industries. In reality, their input is
largely tokenistic.

The framework is similarly deficient on output legitimacy grounds as the resulting
standards and policy produced by the framework fail to achieve policy objectives of
protecting and promoting farm animal welfare, and do not ‘resonate with the citizenry’s
values and identity’ or meet their normative expectations.\(^2\) Far from addressing the
regulatory problem (as outlined in Chapters 2 and 3), the current framework accentuates
it, and its lack of legitimacy is evidenced by the diminishing levels of public trust and
confidence including the associated increase in direct action activism as outlined in
Chapter 5.

Ultimately, Australia’s current exclusionary and undemocratic approach to regulating
the welfare of farm animals is unsustainable. Without change, the already low levels of
public trust and confidence will diminish further resulting in higher incidences of legal
challenge, consumer boycotts, public protest, and vigilantism.\(^3\) Reforms are required to
create a more inclusive, fair and democratic system of farm animal welfare governance.

### 9.3 Enhancing legitimacy: The way forward

As Bloom observes, every issue that is the subject of regulation ‘has its own features
peculiar to it, which must be understood in order to rise to the challenge of regulating it
sympathetically, meaningfully and effectively.’\(^4\) This thesis has presented a thorough
examination of the features peculiar to the task of regulating the welfare of farm
animals and where the current framework is failing. Identifying and understanding such
factors is critical for designing the right regulatory responses to correct the failures and

\(^2\) Vivien Schmidt, ‘Democracy and Legitimacy in the European Union Revisted: Input, Output and
Throughput’ (2013) 61 Political Studies 2, 7.

\(^3\) Paul Martin and Mark Shepheard, ‘What is Meant by the Social Licence’ in Jacqueline Williams and
Paul Martin (eds), *Defending the Social Licence of Farming: Issues, Challenges and New Directions

\(^4\) Geoffrey Bloom, ‘Regulating Animal Welfare to Promote and Protect Improved Animal Welfare
Outcomes Under the Australian Animal Welfare Strategy’ (Paper presented at the AAWS International
to achieve the policy and public interest objectives that animal welfare legislation is designed to serve. The reforms necessary to achieve this involve the establishment of new governance models, standard-setting processes, and enforcement policies. While the reforms proposed here relate primarily to the farm animal welfare context, it would not be difficult to incorporate other areas of animal welfare into the same governance framework proposed. For clarity, the key recommendations made in the following discussion are summarised in Table 7 below.

9.3.1 Governance

The primary regulatory failures of the current farm animal welfare framework can be linked back to the system’s governance arrangements. Chapter 6 introduced the problems that can arise when departments are delegated with the responsibility of pursuing two conflicting objectives, especially when one objective has clear priority over the other. The interview data presented in that chapter revealed the tensions that exist between industry promoting goals and animal welfare regulatory responsibilities. As Biber has noted, agencies will systematically underperform on secondary goals that conflict with the achievement of the agencies’ primary goals.5 In particular, agencies are found to pursue short term economic goals that are easy to measure at the expense of more elusive social goals in the public interest. The structure of the reward system for departments of agriculture is geared towards achieving the economic goals of improving industry productivity and profitability. This gives rise to a case of regulatory capture where the public interest in farm animal welfare is neglected.

The customary response within the regulatory capture literature for dealing with such forms of influence is to recommend the establishment of greater accountability and transparency mechanisms. As Novak explains, the process involves ‘the simultaneously mundane and heroic task of attempting to blunt the force of perennial public corruptions and private coercions by simply piling on “all the checks and balances that human ingenuity can devise.”’6 There are of course myriad forms of checking and balancing devices available to create more accountable regulatory environments. Such options must be considered in light of the primary mechanisms of capture identified. To this


end, poor institutional design, the catalyst for the regulatory failings, will be the primary focus of attention.

Similar institutional design problems have been identified many times before in other regulatory contexts around the world. Regulatory frameworks relating to atomic energy,\(^7\) workplace health and safety,\(^8\) financial services,\(^9\) minerals management,\(^10\) environmental protection,\(^11\) intelligence services\(^12\) and others have suffered from design faults leading to underperformance in key areas. Reforms strategies to address underperformance in the animal welfare context are considered below.

9.3.1.1 Separation of competing responsibilities: Independent Animal Welfare Authorities

The most obvious reform for addressing issues of poor institutional design is to separate out, or decouple, the competing responsibilities.\(^13\) This can be achieved through transferring the subordinate responsibility to either an existing agency that does not possess a conflicting organisational priority, or to a new government entity established specifically to address that responsibility. Thacher and Rein refer to this as the ‘firewalls strategy’, which can be employed when one organisation is tasked with making policy decisions involving competing values.\(^14\) Establishing separate institutions to deal with different values and walling off each institution from the responsibilities of the other ‘helps ensure that each value has a committed defender – that no value becomes neglected because the institutions that should pursue it have become sidetracked by other concerns.’\(^15\)


\(^{8}\) Sanford Gordon and Catherine Hafer, ‘Conditional Forbearance as an Alternative to Capture: Evidence from Coal Mine Safety Regulation’ in Daniel Carpenter and David Moss (eds) Preventing Regulatory Capture: Special Interest Influence and How to Limit it (Cambridge University Press, 2013) 208-239.


\(^{10}\) Henry Hogue, ‘Reorganisation of the Minerals Management Service in the Aftermath of the Deepwater Horizon Oil Spill’ (Congressional Research Service, United States Congress, 2010).

\(^{11}\) Biber, above n 5.


\(^{13}\) Biber, above n 5.

\(^{14}\) Thacher and Rein, above n 12, 469.

\(^{15}\) Ibid, 470.
For example, in the European Union (EU), responsibility for animal welfare was transferred from the Directorate-General for Agriculture to the Directorate-General for Health and Food Safety where ‘protecting the health and welfare of farm animals’ is prominently recognised as one of the Directorate’s five key aims.\(^{16}\) This transfer was undertaken to increase the prominence of animal health and welfare issues within the European Commission following an outbreak of ‘foot-and-mouth’ disease in 1996.\(^{17}\) To add a further degree of independence, scientific advice on animal welfare matters is provided by an independent Panel on Animal Health and Welfare within the European Food Safety Commission.\(^{18}\)

A prominent example of a government creating an entirely new agency to address a public interest concern, was the establishment of the US Consumer Financial Protection Bureau in the wake of the 2007-08 Financial Crisis.\(^{19}\) Following numerous congressional and other inquiries it was found that while the relevant existing regulatory institutions\(^ {20}\) had some consumer protection responsibilities, their incentives to pursue those responsibilities were not sufficient to ensure adequate financial consumer protections.\(^ {21}\) Accordingly, the Consumer Bureau was established to fill that void and ensure consumer protection would be given the priority it required.\(^ {22}\)

The establishment of independent environmental protection authorities (EPAs) provides another example of government reforms designed to separate out particular functions from traditional bureaucratic structures. In 1998, Briody and Prenzler argued for the establishment of an EPA in Queensland to address the presence of regulatory capture on the part of the Environmental Compliance Division within the then Department of Mines and Energy. Marsden and colleagues provided a similar critique of the

\(^{17}\) Email from Denis Simonin, Animal Welfare, Directorate-General for Health and Food Safety, European Commission, to Jed Goodfellow, 9 July 2015.
\(^{19}\) James Kwak, ‘Cultural Capture and the Financial Crisis’ in Daniel Carpenter and David Moss (eds) Preventing Regulatory Capture: Special Interest Influence and How to Limit It (Cambridge University Press, 2013) 98.
\(^{20}\) Including the Office of the Comptroller of the Currency, The Federal Reserve, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, and the Securities and Exchange Commission.
\(^{21}\) Kwak, above n 19.
Tasmanian environmental regime in 2000, identifying instances of regulatory capture with respect to the administration of new environmental regulations. Poor administrative design was a feature of the capture identified, in response to which the authors proposed the establishment of an EPA. An EPA was later established in Tasmania in 2008.23

Equivalent authorities could be established for animal welfare. As with the EPAs, Animal Welfare Authorities could be based at the state level in accordance with Constitutional requirements. Animal Welfare Authorities could be responsible for the administration of the respective state and territory Animal Welfare Acts including the appointment, training, and management of inspectors under the legislation. They could also be responsible for facilitating the development of animal welfare policy at the state and territory level, and for representing their respective jurisdictions in national policy and standards development forums.

An equivalent statutory body could also be proposed at the federal level to coordinate the development of national standards (discussed below) and to oversee areas of animal welfare responsibility governed by the Commonwealth Government such as live animal export (referred to here on as the proposed ‘national Office of Animal Welfare’).24 As noted in Chapter 1, the Australian Labor Party, when in Government in 2013, foreshadowed the proposal of an ‘Independent Office of Animal Welfare’ at the Commonwealth level.25 The Office was proposed precisely to address the issues of conflicting responsibilities within the Commonwealth Department of Agriculture.26 However, when the formal proposal was announced some months later it took the form of an ‘Inspector-General for Animal Welfare and Live Animal Exports’.27 This model will be discussed in the next section.

24 The noun ‘Office’ is used here as opposed to ‘Authority’ as the key functions envisaged for the federal body are related to policy and standards development as opposed to law enforcement. The noun ‘Authority’ is an appropriate descriptor for the proposed state bodies as they would be more heavily involved in state law enforcement functions.
26 Ibid.
Notably, the Northern Territory and Australian Capital Territory’s Animal Welfare Acts each establish an ‘Animal Welfare Authority’. The Animal Welfare Authority in the Australian Capital Territory is responsible for licensing and permitting functions under the Animal Welfare Act 1992 (ACT) and is afforded the investigatory powers of an inspector under the Act. The Animal Welfare Authority in the Northern Territory has a broader role. It is delegated with responsibility for the overall administration of the Animal Welfare Act 2000 (NT) including compliance, prosecution, licensing, investigatory functions, and the appointment of inspectors. However, neither of these Authorities are independent agencies of government. Individual public servants are appointed to the statutory office and these individuals sit within the broader bureaucratic structures of the Territory and Municipal Services Directorate (ACT) and the Department of Primary Industry and Fisheries (NT), respectively. The Animal Welfare Act 2000 (NT) does, however, allow for a ‘Chief Executive Officer’ to be appointed as the Animal Welfare Authority. The significance of this is that under the Northern Territory’s Public Sector Employment and Management Act 1993, a government agency must have a Chief Executive Officer. This suggests the drafters of Northern Territory’s Animal Welfare Act 2000 anticipated the possibility of the Animal Welfare Authority being established as a separate ‘agency’ with its own staff, resources and budgetary allocation. This could be effected through an Administrative Arrangements Order made under the Interpretation Act 1978 (NT). However, to-date the Minister for Primary Industries has opted to appoint a public sector ‘employee’ to the position.

To be effective at separating, or ‘firewalling’, the competing responsibilities, and to provide some insulation from political interference, the Animal Welfare Authorities and the national Office of Animal Welfare would require statutory independence. They could be established by new statutes or within existing state and territory animal welfare legislation via amendments, or in the case of the national Office of Animal Welfare, a new federal animal welfare Act (discussed further below). The enabling legislation would need to establish independence safeguards such as limiting the extent to which

---

31 Animal Welfare Act 2000 (NT), s 26(1).
32 Public Sector Employment and Management Act 1993 (NT), s 19(1).
33 See, Administrative Arrangement Order 2015 (NT).
the responsible ministers could direct or influence the functions of the Authorities and Office. Prescribing the purpose and functions of the Authorities and Office would also be necessary to provide legislative direction and accountability for how each institution is to carry out its responsibilities.

The Australian Law Reform Commission has noted that establishing an office as a statutory authority will:

- make clear its independence, and thus preserve public confidence in its findings and advice;
- encourage the public to communicate with the [authority];
- demonstrate its status as a permanent agency;
- demonstrate its status as a multidisciplinary body, whose work extends beyond a single government department;
- develop and maintain both in-house expertise and networks of experts and stakeholders;
- ensure sufficient budget resources to fulfil its mission; and
- provide it with sufficient operational flexibility to deploy its resources most effectively.\(^{34}\)

All of these features align well with the proposed purpose for establishing the Animal Welfare Authorities and Office and would greatly improve the current administrative arrangements for farm animal welfare.

The Animal Welfare Authorities and national Office of Animal Welfare would still be accountable to responsible ministers, and what ministerial portfolios such bodies fall under would be a matter for the government of the day. For the reasons outlined in this research, it is highly recommended that animal welfare be delegated to a ministerial portfolio that is separate to agriculture. But regardless of which portfolio is chosen, with appropriate statutory safeguards, the functions of the Authorities and Office could be

---

protected. Similarly, the endorsement of national standards for implementation within state and territory jurisdictions would still be subject to ministerial approval, and this may continue to be conducted by AGMIN, but further statutory conditions could be placed on the development of such standards to ensure they meet certain criteria. This will be discussed in the section on policy and standards development below.

Separating competing institutional objectives improves clarity in public administration and the ability to measure government performance. If responsibility for animal welfare was transferred to independent government entities, departments of agriculture would be free to fulfil their primary objective of promoting productive and profitable primary industries unencumbered by growing public demands for greater attention to be given to a conflicting objective. Achieving this balance would improve the democratic legitimacy of the current framework and ensure the public interest in animal welfare was no longer neglected.

9.3.1.2 Regulatory Contrarian: Inspector-General or Ombudsman for Animal Welfare

Another option for reducing the effects of regulatory capture is to establish an independent government entity that has the specific task of monitoring and auditing the performance of a department. The main purpose of such an entity, as Omarova explains, is to ‘help regulators overcome the various cognitive and incentive biases and “to counteract agency inaction or ossification”’. McDonnell and Schwarcz have labelled such entities ‘regulatory contrarians’ reflecting their role in providing a contrary perspective to prevailing bureaucratic thinking. They define contrarians by three distinguishing features: 1) ‘they possess persuasive authority by virtue of their position, access to media and officials, or speaking engagements and reports;’ 2) ‘they are affiliated with, and enjoy the privileged access to, a regulatory entity but are nonetheless independent, as reflected in their budget, staffing, and/or priorities;’ and 3) ‘they are tasked with studying the regulatory process, policy positions, and the regulated [environment] and in some way reporting on deficiencies and potential

---

36 Omarova, above n 9, 641.
Regulatory contrarians often take the form of Inspectors-General or Ombudsman offices.

In July 2013, the Federal Labor Government announced plans to establish an ‘Inspector-General for Animal Welfare and Live Animal Exports’. The proposed role of the Inspector-General was to ‘review and audit Australia’s live animal export trade processes and systems to strengthen [the] animal welfare assurance system.’ The Inspector-General was to be established as an ‘independent, statutory office holder, reporting directly to the Minister [for Agriculture].’ However, the Bill to establish the office was never introduced to Parliament as the Australian Labor Party lost the Federal Election two months later. The current Coalition Government has maintained a policy of opposition to the Inspector-General proposal on the basis that it would be adding another layer of ‘unnecessary red tape’ to the live export trade.

Regulatory contrarians provide an important check on deficiencies in departmental performance. An Inspector-General or Ombudsman for animal welfare tasked with the responsibility of reviewing regulatory performance would provide a much needed contrary perspective to the prevailing department of agriculture views on animal welfare.

9.3.1.3 Tripartism

A third option for increasing transparency and accountability and thereby reduce the effects of regulatory capture is that of regulatory ‘tripartism.’ This theory was first proposed as a potential restraint on regulatory capture by Ayres and Braithwaite 1991. The theory is based on creating a more prominent role for relevant public interest NGOs in regulatory processes. It recommends three key strategies for fostering NGO involvement, including 1) granting NGOs and their members all the information that is available to the regulator; 2) giving the NGOs a seat at the negotiating table with the industry and the regulator when deals are done; and 3) granting the NGOs the same

---

38 Ibid, 1629.
39 Federal Department of Agriculture, above n 27.
40 Ibid.
41 Ibid.
42 John Cobb (Shadow Minister for Agriculture), ‘Minister Admits System is “Strongest” But Adds More Red Tape’ (Media Release, 31 July 2013).
standing to sue or prosecute under the relevant regulatory statute as the regulator.\textsuperscript{44} Essentially, ‘tripartism means both opening to NGOs the smoke-filled rooms where the real business of regulation is transacted and allowing the NGO to operate as a private attorney-general’.\textsuperscript{45} Empowering NGOs in this way is said to create an ‘effective third-party guardian’ of the public interest, which acts as a ‘built-in source of countervailing perspective on substantive policy issues and imposes structural checks on regulatory capture’.\textsuperscript{46}

As explained in Chapter 7, under current arrangements, prominent animal protection groups such as the RSPCA and Animals Australia are provided with the opportunity to consult with the government and industry during the process of developing animal welfare standards. However, it is unlikely that this formal process is what Ayres and Braithwaite envisaged by the ‘smoke-filled rooms where the real business of regulation is transacted.’ One of the apparent challenges of facilitating such access would be identifying precisely when and where regulatory transactions actually take place. Departmental interactions with industry are many and varied, and discussions about current or proposed regulations, and their implementation, take place on a frequent and at times informal basis. Conscious forethought and a genuine commitment to facilitating access on behalf of the responsible department would be a necessary condition for tripartism to operate effectively in practice. Having regard to the approach adopted by departments of agriculture and their close relationship with livestock industries, it is doubtful whether they would facilitate such access.

With respect to granting NGOs the right to prosecute, one may point to the RSPCA’s role in enforcing animal welfare legislation as evidence that this feature of tripartism has been granted. However, in most jurisdictions, it is not the RSPCA as a corporate entity that is granted powers, but the inspectors who are appointed under the legislation by the responsible minister. As outlined in Chapter 8, the enforcement activities of inspectors are subject to the control and oversight of the departments of agriculture through conditions placed of their appointment,\textsuperscript{47} training requirements,\textsuperscript{48}

\begin{footnotes}
\item[44] Ibid, 441.
\item[45] Ibid.
\item[46] Omarova, above n 9, 642.
\item[48] See for instance, Animal Care and Protection Act 2001 (Qld), s 114.
\end{footnotes}
Memorandums of Understanding regarding operational matters, and routine reporting obligations. The RSPCA is sometimes criticised on the basis that it does not pursue more vigorous enforcement actions within the agricultural sector including the initiation of cases of strategic significance, or ‘test cases.’ Such criticism often fails to appreciate the degree to which controlling factors operate to prevent RSPCA inspectors from taking this approach. Even in the absence of more vigorous enforcement, or test cases, it is not uncommon for State RSPCAs to be threatened with having their role in law enforcement removed. Recent parliamentary debates in South Australia and Western Australia demonstrate the very real potential for such threats to materialise. So while the RSPCA is granted some privileges in terms of its role in enforcing animal welfare legislation, this could not be said to amount to a freedom to operate as a ‘private attorney-general.’ In reality, the RSPCA’s enforcement functions are controlled and constrained by the administering departments of agriculture.

The theory of regulatory tripartism presents a number of checking and balancing mechanisms that, if implemented effectively, would certainly improve the accountability and transparency of the farm animal welfare regulatory environment. The challenge, however, lies in fostering a willingness on the part of departments of agriculture to provide for such regulatory privileges. Unfortunately, the structural and cultural factors identified in this thesis may operate to prevent this from occurring. Accordingly, reforms directed at promoting tripartism should be approached as a complementary feature to the establishment of independent Animal Welfare Authorities rather than a stand-alone strategy.

The establishment of the regulatory entities and privileges discussed above would greatly improve the accountability and transparency of the current regulatory framework thereby reducing, or in the case of establishing the Animal Welfare Authorities and Office, eliminating, the conflict of interest and effects of regulatory capture. This, in-turn, would have a positive influence on the regulatory processes of

49 See discussion in Chapter 8 at 8.3.2.
50 See for instance, Prevention of Cruelty to Animals Act 1979 (NSW), s 34B.
51 This is in combination with traditional barriers to public interest litigation; see, Graeme McEwen, ‘Strategic Litigation and Law Reform’ (2011) 7 Journal of Animal Law 91.
52 See, South Australia, Parliamentary Debates, Legislative Council, 27 March 2012, 669; and Western Australia, Parliamentary Debates, Legislative Council, 24 October 2013, 5443c; each discussing proposals to abolish the RSPCA’s role in farm animal welfare law enforcement.
standards development and enforcement as the public interest in farm animal welfare would no longer be neglected.

9.3.2 Policy and standards development

The current approach to developing farm animal welfare standards was detailed and critiqued in Chapter 7. The analysis identified legitimacy problems including a perception of bias due to the control exercised by agricultural institutions and cases of actual bias demonstrated by the nature of the science relied upon to make final decisions on controversial husbandry practices. The views of animal protection stakeholders and the broader community appeared to be routinely excluded as ‘subjective’ or ‘hypothetical’ despite the existence of scientific evidence supporting their concerns.

The legitimacy of the standards development process could be improved through the establishment of a formally-agreed national process. This process would ideally be formalised in statute, preferably within the same federal statute that would establish the national Office of Animal Welfare proposed above (hereinafter referred to as the proposed ‘national Animal Welfare Act’). As the Federal Government’s Constitutional powers with respect to animal welfare are limited (see 4.2, Chapter 4), agreement from the states and partial referral of their residual power to legislate on farm animal welfare to the Commonwealth would provide the surest Constitutional footing. However, as discussed in Chapter 4, it is unlikely the states would cede all of their powers to legislate on farm animal welfare. Under the national model proposed, the states would still retain final decision-making authority over whether the resulting standards are implemented within their jurisdictions. The proposed national Animal Welfare Act would simply govern the process for developing the standards, and this process could be designed to ensure it satisfied state and territory requirements for regulatory impact analysis and public consultation.

The proposition of a formalised national approach to farm animal welfare standards, including through the establishment of federal legislation, enjoys support from stakeholders on both sides of the debate. The farm industry science and policy organisation, the Australian Farm Institute, released a report on farm animal welfare

---

53 Under the referral power, Australian Constitution, s 51(www). Prominent examples of State referrals include the regulation of incorporating a corporation (see the Corporations Act 2001 (Cth)) and consumer credit (see the National Consumer Credit Protection Act 2009 (Cth)).
54 See discussion at 4.2, Chapter 4.
standards development in 2015. Among the report’s six recommendations was a proposal for a ‘National Farm Animal Welfare Act, to replace existing fragmented state legislation.’ Similarly, the RSPCA has developed a national policy position advocating for a nationally consistent approach:

The Australian Government has a vital role to play in achieving national consistency by leading and coordinating the standards development process in conjunction with state and territory jurisdictions. This role should be legally formalised under the Constitution and an agreed procedure should be established in conjunction with all relevant stakeholders outlining the stages of the development process and the principles upon which it is based.

With key stakeholder support, it may be possible to get agreement with state jurisdictions on the establishment of a national Animal Welfare Act and standards development process.

One of the expected features of the national Animal Welfare Act would be the establishment of key national advisory committees. A critical weakness of Australia’s animal welfare framework is the absence of any national scientific or general advisory committee. The United Kingdom, Canada, and New Zealand and many other countries have advisory bodies at the national level (see Appendix 3), and the European Union’s Animal Health and Welfare Panel operates at a supra-national level. These advisory bodies have been responsible for producing high level scientific evidence and policy advice that has led to significant reforms in their respective jurisdictions. Most of these advisory bodies are made up of a combination of stakeholder representatives from livestock industries, animal protection groups, concerned government departments, the veterinary profession and others, and independent experts from

55 Australian Farm Institute, Designing Balanced and Effective Farm Animal Welfare Policies in Australia (2015).
56 Ibid, v.
62 See for instance, EU Scientific Veterinary Commission (original name of the EU Animal Health and Welfare Panel) reports on layer hen and pig welfare: Chapter 7 at 7.5.1 and 7.5.2.
disciplines of veterinary and animal science, ethics, and economics. Only the Dutch Council for Animal Affairs\(^{63}\) and the EU Animal Health and Welfare Panel\(^{64}\) appear to be solely expert-based.

Despite the balance of animal welfare advisory bodies adopting a mix of representative and expert-based membership, there is a strong case for separating the two, particularly when it comes to animal welfare scientific advice. As discussed in Chapter 2, animal welfare science is susceptible to influence from personal values with some scientists choosing to emphasise basic health and functioning conceptions of welfare while others give preference to the affective states of animals. While there is growing acknowledgment of the need to take an integrated approach, the risk of scientists adopting an overly narrow approach to welfare assessment remains, particularly when such research is funded by institutions with a particular interest at stake.\(^{65}\) As animal welfare scientist, Donald Broom, advises, the fundamental questions of what an animal’s state of welfare is, and what an animal’s state of welfare ought to be, should not be conflated.\(^{66}\) Science and only science should be used to answer the first, while ethics, economics, public and interest group representation, and therefore inevitably, politics, are employed to answer the second, guided by the scientific advice on the first.

Therefore, to ensure separation of these two issues, it is recommended that two statutory advisory committees be established at the national level: an animal welfare scientific advisory committee consisting of a range of scientists from relevant and complimentary scientific disciplines (the proposed ‘Scientific Advisory Committee’), and a general representative advisory committee consisting of representatives from a broad range of key stakeholder groups and experts from other disciplines such as ethics, economics, public administration, law and regulation (the proposed ‘Animal Welfare Advisory Committee’). Secretariat support for each Committee could be provided by the national Office of Animal Welfare.

The proposed Scientific Advisory Committee would be responsible for providing the initial scientific review of literature relevant to a proposed animal welfare standard or


\(^{65}\) See Chapter 7 at 7.4.1.

policy, and for coordinating and overseeing the conduct of primary scientific research where it is deemed necessary. The proposed Animal Welfare Advisory Committee would be expected to act as the nation’s preeminent advisory body on animal welfare matters. It would be responsible for overseeing the process of standards development including through the establishment of suitable working groups to undertake the initial drafting following the scientific review, and providing advice and reports on proposed animal welfare policy and standards to the responsible minister. The Animal Welfare Advisory Committee, in consultation with the Scientific Advisory Committee, could also be responsible for overseeing the allocation of public funds for animal welfare scientific research, including those funds directed to industry Research and Development Corporations (discussed in Chapter 7). This would help to ensure that animal welfare scientific research that is underpinned by public funding is directed towards addressing animal welfare issues that are of concern to the public.

The reports and advice of each committee would also be expected to be published and communicated to the public to ensure transparency and to contribute to the broader community debate on animal welfare matters. This is a common and valuable function of many of the national animal welfare advisory bodies operating internationally. The membership and process for appointment to such committees would be prescribed in the enabling Animal Welfare Act and would be expected to include the necessary conditions to ensure independence through appropriate terms of appointment and transparency through publication of conflicts of interest disclosures.

To strengthen accountability, the standards development process should be guided by certain conditions imposed by the national Animal Welfare Act. Under New Zealand’s Animal Welfare Act 1999, before the National Animal Welfare Advisory Committee may recommend to the minister that an animal welfare standard be implemented, it must have regard to a number of factors including public submissions, stakeholder representations during consultations, available technology and scientific knowledge relevant to the standard under consideration. A further condition on the development

67 For example, see UK Farm Animal Welfare Committee reports here: <https://www.gov.uk/government/groups/farm-animal-welfare-committee-fawc#opinions-and-reports>.
69 Animal Welfare Act 1999 (NZ), s 73.
of an animal welfare standard should be a requirement that its provisions are consistent with the purposes and key provisions of the national Animal Welfare Act. The key provisions envisaged here would be those relating to the ‘duty of care’ obligations contained in state and territory animal welfare Acts, which broadly align with the ‘Five Freedoms’ principles. An equivalent statement of principle could be included in the national Animal Welfare Act to guide standards development. Such a condition would effectively preclude the future development of standards that severely impact one or more of the Five Freedoms as determined by scientific assessment, and in doing so, it would ameliorate the ethical inconsistencies and resulting legislative incoherence between primary and subordinate animal welfare laws discussed in Chapter 4. Equivalent conditions should be incorporated in state and territory animal welfare Acts to prevent the possibility of responsible state and territory ministers simply amending certain features of the nationally proposed standards before implementation within their jurisdiction.

A formally-agreed national approach to animal welfare standard-setting, governed by a statutory advisory committee, informed by independent scientific advice, and guided by legislative conditions including the imposition of mandatory considerations, would result in significant improvements to the perceived legitimacy of the current standard-setting process. The perceived bias arising from the dominance exerted by agricultural institutions would be alleviated by the balanced governance of the Animal Welfare Advisory Committee. Livestock industry groups and departments of agriculture would continue to play a prominent role with expected representation on the Committee but they would no longer control the process. The current exclusionary approach to the assessment of animal welfare would be replaced with an integrated evaluation ensuring that broader community and animal protection stakeholder conceptions of animal welfare were included.

9.3.3 Enforcement

The final aspect of the regulatory framework to consider concerns the process of implementing and enforcing animal welfare law and standards. Chapter 8 provided a comparative analysis between the current approaches to enforcing welfare standards within the domestic and agricultural realms of animal use. While a deterrence-orientated

---

70 Discusses in Chapter 4 at 4.4.4.
approach to enforcement was adopted for the domestic realm, in the agricultural context, welfare regulation took on a distinctively compliance-based approach favouring the use of advice and persuasion over punitive measures. The compliance approach was critiqued for its failure to properly respond to the nature of the risks posed by the particular regulatory environment. Failing to appreciate risks was found to be a possible consequence of the regulators’ tendency to identify more strongly with livestock industries and their perceptions of reality. The approach was also critiqued for its tendency to characterise animal welfare offences as ‘technical rule violations’ or ‘side-effects’ of otherwise socially valuable business operations. Together these weaknesses contribute to legitimacy problems as livestock industries are largely left to regulate themselves giving rise to concerns of conflicting interests, and enforcement responses to instances of non-compliance fail to meet community expectations.

To address these legitimacy issues, the approach to regulating animal welfare standards within the agricultural realm requires reform. Greater independence, accountability and transparency in the design of the regulatory approach and responses to non-compliance commensurate with community expectations is required. The meta-regulatory model employed within the agricultural sector, which recognises and oversees the performance of industry quality assurance (QA) schemes, has a number of strengths, particularly in its ability to foster innovation and a commitment to compliance on behalf of the relevant industry. However, industry QA programs should be seen as a supplement to government animal welfare compliance programs, not as a substitute. To ensure appropriate levels of independence and accountability, a program of independent government inspection should operate in conjunction with QA schemes. Membership of a QA scheme should not absolve a facility of the possibility of government inspection. Routine government inspection regimes should continue for both non-QA and QA approved facilities. As discussed in Chapter 8, if facilities identified as ‘low-risk’ are not supplemented by other monitoring programs, ‘such as those of random inspection’, this can ‘under-deter the lower level risk creators, the “forgotten offenders” who escape

71 McDonnell and Schwarcz, above n 37, 1637; Chapter 6 at 6.5.
72 Chapter 8 at 8.3.2.
prioritisation. The overall effect of regulation is then not to reduce risk, but to substitute widely spread risks for lower numbers of larger risks.’ 73

Additionally, such meta-regulatory models must be formalised within legislation via a prescribed authorisation process for QA programs, such as provided for within Victoria’s Livestock Management Act 2010.74 This should preferably occur under the framework of primary animal welfare legislation, rather than livestock management legislation where animal welfare is bundled together with a range of other matters such as biosecurity, food safety, traceability and chemical standards. Separating farm animal welfare standards from animal welfare Acts removes them from their appropriate context, which in-turn may impact how they are interpreted and characterised. Finally, government must be fully open and transparent about the details of such meta-regulatory schemes. Information that is likely to be of special concern to the public includes the frequency of inspections, government reporting requirements for the QA programs and their inspectors, and how incidents of noncompliance are categorised and responded to. Ideally, these inspection arrangements and QA authorisation processes would be administered by the state-based Animal Welfare Authorities discussed above.

When noncompliance is detected, the default response should not simply be dialogue and further engagement with the noncomplying firm as suggested by the responsive regulatory approach.75 The consequences of non-compliance in terms of the harm caused to the animal/s must be a key criterion for determining the correct enforcement response rather than simply considering the regulatee’s attitude to compliance. Non-compliance that results in harm to animals should be met with punitive sanctions in the first instance such as the issuance of an infringement notices for minor noncompliance or prosecution and other significant penalties in the event of major forms of noncompliance. This should translate into an approach of strict compliance with a ‘zero tolerance’ attitude to welfare-related breaches distinct from the current approach, which results in the management of animal mistreatment as opposed to its prohibition. Such an approach is necessary for communicating to livestock industry participants that animal

74 See Livestock Management Act 2010 (Vic) pt 3.
75 Chapter 8 at 8.4.2.
welfare should be a top priority for compliance purposes and that significant financial penalties may be imposed if it is not adequately attended to.

This may resemble a deterrence-based style of enforcement, however, it should not be taken as a call for abandoning the compliance approach altogether. The cooperative meta-regulatory design of the framework is theoretically sound. Subject to the changes recommended above, there is no reason why this regulatory design should not be utilised for the agricultural sector. What is proposed here is for a stricter approach to enforcement within this regulatory design, particularly for non-compliance that results in animal harm. Using the regulatory typology diagram presented in Figure 26 below to explain, this would entail a shift towards the deterrence end of the compliance/deterrence spectrum from its current position. The overall approach would still be compliance-orientated but in seeking to better reflect the high-risk nature of the regulatory environment and community opinion regarding animal welfare breaches, the balance between punishment and persuasion mechanisms requires a shift to the deterrence side of the spectrum.

![Figure 26](image-url)

**Figure 26**: Recommended enforcement approach in typology of regulatory styles
This will be a more challenging position for government in terms of maintaining positive relationships with industry participants. But provided regulatees are fully informed of the regulator’s stance on welfare breaches, and regulators continue to provide assistance in meeting compliance obligations, the position should be accepted by industry as a ‘firm but fair’ approach to enforcement. In light of the community’s sensitivity to animal welfare and the very real potential for entire industries to be affected by publicly exposed mistreatment, industry should be accepting of such a position.

The alternative – taking a ‘soft’ approach to managing animal mistreatment – will simply not be sustainable for regulators. Given heightened community concern, cases of regulatory leniency can be expected to be more frequently exposed and more vigorously scrutinised. This will result in diminished community confidence regarding the performance of government in regulating animal welfare and will threaten the regulator’s legitimacy.

9.3.4 Summary of key recommendations to improve legitimacy

<table>
<thead>
<tr>
<th>Governance</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Separate conflicting responsibilities of promoting productive and profitable primary industries and protecting and promoting farm animal welfare with establishment of state Animal Welfare Authorities and national Animal Welfare Office.</td>
</tr>
<tr>
<td>2. Establish regulatory contrarian in the form of an Inspector General or Ombudsman for Animal Welfare to provide auditing/oversight function for department of agriculture performance on animal welfare responsibilities (could form part of or be separate to functions of proposed Animal Welfare Authorities and Office).</td>
</tr>
<tr>
<td>3. Develop system of tripartism to provide animal welfare NGO’s with greater role in regulatory processes as complimentary feature to establishment of Animal Welfare Authorities and Office.</td>
</tr>
</tbody>
</table>

Policy and standards development
1. Develop national Animal Welfare Act with agreement of states and territories to govern the development of national standards including the expression of key principles of animal welfare.

2. Establish a national statutory Scientific Advisory Committee to provide independent scientific advice for development of policy and standards.

3. Establish a national statutory Animal Welfare Advisory Committee consisting of key stakeholder representatives and other experts to act as the nation’s preeminent advisory body on animal welfare matters and to provide advice on national policy and standards to relevant ministers and ministerial forums considering animal welfare matters.

4. Provide national Animal Welfare Advisory Committee with power to oversee allocation of public funds dedicated to Rural Research and Development Corporations for animal welfare related research projects.

5. Impose statutory conditions on the development of standards through national Animal Welfare Act including requirements to take into account scientific advice of Scientific Advisory Committee and community views, and for standards to be consistent with animal welfare principles expressed in the Act.

**Enforcement**

1. Process for recognising industry QA programs to be formalised in state animal welfare legislation.

2. Independent program of routine government inspection should operate in conjunction with industry QA programs.

3. Government inspection program and QA authorisation process should be administered by state Animal Welfare Authorities.

4. A ‘zero tolerance’ approach to animal welfare offences should be adopted where punitive measures, particularly infringement notices, are imposed in first instance taking into account degree of harm caused by offence.

**Table 7:** Summary of key recommendations to improve legitimacy
9.4 Conclusion

This research has sought to provide a comprehensive account of the state of farm animal welfare regulation in Australia and to examine the veracity of claims that departments of agriculture suffer from conflicting interests with respect to their role in administering the framework. Such claims have in large part been substantiated. Farm animal welfare and industry productivity are predominately in a relationship of conflict. Consequently, departments of agriculture possess competing responsibilities in promoting productive and profitable primary industries while at the same time protecting and promoting the welfare of farmed animals. The empirical research undertaken in this study found that the structure of the departments’ reward systems leads them inevitably to prioritise measurable economic goals associated with productive and profitable primary industries, over the more elusive, less determinate public interest in farm animal welfare. This has led the departments to a community of interests with the regulated parties where they have adopted the same instrumental approach to animal welfare as that advanced by the livestock industries. According to this approach, farm animal welfare is valued to the extent it contributes to economic goals and is therefore effectively regulated through a paradigm of industry productivity. This approach has caused the responsible departments to deviate from serving the public interest in farm animal welfare as demonstrated by various regulatory failures and process deficiencies. These features bear all the hallmarks of a framework that is suffering from regulatory capture, and, typical of capture, it has left a trail of procedurally unfair and democratically illegitimate governance and regulatory processes in its wake.

Fundamentally, the framework is undemocratic. Since the 1970s there has been a shift in public attitudes and values towards animals from the traditional instrumental view towards a post-material ethic of care and compassion. These changing values are not given expression within the current framework as it has been designed to protect the closed and exclusive nature of the agricultural policy community. On input legitimacy grounds the framework offends many of the key components for effective deliberative engagement as political choices regarding the welfare of farmed animals do not reflect the ‘will of the people’ and do not derive from the authentic preferences of the Australian community. Rather, deliberative processes are dominated by agricultural institutions and public conceptions of animal welfare are largely excluded. In reality,
the public’s input is tokenistic. The framework is similarly deficient on output legitimacy grounds as the resulting standards and policy produced by the framework fail to achieve policy objectives of protecting and promoting farm animal welfare, and do not ‘resonate with the citizenry’s values and identity’ or meet their normative expectations.\footnote{Vivien Schmidt, ‘Democracy and Legitimacy in the European Union Revisted: Input, Output and Throuhput’ (2013) 61 \textit{Political Studies} 2, 7.}

This exclusionary and undemocratic approach to regulating the welfare of farm animals is unsustainable. Without change, public trust and confidence will diminish further resulting in higher incidences of legal challenge, consumer boycotts, public protest, and vigilantism. The reforms proposed in this thesis are designed to democratise the farm animal welfare governance framework – to loosen the grip of the agricultural policy community, to invite alternative viewpoints into the frame, and ultimately, to improve its legitimacy.

\begin{center}
\textbf{------------------ END ------------------}
\end{center}
Appendix 1: National Model Codes of Practice for the Welfare of Animals


Model Code of Practice for the Welfare of Animals, **Pigs**, Primary Industries Standing Committee (2008)

Model Code of Practice for the Welfare of Animals, **Feral Livestock Animals**, Australian Agricultural Council (1992)

Model Code of Practice for the Welfare of Animals, Animals at **Saleyards**, Australian Agricultural Council (1991), as in force on 20 May 2009

Model Code of Practice for the Welfare of Animals, Livestock at **Slaughtering** Establishments, Agriculture and Resource Management Council of Australia and New Zealand (2001)


Australian Model Code of Practice for the Welfare of Animals, **Cattle**, Australian Agricultural Council (1992)


### Appendix 2: Semi-structured interview questions for government regulators responsible for animal welfare

<table>
<thead>
<tr>
<th>CATEGORY</th>
<th>QUESTIONS</th>
</tr>
</thead>
</table>
| **Personal background**      | 1. What are your formal qualifications?  
2. What is your employment history?  |
| **Current role**             | 3. What are the primary responsibilities in your current role?  |
| **Role of Department**       | 4. How do you conceive the role of the Department?  
5. How would you describe the primary purpose of the Department?  
6. How would you describe the primary objectives of the Department?  |
| **Conception of role as regulator** | 7. How would you describe the main purpose of your role?  
8. How would you describe the primary objectives of your role?  
9. How would you describe the role of animal welfare regulation within the livestock industries?  
10. How would you describe the appropriate approach to animal welfare regulation within the livestock industries?  |
| **Conception of animal welfare** | 11. How do you conceive animal welfare?  
12. How would you define animal welfare?  
13. How would you describe a good state of animal welfare?  
14. How would you describe a poor state of animal welfare?  
15. How would you describe the relationship between animal welfare and productivity (on-farm)?  |
### Factors involved in standard setting

16. Can you describe what you feel is the appropriate approach to setting animal welfare standards that apply to industry?

17. Can you describe the primary factors and considerations that are taken into account when you are involved in the development of animal welfare policy or law?

18. Can you describe the primary sources of pressure and influence on your decision-making process during the development of animal welfare policy or law?

19. What approach do you take to the resolution of conflicts when they arise in this process?

### Factors involved in standard implementation

20. Can you describe the primary factors and considerations that are taken into account when you are involved in determining how a new animal welfare law should be implemented within your jurisdiction?

21. Can you describe the primary sources of pressure and influence when determining implementation strategies?

### Factors involved in standard enforcement

22. Can you describe the Department’s approach to animal welfare law enforcement?

23. Can you describe the primary factors and considerations that are taken into account when you are determining what enforcement action should be taken for a detected breach of animal welfare law?

24. Can you describe the primary sources of pressure and influence on determining enforcement actions?

### Conceptions of industry

25. How do you think livestock industries conceive animal welfare and its place within the respective industries?

26. What is your impression of industry’s approach to animal welfare?

### Conceptions of animal welfare community*

27. How do you think the animal welfare community conceives animal welfare and its place within the livestock industries?

---

* ‘Animal welfare community’ generally understood to mean the major animal welfare organisations such as the RSPCA and Animals Australia, but also general members of the public who may not be a member of an animal welfare organisation but are nevertheless concerned about animal welfare and make representations to government about such.
28. What is your impression of the animal welfare community’s approach to animal welfare and its place within the livestock industries?

**Relationship with industry**

29. How would you describe the Department’s relationship with the various livestock industries?
30. How would you describe your relationship with the different livestock industries?
31. How much contact do you have with the various livestock industries?
32. What is the nature of that contact?
33. How do you think industry perceives the Department?
34. How do you think industry perceives you?

**Relationship with animal welfare community**

35. How would you describe the Department’s relationship with the animal welfare community generally?
36. How would you describe your relationship with the animal welfare community?
37. How much contact do you have with the animal welfare community?
38. What is the nature of that contact?
39. How do you think the animal welfare community perceives the Department?
40. How do you think the animal welfare community perceives you?
### Appendix 3: Animal Welfare Advisory Bodies

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Advisory Body</th>
<th>Makeup*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>Animal Welfare Council</td>
<td>Expert, representative</td>
</tr>
<tr>
<td>Belgium</td>
<td>Council of Animal Welfare</td>
<td>Expert, representative</td>
</tr>
<tr>
<td>Canada</td>
<td>National Farm Animal Care Council</td>
<td>Expert, representative</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Central Commission for Animal Welfare</td>
<td>Expert, representative</td>
</tr>
<tr>
<td>Denmark</td>
<td>Animal Ethics Council</td>
<td>Expert, representative</td>
</tr>
<tr>
<td>European Union</td>
<td>Animal Health and Welfare Panel</td>
<td>Expert</td>
</tr>
<tr>
<td>Finland</td>
<td>Farm Animal Welfare Council</td>
<td>Expert, representative</td>
</tr>
<tr>
<td>Ireland</td>
<td>Farm Animal Advisory Welfare Council</td>
<td>Expert, representative</td>
</tr>
<tr>
<td>Netherlands</td>
<td>Council for Animal Affairs</td>
<td>Expert</td>
</tr>
<tr>
<td>Norway</td>
<td>Norwegian Council for Animal Ethics</td>
<td>Expert, representative</td>
</tr>
<tr>
<td>New Zealand</td>
<td>National Animal Welfare Advisory Committee</td>
<td>Expert, representative</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Farm Animal Welfare Committee</td>
<td>Expert, representative</td>
</tr>
</tbody>
</table>

* ‘Expert’ includes veterinary, animal science, ethics, economics, and law.
Appendix 4: Final Ethics Approval

From: Ethics Secretariat <ethics.secretariat@mq.edu.au>
Date: Thu, Jul 5, 2012 at 2:33 PM
Subject: Approved- Ethics application- Radan (Ref:5201200249)
To: Prof Peter Radan <peter.radan@mq.edu.au>
Cc: Mr Jed Andrew Goodfellow <jed.goodfellow@students.mq.edu.au>

Dear Prof Radan

Re: "Animal Welfare Regulation in the Australian Agricultural Sector: A Legitimacy maximising analysis" (Ethics Ref: 5201200249)

Thank you for your recent correspondence. Your response has addressed the issues raised by the Human Research Ethics Committee and you may now commence your research.

This research meets the requirements of the National Statement on Ethical Conduct in Human Research (2007). The National Statement is available at the following web site:


The following personnel are authorised to conduct this research:

Mr Jed Andrew Goodfellow
Prof Peter Radan

NB. STUDENTS: IT IS YOUR RESPONSIBILITY TO KEEP A COPY OF THIS APPROVAL EMAIL TO SUBMIT WITH YOUR THESIS.

Please note the following standard requirements of approval:

1. The approval of this project is conditional upon your continuing compliance with the National Statement on Ethical Conduct in Human Research (2007).

2. Approval will be for a period of five (5) years subject to the provision of annual reports.

Progress Report 1 Due: 05 July 2013
Progress Report 2 Due: 05 July 2014
Progress Report 3 Due: 05 July 2015
Progress Report 4 Due: 05 July 2016
Final Report Due: 05 July 2017

NB. If you complete the work earlier than you had planned you must submit a Final Report as soon as the work is completed. If the project has been discontinued or not commenced for any reason, you are also required to submit a Final Report for the project.

Progress reports and Final Reports are available at the following website:

http://www.research.mq.edu.au/for/researchers/how_to_obtain_ethics_approval/human_research_ethics/forms

3. If the project has run for more than five (5) years you cannot renew approval for the project. You will need to complete and submit a Final Report and submit a new application for the project. (The five year limit
on renewal of approvals allows the Committee to fully re-review research in
an environment where legislation, guidelines and requirements are
continually changing, for example, new child protection and privacy laws).

4. All amendments to the project must be reviewed and approved by the
Committee before implementation. Please complete and submit a Request for
Amendment Form available at the following website:

http://www.research.mq.edu.au/for/researchers/how_to_obtain_ethics_approval/
human_research_ethics/forms

5. Please notify the Committee immediately in the event of any adverse
effects on participants or of any unforeseen events that affect the
continued ethical acceptability of the project.

6. At all times you are responsible for the ethical conduct of your
research in accordance with the guidelines established by the University.
This information is available at the following websites:

http://www.mq.edu.au/policy/

http://www.research.mq.edu.au/for/researchers/how_to_obtain_ethics_approval/
human_research_ethics/policy

If you will be applying for or have applied for internal or external
funding for the above project it is your responsibility to provide the
Macquarie University's Research Grants Management Assistant with a copy of
this email as soon as possible. Internal and External funding agencies will
not be informed that you have final approval for your project and funds
will not be released until the Research Grants Management Assistant has
received a copy of this email.

Please retain a copy of this email as this is your official notification of
final ethics approval.

Yours sincerely
Dr Karolyn White
Director of Research Ethics
Chair, Human Research Ethics Committee
Bibliography

Articles, Books, and Reports


Baxter, Lawrence, “‘Capture” in Financial Regulation: Can We Channel it Toward the Common Good?’ (2011) 21 Cornell Journal of Law and Public Policy 175.


Bernstein, Steven, ‘Legitimacy in Global Environmental Governance’ 1 Journal of International Law & International Relations 139.


Botterill, Linda, ‘The Role of Agrarian Sentiment in Australian Rural Policy’ in Francesca Merlan and David Raftery (eds), Tracking Rural Change: Community, Policy and Technology in Australia, New Zealand and Europe (ANU E Press, 2009).


Bruce, Alex, Animal Welfare Law in Australia: An Integrated Approach (LexisNexis, 2011).


Cao, Deborah, Animal Law in Australia and New Zealand (Lawbook Co, 2010).


Carpenter, Daniel, and David Moss (eds) Preventing Regulatory Capture: Special Interest Influence and How to Limit It (Cambridge University Press, 2013).


Delgado, Christopher, ‘Rising Consumption of Meat and Milk in Developing Countries has Created a New Food Revolution’ (2003) 133 Journal of Nutrition 3907.


Gibson, Graeme, ‘Beyond Fear and Loathing: Local Politics at Work’ (Paper presented at the Local Community Services Association Annual Conference, August 2013).


Grant, Wyn, and Anne MacNamara, ‘When Policy Communities Intersect: The Case of Agriculture and Banking’ (1995) XLIII Political Studies 509.


Hesse-Biber, Sharlene, and Patricia Leavy, The Practice of Qualitative Research (SAGE, 2011).


Jones, T, C Donnelly, and M Dawkins, ‘Environmental and Management Factors Affecting the Welfare of Chickens on Commercial Farms in the United Kingdom and Denmark Stocked At Five Densities’ 85 Poultry Science 155.


LayWel Project, Welfare Implications of Changes in Production Systems for Laying Hens (University of Bristol, 2004).


Naald, Brian, and Trudy Cameron, ‘Willingness to Pay for Other Species’ Well-Being’ (2011) 70 *Ecological Economics* 1325.


Phillips, Peter, Humanity Dick: The Eccentric Member for Galway (Tunbridge Wells Parapress, 2003).


Queensland Department of Agriculture, Fisheries and Forestry, Annual report 2012-13 (2013).

Queensland Department of Agriculture, Fisheries and Forestry, Strategic plan 2013-17 (2013).


Sharman, Katrina, ‘Regulation of the Treatment of Farm Animals’ in Deborah Cao, *Animal Law in Australia and New Zealand* (Lawbook Co, 2010) 212.


White, Steven, ‘Regulation of the Treatment of Companion Animals’ in Deborah Cao, *Animal Law in Australia and New Zealand* (Lawbook Co, 2010).


Yin, Robert, *Qualitative Research from Start to Finish* (Guilford Press, 2011).


**Legislation**

*Australian legislation*

*Administrative Arrangement Order 2015* (NT)

*An Act for the more effectual prevention of Cruelty to Animals 1850 14 Vict 40* (NSW) (Repealed)

*Animal Care and Protection Act 2001* (Qld)

*Animal Welfare Act 1985* (SA)

*Animal Welfare Act 1992* (ACT)

*Animal Welfare Act 1993* (Tas)

*Animal Welfare Act 2000* (NT)
Animal Welfare Act 2002 (WA)
Animals Protection Act Amendment Act 1977 (Qld)
Australian Constitution
Australian Meat and Livestock Industry Act 1997 (Cth)
Corporations Act 2001 (Cth)
Crimes Act 1900 (NSW)
Livestock Management Act 2010 (Vic)
National Consumer Credit Protection Act 2009 (Cth)
Prevention of Cruelty to Animals Act 1979 (NSW)
Prevention of Cruelty to Animals Act 1986 (Vic)
Protection of Animals Act 1966 (Vic) (Repealed)
Public Sector Employment and Management Act 1993 (NT)
Surveillance Devices Bill 2014 (SA)

Subordinate legislation and legislative instruments
Animal Care and Protection Regulation 2012 (Qld)
Animal Welfare (Commercial Poultry) Regulations 2008 (WA)
Animal Welfare (General) Regulations 2003 (WA)
Animal Welfare (Pig Industry) Regulations 2010 (WA)
Animal Welfare (Pigs) Regulations 2013 (Tas)
Animal Welfare Regulations 2002 (SA)
Australian Animal Welfare Standards and Guidelines for Cattle
Australian Animal Welfare Standards and Guidelines for Sheep
Australian Animal Welfare Standards and Guidelines for the Land Transport of Livestock
Australian Meat and Live-stock Industry (Conditions on Live-stock Export Licences) Order 2012 (Cth)


Australian Standards for the Export of Livestock (Version 2.3) 2011

Export Control (Animals) Order 2004 (Cth)

Meat Standards Committee Guideline 01-2004 – Ritual Slaughter for Ovine and Bovine

Model Code of Practice for the Welfare of Animals, Animals at Saleyards, Australian Agricultural Council (1991)

Model Code of Practice for the Welfare of Animals, Cattle, Australian Agricultural Council (1992)


Model Code of Practice for the Welfare of Animals, Feral Livestock Animals, Australian Agricultural Council (1992)


Model Code of Practice for the Welfare of Animals, Pigs, Primary Industries Standing Committee (2008)


Model Code of Practice for the Welfare of Animals, The Goat, Australian Agricultural Council (1991),

Prevention of Cruelty to Animals Regulations 2012 (NSW)

International legislation and legislative instruments

Act to Prevent the Cruel and Improper Treatment of Cattle 1822 (UK) (Repealed)
Animal Welfare (Layer Hens) Code of Welfare 2012 (NZ)
Animal Welfare (Pigs) Code of Welfare 2010 (NZ)
Animal Welfare Act 1999 (NZ)
Code of Practice for the Care and Handling of Pigs (Canada)
Cruelty to Animals Act 1835 (UK) (Repealed)
Massachusetts Body of Liberties 1641 (MA) (Repealed)
The Prevention of Cruelty to Animals Act 1837 (UK) (Repealed)

Cases


Department of Local Government and Regional Development v Emmanuel Exports (Unreported, Magistrates Court of Western Australia (Criminal Jurisdiction), Crawford M, 8 February 2008).

Ford v Wiley (1889) 23 QBD 203.


R v Menard (1978) 43 CCC (2d) 458.

Saltoon v Lake [1978] 1 NSWLR 52.
The Nonhuman Rights Project Inc on behalf of Tommy v Paterick Lavery [2014] State of New York Supreme Court, Appellate Division, Third Judicial Department, 518336, 4 December 2014.


Other (Parliamentary debates, news media, websites)


Animals Australia, Submission to Senate Rural and Regional Affairs and Transport Committee Inquiry into the Criminal Code Amendment (Animal Protection) Bill 2015, 12 March 2015.


Australian Veterinary Association, Submission to Senate Rural and Regional Affairs and Transport Committee Inquiry into the Criminal Code Amendment (Animal Protection) Bill 2015, 12 March 2015.


Cobb, John, (Shadow Minister for Agriculture), ‘Minister Admits System is “Strongest” But Adds More Red Tape’ (Media Release, 31 July 2013).


Coles, ‘Coles Brand Fresh Chicken Now 100% RSPCA Approved’, Media Statement, 3 January 2014.


England, ‘Bill to Prevent Bull-Baiting’ House of Commons, 2 April 1800 (Sir W. Pulteney) 202-204, as reported in *Cobbett’s Parliamentary History of England* v.35.


Evidence to Council of Territory Co-operation, Sub-committee – Animal Welfare Governance, Parliament of Northern Territory, Darwin, 3 August 2011, 11-15 (Dr Brian Radunz, Chief Veterinary Officer, Northern Territory Department of Primary Industry).

Evidence to Council of Territory Co-operation, Sub-committee – Animal Welfare Governance, Parliament of Northern Territory, Darwin, 30 June 2011, 15 (Dr Brian Radunz, Chief Veterinary Officer, Northern Territory Department of Primary Industry).

Evidence to Senate Standing Committee on Rural and Regional Affairs and Transport, Parliament of Australia, Canberra, 15 May 2015, 44 (Chris Groves, National Farmers’ Federation).


335


Lawson, Kirsten, ‘ACT Battery Cage and Sow Stall Ban a ‘Message to Rest of Country’’, Canberra Times (online) 26 February 2014.


Queensland Department of Agriculture, Fisheries and Forestry, Activity Agreement Between State of Queensland Acting Through the Department of Agriculture, Fisheries and Forestry and RSPCA Queensland, 1 July 2013.

Queensland, Parliamentary Debates, Legislative Assembly, 2 June 2015, 877 (Premier Annastacia Palaszczuk).


RSPCA Australia, Policies (2014).


RSPCA Australia, Submission to Senate Rural and Regional Affairs and Transport Committee Inquiry into the Criminal Code Amendment (Animal Protection) Bill 2015, 12 March 2015.


Sentient, The Veterinary Institute, Submission to Senate Rural and Regional Affairs and Transport Committee Inquiry into the Criminal Code Amendment (Animal Protection) Bill 2015, 12 March 2015.

South Australia, Parliamentary Debates, Legislative Council, 27 March 2012, 669.


Victoria, Parliamentary Debates, 1881, vol. 37, 241 (Sir B. O’Loghlen).


Wellard Rural Exports Pty Ltd, Submission to Australian Senate, Livestock Export Review Inquiry, 1 September 2011.


Western Australia, Parliamentary Debates, Legislative Council, 19 March 2008, 1147b (Hon Ljiljanna Ravlich).

Western Australia, Parliamentary Debates, Legislative Council, 24 October 2013, 5443c.


