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KEY ANIMAL LAW IN AUSTRALIA

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Introduction

This chapter provides a brief overview and critique of the legal and regulatory framework governing animal protection in Australia. Given its strong reliance on animal agriculture and high rate of companion animal ownership, unsurprisingly in Australia the regulation of the human–animal relationship has become a significant and political issue. Increasingly, the Australian public are questioning the treatment of animals in animal use industries and the adequacy of animal protection under the law. This chapter explains how animal welfare is regulated within Australia’s federal government structure, and puts forward recommendations for necessary structural and institutional regulatory reforms.

What is the legal status of animals in Australia?

Under the law in Australia, most animals are the property of human or corporate owners; a legal status that has significant implications for how they are valued, protected, and managed. However, this does not necessarily apply in the context of animals living in the wild, whose legal status may differ according to context and jurisdiction (Cao 2015, pp. 69–101).

Animals deemed property are the subjects of human property rights and therefore not rights-holders themselves, rendering them reliant on animal welfare legislation to protect their most essential interests. Yet unlike close neighbour New Zealand, under most of Australia’s animal welfare laws, the sentience of animals is not expressly recognised. Only one jurisdiction, the Australian Capital Territory (ACT), has formally recognised the sentience of animals under its primary animal welfare legislation (Animal Welfare Act 1992 (ACT)). The Act’s objectives state that “animals are sentient beings that are able to subjectively feel and perceive the world around them” (s 4A (1) (a)). Further, it recognises that they have “intrinsic value” and “deserve to be treated with compassion and have a quality of life that reflects their intrinsic value” (s 4A (1) (b)).

More jurisdictions look set to follow the ACT’s lead, which may be viewed as a “shift away from categorising [animals] as property” (Kotzmann, 2019). While not altering their property status, legislative acknowledgment that animals have intrinsic value – that is, value independent of their value to humans – certainly renders them unique as a class of property (Kotzmann,
2020). However, if this does signify the beginning of a shift away from a pure property paradigm for animals it is unclear what alternative legal status may be substituted. Although there has been significant debate within the Australian animal protection community regarding the possibility of recognising animals as “legal persons”, there have been no attempts in Australian parliaments or courts to challenge the fundamental legal status of animals under the law. Accordingly, their status as property seems unlikely to change in the near future.

How is animal welfare regulated in Australia?

Reflecting the legal status of animals generally, the Australian regulatory framework for animal welfare rests on the dual presumption that using animals for most human purposes is acceptable, and that causing pain and suffering to animals can be justified in various circumstances.

Federal division of power

Australia has a federal system of government in which legislative power is divided between the national Commonwealth Government and the eight state and territory governments. Although there is potential to use indirect heads of legislative power, there is no direct power to pass laws with respect to animal welfare and protection at the national level under the Australian Constitution (Bruce, 2018, 75). For this reason, the majority of Australian animal welfare law exists at the state and territory level. However, the Commonwealth has responsibility over animal welfare as it relates to international trade, such as the live export of animals, the regulation of export abattoirs, and the international trade in wildlife.

Regardless of its limited direct power, it is possible for the Commonwealth to take a greater role in animal welfare and protection, such as by leading and coordinating the states and territories to develop nationally consistent animal welfare standards. Historically, however, the Commonwealth has opted to limit the scope of its involvement, which has led to a lack of national consistency in Australia’s animal welfare laws and policies. In fact, the absence of federal leadership and oversight was a significant factor contributing to the “D” ranking Australia received in World Animal Protection’s latest 2020 revision of the global Animal Protection Index (“API”) (World Animal Protection, 2020).

Engagement with international animal welfare standards and initiatives

Australia has provided its support to most of the few international agreements and initiatives that exist in the international animal welfare space. For instance, Australia has a consistent track record of engagement with the OIE’s Assembly, Specialist Commissions, and Animal Welfare Standards. The API concluded that although at the state and territory level, “the OIE’s animal welfare standards are broadly covered in legislation or policy”, the fact that Australia no longer has a national animal welfare strategy “may act as a barrier for the OIE standards to be fully implemented” (World Animal Protection, 2020). The Australian Government has also pledged its in-principle support for the proposed Universal Declaration on Animal Welfare, and signed relevant international treaties such as the Convention on Biological Diversity (1992), Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973), Convention on Wetlands of International Importance Especially as Waterfowl Habitat (1971), and the International Convention for the Regulation of Whaling (1946).
Governance framework

With the exception of the ACT and South Australia, animal welfare law and policy in Australia is governed by state, territory, and Commonwealth agriculture ministers and departments. Table 28.1 provides an overview of the responsible departments in each jurisdiction. The inherent issues with delegating animal welfare regulatory responsibilities to ministers and departments of agriculture are discussed in further detail below under “How can the legal and regulatory system be reformed?”

With the exception of Western Australia, all states and territories have established animal welfare advisory committees. However, only half of these are formally recognised in legislation. The Australian Capital Territory, Northern Territory, South Australia, and Tasmania establish animal welfare advisory committees under their animal welfare legislation, while New South Wales, Victoria, and Queensland have non-statutory committees. Unlike animal welfare advisory committees in other nations like New Zealand, none of the committees in Australia are empowered to make animal welfare standards or codes. The committees are merely advisory bodies and their advice and reports are not published. There is also minimal to no interaction between the various state and territory committees and Australia has no national animal welfare advisory body to promote national consistency.

There are limited political or government mechanisms specifically designed to provide oversight and accountability for the administration of animal welfare law. At the federal level, the Commonwealth Government established the Inspector-General of Live Animal Exports to oversee the Department of Agriculture, Water, and Environment’s performance in regulating the live animal export trade following an animal welfare disaster onboard a live sheep voyage to the Middle East in 2017. General oversight and accountability mechanisms which can be employed to scrutinise animal welfare regulatory actions include Ombudsman bodies, Freedom of Information laws, federal and state parliamentary scrutiny committees, and of course the relevant tribunals and courts within the Australian judiciary.

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<tr>
<th>Jurisdiction</th>
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<td>Australian Capital Territory (ACT)</td>
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<td>New South Wales (NSW)</td>
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<td>Northern Territory (NT)</td>
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<td>Western Australia (WA)</td>
<td>Animal Welfare Act 2002</td>
<td>Department of Primary Industries and Regional Development</td>
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Animal welfare legislation

As Table 28.1 provides, all states and territories have developed their own animal welfare legislation (hereafter referred to collectively as the “Animal Welfare Acts”). The Animal Welfare Acts are broadly consistent in terms of key elements and practical outcomes, however, there are quite significant differences in the framing and drafting of offences, penalties, and enforcement powers. Like other Commonwealth nations, Australia inherited its animal welfare laws from the United Kingdom and therefore similar animal welfare principles apply.

Cruelty offences

As a starting point, all of the Animal Welfare Acts prohibit animal cruelty. While different drafting is employed, the general meaning of animal cruelty under the legislation is the infliction of unnecessary harm upon an animal. In determining when harm caused to an animal is unnecessary in the circumstances, Australian courts apply a proportionality test derived from the English common law, which considers both the object of the harm and the means used to achieve that object, with particular focus on the amount of pain or suffering caused and whether it was proportionate to the object sought to be achieved (Ford v Wiley (1889) 23 QB 203; Department of Local Government & Regional Development (WA) v Emanuel Exports Pty Ltd, Graham Richard Dawes and Michael Anthony Stanton, Magistrates Court of Western Australia, 8 February 2008).

If a disproportionate level of pain and suffering is found to have been inflicted, the impugned act or omission will amount to animal cruelty. By implication, this means the infliction of pain and suffering upon an animal is not in itself an offence. It is only when that pain and suffering is considered unnecessary that it becomes an offence. All of the Animal Welfare Acts then go on to expressly list a range of other conduct that falls within the meaning of animal cruelty, such as beating, terrifying, overriding, overworking, fighting, abandoning, and many others.

Duties of care

In addition to prohibiting animal cruelty, the Animal Welfare Acts impose duties of care upon persons responsible for the welfare of animals under their control. These duties may be framed in a positive sense (i.e. “a person in charge must provide … ”) or in a negative sense (i.e. “a person in charge must not fail to provide … ”). Currently, most Animal Welfare Acts in Australia frame the duties in the negative, as elements of the general cruelty offence, but there is now a trend towards separating out the duty requirements from the cruelty offences and framing them as a positive “duty of care”. This reframing is important as it enables inspectors to act proactively to prevent animal neglect before the animal has suffered, improving animal welfare outcomes and better serving the intent of the legislation. The duties generally relate to the provision of appropriate food and water, shelter and living conditions, treatment of disease or injury, exercise and opportunities to express normal behaviour, and handling.

Defences and exemptions

The vast majority of animals used for commercial or other instrumental purposes are covered by industry codes or standards that operate as defences or exemptions to the application of the cruelty or duty provisions contained in the Acts. This effectively sets up a two-tiered system of animal welfare, where farmed animals are subject to lower standards of protection compared to those within a domestic companion context who enjoy the full protections set out in the legisla-
tion. Unlike in New Zealand’s *Animal Welfare Act 1999*, there is no requirement in Australia for codes and standards to be consistent with the purpose and duties of the principal Animal Welfare Acts. This creates an incoherent legislative framework in which subordinate legislation authorises conduct that is inconsistent with the purpose and intent of the legislation under which it is made.

**How is animal welfare regulated with regard to specific areas of animal use?**

**Farmed animals**

Requirements relating to the welfare of farmed animals in Australia are prescribed in industry-specific “Model Codes of Practice”, first developed in the 1980s and 1990s. The Model Codes are voluntary (except in South Australia), although compliance with their provisions affords a defence to prosecution for general animal cruelty or breach of duty of care offences in most jurisdictions. These defences effectively render practices, which may otherwise be considered cruel and prosecutable offences, immune from criminal liability.

However, the Model Codes are now being progressively replaced by the “Australian Animal Welfare Standards and Guidelines”, which are designed to be enforceable, with the Standards prescribed as mandatory regulations under state and territory law (Animal Health Australia, 2020). Progress on converting the Model Codes into the enforceable Standards and Guidelines has been very slow. Despite the conversion process commencing in 2005 (Australian Government, 2009), only the *Australian Standards and Guidelines for the Land Transport of Livestock* have been fully implemented in all state and territory jurisdictions. Standards and Guidelines for sheep, cattle, and saleyards were developed between 2016 to 2018, but at the time of writing, only three out of eight states and territories have implemented them.

The Model Codes and Standards and Guidelines have been criticised by animal welfare groups for failing to lift the bar on animal welfare standards beyond current industry practice. The current Model Codes and Standards and Guidelines continue to permit practices that harm animal welfare, such as extreme confinement systems like battery cages for layer hens and sow stalls for pigs. They also continue to permit painful husbandry practices without pain relief, including tail docking, castration, spaying, beak trimming, hot iron branding, de-horning, and mulesing.

Legislative requirements relating to Australia’s live animal export trade are set out in the *Australian Standards for the Export of Livestock* (“ASEL”) made under the *Australian Meat and Livestock Industry Act 1997* (Cth) and the *Export Control (Animals) Rules 2021* (“ECAR”) made under the *Export Control Act 2020* (Cth). The ASEL outline prescriptive requirements relating to the transport process from farm, to port, to the conditions onboard the vessels including stocking densities, ventilation requirements, veterinary treatment, and reporting obligations. The ECAR attempt to regulate the treatment of exported animals in the importing countries through the Exporter Supply Chain Assurance System (“ESCAS”). The ESCAS places obligations on exporters to ensure exported animals only go through pre-approved supply chains that meet OIE standards. In practice, many animals are “leaked” outside of approved supply chains and breaches of OIE standards occur frequently (Australian Government, 2021). Even if compliance with the standards was fully achieved, they permit slaughter without stunning which means that Australian animals can be slaughtered overseas whilst fully conscious.

**Companion animals**

The welfare of companion animals is regulated at the state and territory level primarily by the general cruelty and duty of care provisions of the principal Animal Welfare Acts (see above).
More prescriptive Codes of Practice apply for the commercial breeding and sale of companion animals in most state and territory jurisdictions. Unlike the Codes and Standards for farmed animals, the Codes for the breeding and sale of companion animals are developed on a state-by-state basis and therefore vary considerably in scope, detail, and the level of protections afforded. These Codes generally regulate the conditions in which dogs can be bred and sold commercially, including licensing of the breeding and sale facility and business, kennel specifications, maximum litters, veterinary requirements, and record keeping.

Further regulations have been introduced in Victoria to effectively prohibit large-scale commercial puppy farming by capping the number of breeding dogs for any facility to ten, requiring any facility seeking to breed over ten dogs to seek Ministerial approval, and banning the sale of dogs (other than rescue dogs) through pet stores (Domestic Animals Act 1994, Pt 4. Div. 3AA). While other jurisdictions have introduced prescriptive requirements for dog breeding, they still permit large-scale intensive dog breeding operations.

**Animals used in research**

The use of animals in scientific research is governed by the *Australian Code for the Care and Use of Animals for Scientific Purposes* (the “Scientific Code”). As with the Codes and Standards for farmed animals, the Scientific Code is developed at the national level (by the National Health and Medical Research Council) and is implemented and enforced at a state and territory level under the Animal Welfare Acts, with the exception of NSW, which has established a separate legislative regime for animal research under the *Animal Research Act 1985* (NSW). The Scientific Code sets out the principles of the “3Rs” – replacement, reduction, and refinement – and the requirements for establishing Animal Ethics Committees. However, the effectiveness of the Code for protecting animal welfare has been critiqued on numerous grounds, including the nature of some of the experiments it permits. Moreover, the adequacy of its implementation is brought into question when considering the very large numbers of animals used in Australia for scientific research every year. While national statistics are not collated in a uniform way, estimates suggest Australia has one of the highest per capita rates of animal use for research in the world at approximately 3.2 million animals in 2015 (Taylor and Rego Alvarez 2019, 204).

**Wild animal welfare protection**

**Animals living in the wild**

Although the Commonwealth has adopted some responsibility for wild animal welfare, it is managed primarily by state and territory governments (Cao, 2015, pp. 245–255). Most animal welfare legislation technically applies to animals living in the wild, however its application is often significantly limited or in some cases, completely excluded (White, 2009, pp. 238–242). Nature conservation legislation may also address wild animal welfare, however its primary focus is the preservation of species and ecosystems, rather than protection of individual animal welfare (Thiriet, 2009, p. 270).

Commentators argue that the overall effect of this legislative regime is the creation of a “hierarchy of protection”, preferencing native animals with higher conservation status first, common native animals second, and common introduced species last (Thiriet, 2009, 270; White, 2009, 251). As a consequence, wild animal welfare regulation fails to acknowledge the equal capacity for suffering of all sentient animals (Thiriet, 2009, 270; White, 2009, p. 256).
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The treatment of kangaroos is a prime example of the hierarchy in action. Although kangaroos are native animals protected under nature conservation legislation, both commercial and non-commercial kangaroo shooting are legally permitted. This is due to government perception that certain kangaroo species are “common” native animals, whose populations need to be reduced – a view that some scientists question (Boom and Ben-Ami, 2010). Nationally each year on average two million kangaroos are commercially shot across five state jurisdictions – a figure which includes an estimate of the number of dependent young killed by shooters or left to die in the wild. Government support for the killing of these protected native species is premised on a belief that it is acceptable to manage native animals which are perceived to exist in abundance via lethal means. This is despite the fact that strong opposition has mounted both in Australia and globally against all forms of kangaroo shooting, largely due to the unavoidable and significant welfare risks associated with the shooting of free-ranging animals in the wild.

Wild animals in captivity

Wild animals are held in captivity in Australia for a variety of purposes, including for conservation, education, and entertainment. Exhibiting captive wild animals is regulated at the state/territory level, with different regimes applying across the jurisdictions (Bruce 2018, pp. 169–178). A vast range of species are held captive and exhibited across the country, although the New South Wales Government recently introduced a ban on the breeding and importation of cetaceans (Biodiversity Conservation Regulation 2017, s 2.8A).

In 2019, national standards and guidelines for the exhibition of animals kept in facilities (such as zoos) were endorsed by the states and territories (The Australian Animal Welfare Standards and Guidelines for Exhibited Animals (2019)), aiming to create more consistency in the standard of care across Australia. However, these standards do not cover circuses, which are governed by separate circus animal codes and standards regulated at a state and territory level. Local councils also possess the power to determine whether circuses may be held on their land, with over 40 opting to ban circuses that use wild animals (RSPCA South Australia, 2021). Despite this, keeping and exhibiting wild animals for entertainment purposes in mobile exhibitions remains legal (except in the ACT for certain species), although presently there are no circuses using wild animals in Australia.

Animals in entertainment

In addition to exhibition in zoos, circuses, and aquaria, animals are used for entertainment in Australia in a range of other contexts, including rodeos, horse racing, greyhound racing, and film/theatre. These industries are regulated at the state/territory level and different legislative standards apply across the country (Bruce, 2018, pp. 179–188). Certain problematic practices are banned in specific jurisdictions. For example, the Australian Capital Territory has prohibited rodeos and NSW has banned jumps racing. Some practices have been banned in all jurisdictions, such as animal fighting events or using animals as bait and lures for animal racing.

How can the legal and regulatory system be reformed?

The legal and regulatory system for animal protection in Australia arguably does not adequately represent and safeguard the interests of animals. Australia lacks a consistent national approach, with the Commonwealth government adopting minimal responsibility and leadership.
Various practices which cause animal pain and suffering are legalised, and those protections that do exist are often applied on a differential basis, failing to acknowledge the equal capacity for pain and suffering shared by all sentient animals. Substantive law issues are compounded by the fact that enforcement of animal welfare legislation is under-resourced and inadequate for achieving the overall legislative objects. Arguably there is significant need for reform, yet achieving law reform in this area has proven to be difficult and slow-moving.

Reform challenges and successes

Reform attempts face a broad range of challenges, including problematic law reform processes, close relationships between government and industry, lack of public awareness, lack of political support, and the existence of powerful lobby groups campaigning on behalf of animal use industries. For this reason, generally only small incremental reforms are able to pass through the law reform process, frustrating the achievement of broader systemic change. As a result, the reform dialogue is often reduced to discussions about how to regulate inherently harmful activities, rather than eliminating them.

Complete bans have mainly been achieved where the practice in question was very minor or non-existent within the relevant jurisdiction. For example, legislation restricting the use of animals for cosmetics testing was introduced, yet this type of testing was not actually being used in Australia. Similarly, the Australian Capital Territory (ACT) banned certain intensive farming practices that were almost completely absent in the jurisdiction. The ACT ban prohibited two significant intensive farming practices — specifically, the use of battery cages for egg production and the use of sow stalls for pig production. However, at the time the ban was implemented there was only battery cage operator and no intensive piggeries in the ACT (Brennan, 2014). A further example from NSW is the introduction of a ban on the importation and breeding of cetaceans for captivity at a time where the only remaining dolphinarium in NSW had already ceased the practice.

Despite their limited practical impact, these achievements represent an important shift in how animals are valued. They also create models for reform for other jurisdictions and make it much harder for governments to roll back on these hard-won protections in the future. However, in practice they all had minimal impact on the status quo, whilst in contrast proposed reforms with significant implications both for vested interests and animal welfare continue to fail despite public support. For instance, although a majority of the Australian public are opposed to live animal export (Sullivan, 2019), and it is clear that regulation cannot address the trade’s inherent animal welfare challenges, the industry continues to receive government support largely due to its perceived economic benefit for the country.

It has proven extremely difficult to achieve meaningful reform in relation to the practices of well-established animal use industries, such as horse racing, greyhound racing, and intensive animal agriculture. Due to these challenges, some important reforms are largely excluded from the reform agenda, deemed to be politically unfeasible. These include banning all intensive animal agriculture practices across the country and introducing animal rights recognition into law. Despite the challenging law reform context, some impactful reforms have been achieved, largely due to the efforts of animal protection advocates and organisations. These include Tasmania’s ban on establishing new battery cage operations and qualified ban on sow stalls, the ACT’s ban on greyhound racing, Victoria’s effective prohibition on puppy farming and requirement for pain relief in mulesing, and bans on recreational duck hunting across various jurisdictions. As is often the case, a number of reforms were achieved as reactionary measures by government in response to animal cruelty exposés (McEwan, 2019, p. 8). These reactionary law
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reform measures, although important for improving animal welfare, are reflective of a broader systemic failure to adequately prevent animal suffering.

Need for institutional and structural reform

Animal protection campaigns in Australia have traditionally taken a single-issue approach, pursuing reforms in regard to specific practices, such as tightening the regulations for greyhound racing or banning live export. However, the animal protection community is now starting to place increasing focus on more foundational institutional and structural challenges impeding the progress of animal welfare policy and regulation. In particular, the impacts of close relationships between government and animal use industries on animal welfare policy, and the inadequate frameworks governing the development of animal welfare standards. Proposed reforms in these areas aim to reduce the high degree of influence and control of agricultural institutions over Australia’s animal welfare policy framework, and to introduce more transparent and accountable processes for policy development.

Independent offices of animal welfare

One particularly prominent national campaign in this regard is the movement to secure the introduction of an independent statutory entity dedicated to animal welfare at the national level. A key aim of this reform is to address the issues raised by the influence of animal use industries, and to reduce conflicts of interest in the animal welfare policy process. Numerous versions of the reform have been debated, however they are all variations of an independent federal statutory entity dedicated to animal welfare policy and standards development.

Although such a body could not be granted power to enforce animal welfare law (due to constitutional limitations), it could coordinate the development of national animal welfare policy and standards in consultation with the states and territories. This is precisely what the Australian Productivity Commission proposed in its landmark report on the regulation of Australian agriculture in 2017 (Australian Government Productivity Commission, 2017). After identifying several deficiencies with the current governance and regulatory arrangements, including the perception of conflicting interests within agriculture departments, the Productivity Commission recommended the establishment of an Australian Commission for Animal Welfare (ACAW).

It was envisaged that the Commission would oversee the development of national animal welfare standards and monitor the performance of state and territory governments in implementing the standards. However, the Australian Government rejected the need for such a body, raising uncertainty about its proposed constitutional basis and claiming the Productivity Commission had not established a viable role for the proposed ACAW (Australian Government, 2019).

Separately from the Productivity Commission’s report, the Australian Government did establish an Inspector-General of Live Animal Exports Act 2019 (Cth) to oversee the Department of Agriculture’s performance in regulating the trade with a clear focus on animal welfare (Inspector-General of Live Animal Exports Act 2019). While this entity does not perform the role proposed for the ACAW, it is nevertheless an example of an independent statutory entity with a focus on animal welfare that could be expanded and built upon in the future with further resourcing and simple amendments to the enabling legislation. To address equivalent issues at a state and territory level, similar statutorily independent bodies have been proposed to administer state and territory animal welfare law in the form of state Animal Welfare Authorities. These Authorities
could replace the role of departments of agriculture in administering animal welfare legislation at the state level.

Such institutional reforms are not a panacea for the lack of government commitment to addressing current animal welfare challenges requiring urgent attention. However, properly constituted, they could significantly reduce the influence of conflicting political and economic interests currently dominating the policy domain, and facilitate a renewed and balanced focus on upholding current standards and introducing meaningful reforms.

The degree of control exerted by agricultural institutions over animal welfare policy and law has been shown to constitute a form of “regulatory capture”, in which the responsible agencies consistently act in the interests of the livestock and other animal use industries in a way that deviates from the public interest the regulation is designed to serve (Goodfellow, 2016). This is largely due to the fact that the dominant purpose of these institutions is to promote productive and profitable primary industries and otherwise serve the interests of the agricultural sector.

Recent examples of regulatory capture in the animal welfare policy process demonstrate the need for a more independent regulator in this policy domain. One particularly significant example is in relation to the development of Australia’s national Standards and Guidelines for the Welfare of Poultry, led by the New South Wales Department of Primary Industries (DPI). In 2017, Freedom of Information documents revealed (despite denial by the government) that, during the process of developing the standards, DPI regulators held secret meetings with poultry industry executives. The purpose of these meetings was to develop strategies for navigating the draft standards through stakeholder consultation meetings and to arrange for industry executives to vet the proposed independent chairperson for the meetings prior to their appointment (Thomas and Branley, 2017; Ellis, 2018). DPI had also removed reference to the importance of allowing poultry to perform normal patterns of behaviour from the draft standards because this was not compatible with the continued use of barren battery cages for egg-laying hens, a practice the egg industry was seeking to protect (Thomas and Branley, 2018).

Another recent example of regulatory capture involved the federal Agriculture Minister’s last-minute intervention on behalf of the Australian cattle industry to override plans to reduce stocking densities onboard live export ships. Following a two-year review of the Australian Standards for the Export of Livestock from 2018–2019, modest reductions in stocking densities to allow cattle to lie down and better access food and water troughs were recommended for implementation by 1 November 2020. However, after vigorous lobbying from the cattle industry, federal Minister for Agriculture, the Hon. David Littleproud MP, intervened three days before the commencement date to shelve the density reductions and re-insert the old density levels in the revised standards, saving the industry an estimated $40 million per year (Australian Government, 2020).

These are just two specific examples of a systemic approach by government whereby private economic interests are prioritised over the public interest in achieving clear, science-based animal welfare improvements (for a full account of the effects of regulatory capture, see Goodfellow 2015). By delegating responsibility for animal welfare policy exclusively to agricultural departments, the system is subject to capture by institutional design. Accordingly, institutional reform, such as introducing independent offices of animal welfare, is required to remove conflicting political and economic interests and introduce greater independence and evidence-based objectivity into the process.

**Transparent and accountable animal welfare standard-setting process**

A second related campaign is the call for more transparent and accountable animal welfare standard-setting systems. The aim of this reform is to ensure that animal welfare standards ade-
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Quately reflect public opinion, and are consistent with best available science. One way to help achieve this outcome is by creating a more formalised standard-setting system that better protects the interests of animals. Unlike countries such as New Zealand, where the process for developing national standards and regulations is prescribed in law (see, Animal Welfare Act 1999, Pt. 5 and s 183A), Australia’s process is undertaken in an ad hoc fashion where one jurisdiction voluntarily nominates to take on the responsibility of managing the development process for a given set of standards. There is no legislation governing how the process takes place, what factors need to be considered, nor what criteria need to be met. This is problematic, as in the absence of appropriate formalised procedures, agricultural institutions are able to exert significant influence over the process.

These institutions include state and federal ministers for agriculture, departments of agriculture, and peak livestock industry representative bodies; together forming an “exclusive policy community” controlling the development of animal welfare standards (Goodfellow, 2015, pp. 171–173). This is especially the case regarding welfare standards for farmed animals. The key incentives and priorities for these institutions are often misaligned with those of protecting and improving animal welfare, particularly in circumstances where welfare proposals conflict with industry productivity goals (Goodfellow, 2016, pp. 215–216).

When it comes to setting standards of animal care, the Australian agriculture policy community typically adopts a narrow conception of animal welfare which focuses primarily on basic health and biological functioning outcomes. The affective states domain of animal welfare (that is, how the animal is subjectively feeling) has traditionally been downplayed or dismissed by this policy community as being subjective or hypothetical, or at best, indeterminate (Goodfellow, 2015, pp. 237–240). This is not consistent with contemporary animal welfare science which now takes a more holistic approach to welfare assessment in which both the physical and mental states of the animal are considered (Mellor, 2017). Introducing formal legislative criteria for standards development processes may help to prevent this limited conception of animal welfare from frustrating the achievement of science-based welfare standards that more closely align with the interests of animals.

While there may arguably be constitutional barriers to enacting a national animal welfare law to govern the standard-setting process, no such barriers exist for state and territory governments to introduce standards development processes and criteria within their legislation. Amendments could be made to the regulation-making powers within state animal welfare legislation requiring the responsible authorities to be satisfied that any proposed standards are based on relevant scientific evidence and have taken into account community expectations.

The amendments could also include a requirement that all standards proposed are consistent with the substantive duty of care provisions contained in the principal animal welfare legislation. This could improve the coherence of the legislative framework by reducing the level of inconsistency between that which is permitted in the principal legislation relative to the practices permitted in the subordinate industry standards. To further enhance accountability, the legislation could also require all proposed standards to be tabled in the relevant state parliament to encourage high level political debate and greater awareness of animal welfare issues among politicians and the general public.

An example of how such provisions improve accountability in the standards development process can be seen in the recent New Zealand case of The New Zealand Animal Law Association v The Attorney-General [2020] NZHC 3009. Section 183A of the NZ Animal Welfare Act 1999 requires any practices prescribed in regulations that do not meet the substantive animal care obligations of the Act, including the obligation to ensure that the behavioural needs of animals are met, to be brought into line with those obligations within a ten-year period. This provision
allowed the New Zealand Animal Law Association (NZALA) and SAFE (NZ) to challenge the legality of regulations that permitted the use of farrowing crates and mating stalls which prevent pigs from expressing their behavioural needs.

The High Court of New Zealand agreed with NZALA and SAFE, finding that the Minister of Agriculture and the National Animal Welfare Advisory Committee had acted illegally when they failed to phase out farrowing crates and mating stalls within the requisite time period. The Court declared the regulations to be unlawful and invalid, and in response one month later the New Zealand Government announced its commitment to phasing out the use of these crates and stalls by 2025. Prescribing similar criteria and improved processes in Australian state and territory animal welfare legislation could significantly enhance the transparency and accountability of the current standards development framework and lead to more robust and consistent animal welfare standards.

Conclusions

Although Australia is one of the world’s most economically advanced nations, it has failed to implement an adequate framework for animal protection. Due to the country’s federal structure and a lack of national leadership, the Australian legal and regulatory regime for animal welfare and protection is fragmented across the states and territories. Although this fragmentation has created an inconsistent approach to animal welfare, there are some commonalities between the jurisdictions. Almost all fail to recognise the sentience of animals, and they each permit a wide range of practices that cause animal pain and suffering. They also share broader structural and institutional challenges necessitating regulatory reform.

Institutional reform is required to remove conflicting political and economic interests and introduce greater independence and evidence-based objectivity into the animal welfare policy process. This could be achieved through the establishment of federal and state/territory statutory entities dedicated to animal welfare policy and standards development. A related necessary reform is the introduction of a transparent, consistent, and accountable animal welfare standard-setting process. Although achieving these reforms would not address all of the major deficiencies in the Australian animal welfare regime, it would represent a fundamental step in the right direction.

References


Ford v Wiley, 1889. 23 QBD 203.


