

**Regulating animal welfare  
to promote and protect  
improved animal welfare outcomes  
under the Australian Animal Welfare Strategy**

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**To be delivered at AAWS International Animal Welfare Conference  
Gold Coast, 1 September 2008**

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## **Abstract**

This paper applies general thinking and practices about regulation within Western liberal democracies to the subject of regulating animal welfare. It focuses on how animal welfare might be regulated to promote and protect improved animal welfare outcomes consistent with the Australian Animal Welfare Strategy. Specific features of animal welfare must be understood in order to regulate it, like the inability of animals to represent their own interests, the other interests contiguous with animal welfare and the effect of the international trade rules on domestic animal welfare regulation.

Non-regulatory mechanisms are inadequate alone to secure consistent animal welfare outcomes. Regulating animal welfare has been a political process, with stakeholders pressing their differing claims with variable reference to existing knowledge.

Past and existing attempts to regulate animal welfare have treated animal cruelty and animal welfare as one topic to be regulated in the same way but they are better treated as two topics, to be regulated in different ways. Regulation can generally take a legal process approach of command and control, or a social process approach of cooperative regulator-industry problem solving.

It may better achieve animal welfare outcomes to shift regulation of animal welfare from a legal process approach to a social process approach, leaving anti-cruelty offences regulated according to legal process. Different regulatory forms may suit different animal welfare issues, including licenses, disclosure, labelling, non-government standards, co-regulation and regulating the regulators. Five Considerations for Regulators are proposed.

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## **Acknowledgments**

This paper was commissioned by the Department of Agriculture, Forestry and Fisheries (DAFF) as part of the Australian Animal Welfare Strategy (AAWS). It has been produced through a collaborative process between the author and representatives of DAFF and the AAWS Advisory Committee, following a common AAWS approach. It does not represent the official views of DAFF or the AAWS Advisory Committee. Thanks to Laura Budd, Ivan Caple, John Drinan, David Favre and Allan Sheridan for their considerable input and contributions in the development of this paper. Without their help, this paper would be substantially the poorer in scope and outlook.

## 1. Introduction

This paper applies thinking and practice about regulation within Western liberal democracies like Australia to the subject of regulating animal welfare. In particular, this paper discusses how animal welfare might be regulated to promote and protect improved animal welfare outcomes consistent with the Australian Animal Welfare Strategy (**AAWS**). This paper is about *the form* rather than *the content* of animal welfare regulation.

While much has been written about the possible principles, content or outcomes of regulation of animal welfare, little has been written about the form that regulation on this topic should take.<sup>1</sup> While this topic may receive incidental attention in discussions of principles, content or outcomes, it deserves attention as a topic in its own right. The same principles, content or desired outcomes may animate a civil right to sue for compensation, an administrative or regulatory regime or criminal laws or, at the non-regulatory end of the behaviour change spectrum, an education campaign or a regime of self-regulation. It matters greatly to the process and the outcomes of animal welfare, however, which form a regulation or other method of behaviour change takes.

This paper looks first at specific features of animal welfare which must be understood in order to regulate it, like the inability of animals to represent their own interests, the other interests contiguous with animal welfare and the effect of the international trade rules on domestic animal welfare regulation. After reviewing the aspects of the AAWS relevant to the topic of regulating animal welfare, this paper seeks to identify when it may be appropriate to regulate animal welfare, noting both that regulation should be as limited as possible to achieve desired aims and that non-regulatory mechanisms alone are not sufficient to ensure positive animal welfare outcomes.

Developing and administering regulation is not just a policy process, it is a political process. While animal welfare has not tended to be a party political issue, in the past decades it has been actively contested by different sectors of the community, most notably animal use industries and the animal protection movement.

Past and existing attempts to regulate animal welfare have treated animal cruelty and animal welfare as one topic, largely deserving the same form of regulation. This approach may have impeded securing both reduced animal cruelty and improved animal welfare. This paper suggests that it would be better to treat animal cruelty and animal welfare as two separate, albeit related, topics, and to use different forms of regulation in each case. Regulation can generally take a legal process approach of command and control, or a social process approach of cooperative regulator-industry problem solving. It may better achieve animal welfare outcomes to shift regulation of animal welfare - applying as it does to the heterogeneous socially

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<sup>1</sup> Radford (2001) is one of the few who devotes substantial attention to this topic.

sanctioned activities constituting the lawful use of animals - from a legal process approach to a social process approach, leaving anti-cruelty offences regulated according to legal process through the criminal law.

Given the effect that different forms of regulation may have on animal welfare processes and outcomes, it is necessary to consider the different regulatory options that may suit different animal welfare issues, including licenses, disclosure, labelling, non-government standards, co-regulation and regulating the regulators. The paper concludes by proposing Five Considerations for Regulators, in the same vein as the Five Freedoms commonly claimed to apply to the handling of animals.

This paper includes in its scope regulation of all animal welfare issues, but it focuses on animals in agriculture. This focus is due to the fact that nearly all animals in contact with humans are agricultural animals (Wolfson and Sullivan, 2004, 206) and, for related reasons, that regulations pertaining to animals in agriculture are far more detailed and developed than regulations pertaining to other animal use sectors. Where State and Territory regulation is discussed, New South Wales regulation is taken as the example. While regulation is by no means uniform across Australian jurisdictions, the New South Wales regulatory regime is sufficiently similar to those of the other States and Territories for the purposes of this paper.

## **2. Summary**

### **2.1 Introduction**

This paper applies thinking and practice about regulation within Western liberal democracies like Australia to the subject of regulating animal welfare. In particular, this paper discusses how animal welfare might be regulated to promote and protect improved animal welfare outcomes consistent with the Australian Animal Welfare Strategy (**AAWS**). This paper is about *the form* rather than *the content* of animal welfare regulation.

### **2.2 Considerations for regulating animal welfare**

#### **Definitions**

'Animal welfare' may be defined differently depending on the context, whether scientific, legal or otherwise. Definitions may be performance based (or the welfare outcome achieved) or systems based (or the means by which the welfare outcome is achieved). Systems are often easier to assess (and so regulate) but do not necessarily produce the desired outcome. Regulations that are prescriptive as to systems may entrench systems that perform well in relation to certain measures of animal welfare but impede the uptake of systems that perform better for other measures. An ethical matrix approach to defining animal welfare is a more sophisticated and equitable approach to this multi-factorial question.

Legislative definitions have varied over time, starting with a concern only to prohibit cruelty and moving more towards including positive obligations to secure an animal's welfare.

***Direct and indirect interests in animal welfare***

As a subject of regulation, animal welfare is unusual in that no human being has a "direct interest" in its outcome. To the extent that humans have an interest, it is either an indirect interest in an animal's welfare, or a direct interest in some other fact about the animal that affects humans directly, such as the economic value of the animal or its communicable disease status. These qualities may be related to animal welfare but they are not the same thing.

Because neither animals themselves, nor authorised inspectors, nor concerned others can (easily) bring a complaint over animal welfare in most circumstances, much animal welfare regulation must rely on the substantial voluntary compliance of those regulated.

***Interests other than animal welfare***

Animal welfare is only one of several interests when it comes to regulating activities affecting animals. Other related interests include economics, the environment (including environmental effects on animals, and animal industry effects on the environment), planning and local government, human and animal health, occupational health and safety, animal product food safety and quality, research, tourism and entertainment. Realisation of these other interests will affect, and sometimes impinge on, realisation of the interests of animal welfare.

***International considerations***

Under the WTO Agreement, it is not permitted for a country to discriminate on the basis of "like products". Two products will be "like" despite differences in "non-product related process and production methods". The problem for animal welfare interests is that nearly all attempts to improve animal welfare are concerned with *the way in which* the animals are treated, not with the end product. A nation is likely to be in breach of the WTO Agreement if it has domestic laws purporting to prohibit the sale of one particular animal product produced in a way that entails objectively poor animal welfare, but treating without discrimination the sale of that same animal product produced in a way that entails objectively good animal welfare, whether domestically or internationally produced.

In today's highly globalised world, a nation must often either reduce its animal welfare standards to the lower levels of other countries, or see the applicable domestic animal industry shrink or disappear. This significantly limits the nation's scope for regulation of domestic animal welfare standards.

### ***Multiple jurisdictions***

Animal issues are largely regulated at a State and Territory level, except where there is an international element to the issue, such as quarantine or trade, in which case the Commonwealth Government has regulatory responsibility including over aspects of treatment of animals and certification of animal or product health status. Such a situation arises in relation to regulations covering the live export of animals from Australia. It has been noted as a significant issue that the existing framework of jurisdictional regulatory control over livestock welfare in Australia is in need of significant revision to achieve an acceptable level of national consistency for livestock industries.

Companion animals, and other domestic animals, while being regulated under State or Territory legislation, tend to be regulated through 'animal management' requirements enforced by local government authorities. The same challenges associated with inconsistency between jurisdictional regulations for many issues are regularly experienced in the regulation of animal issues.

### ***2.3 The Australian Animal Welfare Strategy***

The scope of the AAWS is extremely broad: the care, uses and direct and indirect impacts of human activity on all sentient animals in Australia. Uses of animals are in six key animal sectors: livestock/production animals, animals used in research and teaching, aquatic animals, companion animals, animals used for work, sport, recreation and display, and animals in the wild. The stakeholders to be consulted and involved are likewise extremely broad including all animal use industries and animal welfare groups, and most others with an interest in animal welfare.

Factors shaping the animal welfare framework as identified in the AAWS include policies, legislation/regulation, co-regulation/QA, national codes, reporting/benchmarking, education/training, research/development, international developments, and community expectations. Several of these are regulatory.

### ***2.4 The case for regulating animal welfare***

Regulation represents an imposition on people and must be justified to be made. The case for regulating animal welfare might rely on the following propositions:

- that there is a need to protect the welfare of animals,
- that there is sufficient community wide agreement on basic principles about animal welfare that provide a basis for regulation, namely that use of animals is acceptable, as long as it is humane,
- that animal welfare can be genuinely promoted through regulation, and
- that the protection of animal welfare cannot be conveniently achieved in some way other than regulating it, principally because private and third parties cannot, through the legal system, satisfactorily vindicate those interests and because the unregulated market is incapable of delivering that outcome.

## **2.5 Politics and regulation**

Successive pressures to regulate animal welfare have stimulated successive counter-reactions as industry has sought to limit the effect of regulation. Theories of 'industry capture' of regulators suggest that regulations favour the interests of industry over the public. The extent to which regulations recognise the views of industry or community groups depends, in part, on their respective capacities to exert influence. Actual influence may differ from claimed influence. Issues like live export and the content of codes have been openly contested by industry and interest groups. From the regulators' side, effective enforcement of regulation will depend on the resources the government allocates to that activity.

## **2.6 Regulatory approach**

There are two major approaches for government regulation in enforcement or implementation: legal process and social process (Kagan, 2004, 221). The legal process approach, also known as "command and control", views regulations as authoritative legal norms whose breach demands punishment. The social process approach provides for cooperative government-regulated industry problem solving and a remedial response to breaches.

The primary role for regulation is not to establish absolutes of right and wrong, but to get the work of society done by refashioning human and other resources so that a particular outcome will be achieved. Different issues may best be regulated at different points along the legal-social process spectrum, reflected in a pyramid of sanctions, from warning letters at the base to criminal penalty or license revocation at the peak.

There is some confluence of opinion between industry and the animal protection movement that regulation of animal welfare standards by breach leading to possible criminal prosecution is the wrong regulatory frame, and that a more administrative frame closer to the social process approach would achieve better animal welfare outcomes.

## **2.7 Forms of regulation**

### ***Administrative vs criminal approach***

There are at least two important implications of regulating compliance with animal welfare standards through the framework of anti-cruelty offence legislation. Firstly, because criminality is the peak of the pyramid of possible sanctions, it immediately - and arguably inappropriately - escalates breach of animal welfare standards to that peak. Second, if animal industry representatives, when making submissions on the content of an MCOP, have in mind the possibility of prosecution for breach of that MCOP, it may lead them to argue for lower standards of animal welfare in the MCOP than they expected to be able to attain, in order to minimise the possibility of prosecution.

### ***Regulation by licence***

License systems create localised regulations that apply only to the licensees who have 'opted in'. Licensees have often made a significant commitment to the licensed activity, through investment of capital or completion of education or training, and so may have a large stake in complying with licensing regulation. Regulation may be complex, and usually requires positive conduct, not just refraining from poor conduct. Licensing is often a more resource intensive method of regulation for all concerned. Some animal industries, including research, zoos, circuses and the live export industry, are regulated in ways that include licencing.

### ***Disclosure***

Mandatory disclosure of information about a regulated entity, including any risks relevant to those affected by its actions, is an interesting alternative to more invasive regulation. Regulators may recognise that they do not have the resources to monitor compliance themselves, but open disclosure permits the public, or consumers, or shareholders to protect themselves. The AAWS aims to facilitate 'the development, collection and collation of national statistics on animal welfare standards as a basis to benchmark Australia's animal welfare outcomes' as a move in this direction.

### ***Labelling***

Labelling is frequently mentioned in discussions about animal welfare regulation as a way of informing consumers about the animal welfare credentials of animal products. Labelling is now under consideration by the European Union for a large range of products according to objective scientific measures, and is currently in place through a scheme jointly developed by the Australian Egg Corporation Limited and State and Territory Governments for labelling the provenance of eggs.

### ***Non-government standards***

There is scope for voluntary compliance with standards produced by non-government organisations or for industry self-regulation as a method of achieving results that otherwise might require regulation. The RSPCA(UK)'s Freedom Foods and the Australian Egg Corporation Limited's Egg Corp Assured scheme are examples. Voluntary compliance always raises the possibility that additional costs of compliance may make the participant less competitive against non-participants.

### ***Co-regulation***

Co-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 the regulator either sets or negotiates with industry. The AQIS Export Meat Program is an example where a co-regulatory framework has reduced unnecessary structural requirements for compliance and allowed for the development of validated but cost-effective approaches under a Quality Assurance framework that meets the operational outcomes for food safety and other regulatory requirements to export meat from Australia.

### ***Regulating the regulators***

The substantial inroads of regulation into many activities poses the question of the accountability of the regulators themselves. The AAWS project to encourage national consistency of livestock animal welfare outcomes under jurisdictional legislation is seeking to make regulation more efficient for the benefit of national industries. Also, ministerial advisory committees such as the National Consultative Committee on Animal Welfare to the Federal Minister, and the Animal Research Review Panel to the NSW Minister, are a source of advice independent of the regulators.

### **2.8 Five Considerations for Regulators**

The Five Considerations for Regulators in animal welfare are derived from this paper and seek to provide guidance for regulators equivalent to the guidance from the Five Freedoms for animal handlers.

- 1. Understand the specific features of animal welfare relevant to regulating animal welfare**
- 2. Have a good reason for imposing additional regulations, taking into account non-regulatory measures**
- 3. Treat regulation of animal welfare and regulation of animal cruelty as separate, though related, topics**
- 4. Aim to move regulation of animal welfare away from the legal process end of the spectrum and towards the social process end of the regulatory spectrum**
- 5. Consider the suite of regulatory forms for regulating animal welfare**

## **3. Considerations for regulating animal welfare**

Before looking at general regulatory theory, it is important to establish the specific features of animal welfare that must be kept in mind while applying general regulatory theory to it. Every issue that the subject of regulation - be it inner city crime, climate change, the stock exchange or animal welfare - 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.

### **3.1 Definitions**

The term “animal” is defined differently depending on the aims and purposes of the legislation or other regulation. For example, the centrepiece animal welfare law in New South Wales, the *Prevention of Cruelty to Animals Act 1979 (NSW)* (**POCTAA**), defines animals as “(a) a member of a vertebrate species including any amphibian, or bird, or fish, or mammal (other than a human being), or reptile, or (b) a crustacean

but only when at a building or place (such as a restaurant) where food is prepared or offered for consumption by retail sale in the building or place.” By contrast, an “animal” is defined in section 528 of the *Environment Protection and Biodiversity Act 1999 (Cth)* as “any member, alive or dead, of the animal kingdom, other than a human being”. The definition of “animal” in any regulation will be driven by the purpose of that regulation and will differ according to purpose.

“Animal welfare” is another term that is capable of various definition. Definitions vary depending on whether they are for scientific, legal or other purposes. An authoritative basic scientific definition is from the World Organisation for Animal Health (also known as the OIE) (OIE, 2008, 285):

“Animal welfare” means how an animal is coping with the circumstances 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, able to have normal social contact with others of the same species, and if it is not suffering from unpleasant states such as pain, fear, and distress. Good animal welfare requires disease prevention and veterinary treatment, proper housing, management, nutrition, humane handling and humane slaughter/killing. By scientific convention, “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.

The above definition of welfare combines elements of performance-based standards (or the welfare outcome achieved) with systems-based standards (or the means by which the welfare outcome is achieved). Performance-based standards include whether the animal is “healthy, comfortable, well nourished, safe, able to express innate behaviour ...”. Systems-based standards include whether the animal has “proper housing, management, nutrition ...”. In regulatory enforcement terms, it is often easier to assess systems-based standards (Is there a proper system for providing food and water? Is the housing in good condition?) than performance-based standards (Is the animal comfortable? Is the animal well nourished?).

An issue for regulators imposing systems based standards is validation of the animal welfare outcome achieved. Unless the systems involved have been shown to deliver good welfare outcomes under normal operational conditions, then it is possible for a system to be compliant but ineffective at achieving the animal welfare outcomes sought. In compliance terms, performance standards are all that matter in the final analysis. Regardless of what system is used, do the animals have good welfare? One approach is to aim for outcomes that aspire to those ideal states expressed by the UK Farm Animal Welfare Council’s ‘Five Freedoms’.

There are limitations however to this more or less direct approach. Different production systems give different emphasis to one or other of those five ‘outcomes’ statements (or welfare indices), still begging the question of which production system is to be preferred on animal welfare grounds. As animal welfare performance is a multi-factorial quality, comparing welfare across multiple management systems

can be complicated. Where multiple animal management systems are used, among producers in the same State or in Australia or between Australia and other countries, it may be extremely difficult to compare their performance for regulatory purposes. Freedom Foods' assessment in the United Kingdom shows that on some aspects of welfare (such as incidence of communicable diseases), free range systems for layer hens perform more poorly than cage based system (RSPCA(UK), 2008).

Regulations that are prescriptive as to systems raise questions of equity and may effectively entrench systems that perform poorly on some welfare indices whilst impeding the uptake of systems that perform as well or even better on those or other welfare indices.<sup>2</sup> Gas stunning of poultry as a form of humane stunning, instead of electrocution or other approved methods, is arguably an example of a more humane practice, developed after the applicable *Model Code of Practice for the Welfare of Animals: Domestic Poultry* 4<sup>th</sup> ed<sup>n</sup>, (Primary Industries Standing Committee, 2002) that does not have the benefit of express protection afforded by compliance with that code. Those who seek to improve animal welfare over and above the minimum level may find themselves in need of alternative mechanisms that do not disadvantage them in comparison to those who seek to operate purely at the minimum level.

An ethical matrix system for evaluating animal welfare can help to deal with the multi-factorial nature of animal welfare decisions. Whiting claims that the ethical matrix can be used "to reflect the sensibilities of a pluralistic society in response to a desire for a more integrated, transparent and comprehensive approach to develop policy and regulator decisions" (Whiting, 2004, 1). He seeks to demonstrate that claim by applying the ethical matrix system to the question of downer cattle transport but the system could be equally applied to any animal welfare question. The ethical matrix approach can best be summarised by a matrix (Mepham, 2000, 170):

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<sup>2</sup> The model codes of practice that in many ways 'regulate' agricultural practices are not regularly amended. Advances in animal welfare practices may well differ from the conduct stipulated in the codes. Nevertheless, it is important to note that the codes represent a type of 'safe harbour' (Sullivan and Wolfson, 2008, 115f), in that compliance with them generally equates with a defence to an alleged breach of an anti-cruelty statute. Seen in this way, as long as a new agricultural practice is not in itself a breach of the prohibition on animal cruelty, it is still lawful to use that practice instead of a practice in a code.

Respect for:	Wellbeing	Autonomy	Justice
Treated organism	Eg, Animal welfare	Eg, Behavioural freedom	Telos [intrinsic value respected as sentient beings]
Producers (eg, farmers)	Adequate income and working conditions	Freedom to adopt or not adopt	Fair treatment in trade and law
Consumers	Availability of safe food; acceptability	Respect for consumer choice (eg, labelling)	Universal affordability of food
Biota	Protection of the Biota	Maintenance of Biodiversity	Sustainability of Biotic populations

As the matrix suggests, the ethical matrix system seeks to identify the issues relevant to significant parties affected by a specific decision or policy as an aid to consideration of the issues.

Legislative definitions have varied over time, starting with a concern only to prohibit cruelty and moving more towards including positive obligations to secure an animal's welfare. The world's first anti-cruelty offence of animal welfare apparently came from the Puritans of the Massachusetts Bay Colony, who enacted a "Body of Liberties" in 1641 that prohibited "any Tirrany or Crueltie towards any brute Creature which are usuallie kept for man's use" (quoted in Sunstein, 2004, 252). Compare that to section 5 of POCTAA today:

- (1) A person shall not commit an act of cruelty upon an animal.
- (2) A person in charge of an animal shall not authorise the commission of an act of cruelty upon the animal.
- (3) A person in charge of an animal shall not fail at any time:
  - (a) to exercise reasonable care, control or supervision of an animal to prevent the commission of an act of cruelty upon the animal,
  - (b) where pain is being inflicted upon the animal, to take such reasonable steps as are necessary to alleviate the pain, or
  - (c) where it is necessary for the animal to be provided with veterinary treatment, whether or not over a period of time, to provide it with that treatment.

This provision includes an offence in section 5(1) similar in flavour to the 1641 offence, in that it prohibits cruelty, but it also imposes positive duties on a person in charge of an animal to take steps to alleviate pain (section 5(3)(b)) and to provide an animal with veterinary treatment (section 5(3)(c)). POCTAA also imposes other positive duties on a person in charge of an animal, most significantly, to "provide the animal with food, drink or shelter, or any of them, which, in each case, is proper and

sufficient and which it is reasonably practicable in the circumstances for the person to provide” under section 8.<sup>3</sup>

Bernard Rollins (2004, 959-960), a professor of philosophy at Colorado State University who has played a significant part in the debate over animal ethics in the United States, suggests the reason for this shift:

A moment’s reflection on the development of large-scale research and high-technology agriculture elucidates why these innovations had lead to the demand for a new ethic for animals in society. In a nutshell, this new technology represents a radically different playing field of animal use from the one that characterized most of human history: in the modern world of agriculture and animal research, the traditional anticruelty ethic grows increasingly less applicable. A thought experiment makes this clear. Imagine a pie chart that represents all the suffering that animals experience at human hands today. What percentage of that suffering is a result of intentional cruelty of the sort condemned by the anticruelty ethics and laws? ... only a fraction of 1% ...

The shift in emphasis in the definition of animal welfare is reflected in the fact that Australian legislation enacted up to and including 1986 tends to have names like *Prevention of Cruelty to Animals Act* whereas each equivalent statute enacted from 1992 onwards has been titled *Animal Welfare Act* or *Animal Care and Protection Act*. The following is a table of Australian animal welfare legislation in date order:

Name of Act	Jurisdiction
<i>Prevention of Cruelty to Animals Act 1979</i>	NSW
<i>Prevention of Cruelty to Animals Act 1985</i>	SA
<i>Prevention of Cruelty to Animals Act 1986</i>	VIC
<i>Animal Welfare Act 1992</i>	ACT
<i>Animal Welfare Act 1993</i>	TAS
<i>Animal Care and Protection Act 2001</i>	QLD
<i>Animal Welfare Act 2002</i>	WA
<i>Animal Welfare Act 2007</i>	NT

An interesting feature of animal welfare definitions in legislation is that their unit of concern is an individual animal. This contrasts with the way that most animals whose welfare is regulated under that legislation – that is to say, animals in agriculture<sup>4</sup> - experience life, which is in a herd (or flock or other group). It may be that the more meaningful unit is the herd rather than the individual animal, in terms of the animal handling practices that affect welfare. Furthermore, it may be that, by seeking to maximise the welfare of the herd, the sum of the welfare of the individual animals

<sup>3</sup> A provision of this kind has even been seen as creating a kind of duty of care in relation to animal welfare (White, 2003), though query whether this concept from civil law is sufficiently similar properly to describe the legal effect of provisions like section 8 of POCTAA.

<sup>4</sup> Estimates of the number of animals used in agriculture as a percentage of all animals with whom humans interact are of the order of approximately 98 percent in the United States, and Australian figures are probably similar (Wolfson and Sullivan, 2004, 206)

within the herd would be greater than if one were to seek to maximise welfare of each individual animal within the herd.

A final comment before leaving the issue of defining animal welfare. When the definition is for the purpose of science, it may be important to include only what we know scientifically about animal welfare. When it comes to regulation, however, we must accept that we are at times obliged to make decisions in a state of imperfect knowledge. We should therefore be taking a risk management approach. Requiring codes of practice to be based only on objective scientific evidence, rather than taking that risk management approach, runs the risk of making animals the default victims of the current state of our knowledge or ignorance.<sup>5</sup>

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<sup>5</sup> See a strong criticism by Sullivan and Wolfson of the scientific approach taken to assessing animal welfare only within the limits of present knowledge by both the New Jersey Department of Agriculture, in developing standards for the care of domestic livestock, and the Appellate Division (the court) in review of the Department's decisions in *New Jersey Society for the Prevention of Cruelty to Animals v New Jersey Department of Agriculture* (NJ Superior Ct App Div Feb 19, 2007) (Sullivan and Wolfson, 2008)

### **3.2 Direct and indirect interests in animal welfare**

A subject of regulation, animal welfare is unusual in that no human being has a “direct interest” in its outcome. To the extent that humans have an interest, then it is either indirect interest in an animal’s welfare, or a direct interest in some other fact about the animal that affects humans directly. To say that no human has a direct interest in the welfare of an animal is to make the same point as saying that no human has a direct interest in the welfare of any other human. Welfare is a quality that is only experienced by the being to whom it relates.<sup>6</sup> Nevertheless, one person may have a profound interest in the welfare of another person, such as a parent’s interest in a child’s welfare, or the mutual concern that spouses may have for each other. Similarly, a person may have a profound interest in the welfare of an animal, as often happens between a person and a companion animal or a farmer and their livestock. In all of these cases, the interest in that other being’s welfare is indirect.

Equally, a person may have a direct interest in a quality of an animal that does directly affect that person. A farmer has a direct financial interest in the economic value of their livestock. Humans in close proximity to a bird with avian influenza have a direct personal health interest in the communicability of that disease. A consumer of animal products has a direct consumption interest in the quality of the product. Equivalent examples between humans would include the business or financial interest of an employer in the capacity for productive work in their employee, or the health interest of people in close proximity to a person with a communicable disease.

In each of these cases of indirect interest, the welfare of the object of the interest may be relevant to the subject’s interest: a farmer may obtain a better price for an animal that has experienced a high standard of welfare, a human may find their pet dog healthier, happier and keener to show affection, an animal or person carrying a communicable disease with a high standard of welfare may be more capable of resisting infection. In each case, however, it is not the welfare of the being itself that is the cause of direct concern but another quality. This is the case, even though the other quality may be affected by the being’s welfare.

The philosophical turn this paper has taken has important ramifications, in practice and in law. In practice, when most capable adults experience harm to their welfare, they can take remedial action as well as, in appropriate circumstances, bringing a legal complaint. By contrast, the capacity for animals experiencing harm to their welfare to take remedial action in practice is often severely limited due to their lack of autonomy. The capacity of animals to bring a legal complaint is non-existent due

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<sup>6</sup> The AAWS’s acknowledgement of the “increasing recognition in the community that animals have an *intrinsic value*” (italics added) (DAFF, 2005, 5) is a corollary of the proposition that animals have a direct interest in their own welfare.

to the fact that our legal system does not recognise that animals have the right to bring a complaint (or have one made on their behalf) due to a lack of standing.<sup>7</sup>

It follows that, because neither animals themselves, nor authorised inspectors, nor concerned others can (easily) bring a complaint over animal welfare in most circumstances, much animal welfare regulation must rely on the substantial voluntary compliance of those regulated.

### **3.3 *Interests other than animal welfare***

As is virtually always the case when seeking to regulate an area, there are many interests other than those immediately relevant to the area to be regulated that must be taken into account and may compromise the outcomes sought. When regulating occupational health and safety, other relevant interests include capacity of employers to afford different options of systems of work, level of training and education of the workforce, and international economic factors and laws.

So too with regulating animal welfare. Animal welfare is only one of several interests when it comes to regulating activities affecting animals. Related interests other than animal welfare include economics, the environment (including environmental effects on animals, and animal industry effects on the environment), planning and local government, human and animal health, occupational health and safety, animal product food safety and quality, research, tourism and entertainment. Each of these interests is a direct interest of humans with an importance distinct from animal welfare, to be considered alongside humans' indirect interest in animal welfare. Realisation of these other interests will affect, and sometimes impinge on, realisation of the interests of animal welfare<sup>8</sup>.

Very different animal welfare standards may relate to the same animal in different animal use sectors. A rabbit may be kept as a pet, for sale in a pet shop, the subject of scientific research, raised for its meat or fur in agriculture, transported by a commercial enterprise, for sale in a livestock market, killed at an abattoir, on display in a zoo, used as part of a performance, or living in the wild (this last setting not being an animal use sector) (Radford, 2001, 123).

In response, Favre (quoted in Radford, 2001, 123) argues, "If we are willing to admit that a rabbit is a rabbit regardless of who owns it or where it is being held, then it is

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<sup>7</sup> Note that, the mere fact that some humans, such as minors and those with severe learning disabilities, do not have the practical capacity to bring a legal complaint does not stop them having a right to bring a legal complaint. This right may be exercised on their behalf by a parent or guardian by bringing a legal complaint on their behalf. There is no equivalent right for a human to bring a complaint on behalf of an animal, even where the animal is considered to possess sentience.

<sup>8</sup> This is explicit in the AAWS: 'animal welfare is a complex issue. Science and ethics are both essential. Science provides the body of evidence about animals that is used for moral and ethical judgements about their welfare. At the same time, decisions about animal welfare are influenced by cultural, social, economic and occupational health and safety considerations. Australia emphasises the importance of stockmanship, the skills and responsibilities of animal carers and their role in good husbandry and the delivery of acceptable animal welfare outcomes' (DAFF, 2005, 6).

apparent that only one set of standards is necessary to protect rabbits around the world.” The fact that regulatory protections are “greater” for rabbits used in research than for rabbits as pets leads Radford to remark that “Protection is more complicated than it might initially appear” (Radford, 2001, 123). In the terms of this paper, this situation may be explained by at least three factors. First, the definition of an animal’s welfare may differ in different settings, for example, a pet rabbit will be used to human contact and may depend on it as its primarily source of socialisation, whereas a wild rabbit may find contact with humans deeply stressful. Secondly, there are interests in addition to animal welfare that affect the regulation of animal welfare. Thirdly, animal welfare regulation is only one factor influencing animal welfare outcomes for animals.

### **3.4 Multiple jurisdictions**

Animal issues are largely regulated at a State and Territory level, except where there is an international element to the issue, such as quarantine or trade, in which case the Commonwealth Government has regulatory responsibility including over aspects of treatment of animals and certification of animal or product health status. Such a situation arises in relation to regulations covering the live export of animals from Australia.

Companion animals, and other domestic animal issues, while being regulated under State or Territory legislation, tend to be regulated through ‘animal management’ requirements enforced by local government authorities. The same challenges associated with inconsistency between jurisdictional regulations for many issues are regularly experienced in the regulation of animal issues as well. The significant degree of traffic of animals, whether domesticated or wild, across borders is just one common situation raising the issue of inter-jurisdictional differences.

It has been noted as a significant issue that the existing framework of jurisdictional regulatory control over livestock welfare in Australia is in need of significant revision to achieve an acceptable level of national consistency for livestock industries. While each jurisdiction has anti-cruelty legislation, they all differ in their terms. An important example of an issue on which the anti-cruelty statutes differ is the way in which each statute deals with the national model codes of practice (**MCOPs**).<sup>9</sup> MCOPs are key documents in the regulation of animal welfare in Australia, setting out detailed procedural guidance on acceptable practices for a wide range of animals and settings. While some statutes make it an offence to breach an MCOP<sup>10</sup>, others make the fact of compliance or non-compliance with an MCOP admissible as evidence in proceedings under the statute for failure to comply with the statute<sup>11</sup>, while others still make compliance with an MCOP a defence to a charge of cruelty<sup>12</sup>. In a recent case involving live export of sheep, an exporter of sheep was found to have

<sup>9</sup> Eighteen MCOPs have been commissioned by the Primary Industries Ministerial Council (or its predecessor). Topics for MCOPs include the pig, animals at saleyards, and transporting of cattle.

<sup>10</sup> For example, *Animal Care and Protection Act 2001 (QLD)*, section 15.

<sup>11</sup> For example, POCTAA, section 34A.

<sup>12</sup> For example, *Animal Welfare Act 2002 (WA)*, section 25.

breached Western Australian anti-cruelty legislation, however the operation of that legislation was found to be rendered invalid because it was found to be inconsistent with applicable Commonwealth legislation regulating the same conduct<sup>13</sup>.

In the case of all anti-cruelty statutes, MCOPs are only incorporated if specifically referred to in the statute or subordinate legislation under the statute. So, different jurisdictions may, and do, refer to different MCOPs, while leaving other MCOPs unrecognised in that jurisdiction's legislation.

It is not just the terms of the regulations that differ across jurisdictions. It is also the regulators, and the manner in which regulations are implemented and enforced. So, even when the terms of regulation are the same, or at least consistent, the manner in which they are regulated (including the resources devoted to regulatory activities) may produce different results.

The significance of this issue is recognised in the AAWS, which includes an objective to “facilitate improved consistency of legislation across states and territories for improved and sustainable animal welfare outcomes” (DAFF, 2005, p.11) The use of the terms “consistency” and “harmonised approach” in the AAWS is a reflection of the difficulty of achieving the outcome of uniformity in regulation across the relevant Australian jurisdictions.

### **3.5 International considerations**

The World Organisation for Animal Health, the OIE, has developed outcomes focused animal welfare ‘guidelines’ rather than prescriptive ‘standards’ for use by its 174 member countries in section 3.7 (Animal Welfare) of its *Terrestrial Animal Health Code* (OIE, 2008). These guidelines are intended to help countries address animal welfare risks and seek equivalent welfare outcomes rather than impose restrictive measures on nations of varying levels of economic development.

International law regulating economic relations, under the 1994 Marrakesh Agreement Establishing the World Trade Organisation (**WTO Agreement**), has a major effect on animal welfare considerations, not just in international trade, but domestically in each member nation, including Australia. The relevant provisions are Articles I, III, XI and XX of the General Agreement on Tariffs and Trade, which is incorporated into the WTO Agreement. The effect of these provisions is that it is not permitted for a country to impose discriminatory trade restrictive measures on “like products”. In accordance with WTO jurisprudence, two products will be “like” despite differences in “non-product related process and production methods”.

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<sup>13</sup> *Department of Local Government & Regional Development v Emanuel Exports P/L and others* (Magistrates Court of Western Australian, 8 February 2008) but note that the Western Australian State Solicitor has subsequently advised that the Magistrate was incorrect in finding that the Western Australian legislation was rendered inoperative. A similar issue of inconsistency between Commonwealth and State legislation was raised, but not decided, in *Song v Coddington* (2003) 59 NSWLR 180.

The problem for animal welfare interests is that “nearly all attempts to improve animal welfare are concerned with *the way in which* the animals are treated, not with the end product of meat, eggs, fur, etc.” The upshot of this is that, as far as the WTO Agreement is concerned, “an egg is an egg ... and tuna is tuna”, regardless of the effect of the method of production on the welfare of the animal. Accordingly, a country is likely to be in breach of the WTO Agreement if it has domestic laws purporting to prohibit the sale of one particular animal product produced in a way that entails objectively poor animal welfare, but treating without discrimination the sale of the same animal product produced in a way that entails objectively good animal welfare, whether domestically or internationally produced (Stevenson, 2003, 4-5).

This means that a country cannot prohibit or in other ways restrict the import or domestic sale of an animal product solely on the grounds that it has been produced in a way that it finds objectionable on animal welfare grounds<sup>14</sup>. Most improvements in animal welfare add to the eventual cost of the animal product. While it is open to a country to prohibit certain animal production methods on animal welfare grounds within its borders, the animal products produced according to higher animal welfare standards are likely to cost more than those produced to lower standards elsewhere. The likely result is that domestically produced animal products will be more expensive in comparison with foreign products produced to lower standards, leaving them uncompetitive on price, both domestically and internationally.

Given the highly globalised nature of today’s world, the invidious choice for such a country is either to reduce its standards to the lower levels of other countries, or see the applicable domestic animal industry shrink or disappear. The upshot is that countries have a severely limited scope to regulate animal welfare standards domestically. Radford describes this “very real dilemma” thus:

[should] proponents of improved animal welfare ... in order to be ethically consistent, always seek the highest possible domestic standards of protection even though to do so may encourage manufacturers and producers to move their activities to other countries, with the result that animal suffering is simply exported to jurisdictions where the standards may be significantly less, or even non-existent? Or is it better to impose standards with which commercial undertakings can live, albeit that this means compromising the interests of animals [domestically] (Radford, 2001, 120)?

On this question, it is noteworthy that the AAWS “provides a framework for sustainable improvements in animal welfare outcomes, based on scientific evidence and social, economic and ethical considerations” (DAFF, 2005, 7). Through the references to “sustainable” improvements based, among other things, on “economic” considerations, as well as the statement that the AAWS ‘builds on historic and

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<sup>14</sup> Under the Sanitary and Phytosanitary Agreement of the General Agreement on Tariffs and Trade (known as the SPS Agreement), trade restrictive measures may be imposed on products that are shown to carry an animal or human health risk that exceeds the importing country’s ‘acceptable level of protection’. Animal welfare is not considered as an animal or human health risk, for the purposes of the SPS Agreement.

existing animal welfare arrangements in Australia' (DAFF, 2005, 5), it appears clear that the AAWS has declared a preference for the second option described by Radford.

The dilemma described above may paint too pessimistic a picture, at least in some cases. Clearly, there are many factors other than animal welfare that affect product price, such that a more expensive animal welfare component of the price does not necessarily render the product uncompetitive overall. Furthermore, consumer preference for products embodying better animal welfare standards can sometimes overcome price differences. Responding to the economics of globalisation, corporations may indeed move aspects of their operations to countries with lower general production costs but they may require, through private sourcing arrangements, that their animal products be produced to standards of animal welfare at least comparable to the country of eventual sale, so that they can badge themselves as animal welfare friendly.

#### **4. The Australian Animal Welfare Strategy**

This section of the paper looks at the specific regulatory orientation that the AAWS proposes in relation to animal welfare.

The AAWS covers “all sentient species of animals” (Australian Department of Agriculture, Fisheries and Forestry (DAFF), 2005, 7), a definition that differs from the definition of ‘animal’ in the various State and Territory primary animal welfare statutes.

Interestingly, the AAWS contains no explicit definition of animal welfare. This may be in recognition of the different definitions of animal welfare that may be appropriate in different settings. The AAWS vision is that ‘the welfare of all animals in Australia is promoted and protected by the development and adoption of sound animal welfare standards and practices’ (DAFF, 2005, 7). In focussing on delivering standards and practices for the humane treatment of all sentient animals, the vision advances a systems-based, as opposed to performance-based, concept of animal welfare.

It would be hard to identify an animal welfare issue in Australia that does not fit within the scope of the AAWS. The scope of the AAWS is the care, uses and direct and indirect impacts of human activity on all sentient animals in Australia (DAFF, 2005, 7). Uses of animals are in “six key animal sectors: livestock/production animals, animals used in research and teaching, aquatic animals, companion animals, animals used for work, sport, recreation and display, and animals in the wild” (DAFF, 2006, 6). Animals in the wild includes “native and introduced wildlife and feral animals” (DAFF, 2005, 7).

The constituency of, or stakeholders in, the AAWS is extremely broad. AAWS processes aim “to engage all animal use industries, including the livestock industries, the aquaculture and fishing industries, companion animal carers and the

companion animal industry, recreational animal industries, the veterinary profession, researchers, community groups, animal welfare organisations, governments and the community” (DAFF, 2006, 13). Implementation of the AAWS is intended to “meet the expectations of the whole of the Australian community ...” (DAFF, 2005, 6).

Factors shaping the animal welfare framework as identified in the AAWS include “Policies, Legislation/regulation, Co-regulation/QA, National codes, Reporting/benchmarking, Education/training, Research/development, International developments, Community expectations.” (DAFF, 2005, 9) Perhaps the first four or five of these fall within the category of regulation, although “international developments” may include regulation as well. This clearly establishes that regulating animal welfare as a means to achieve improved animal welfare outcomes is a primary concern of the AAWS, but this is not the AAWS’s only concern or means.

## **5. The case for regulating animal welfare**

### **5.1 *Making the case for regulating animal welfare***

Regulations are an imposition on those subject to them. It is a basic principle of a liberal society that we should not impose on others unless there is a good reason for doing so. In 1869 John Stuart Mill enunciated a famous version of this principle that, “The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others” (Mill, 1869).

The prevention of harm to others that may justify regulation relating to animal welfare is of course principally the prevention of harm to animals. The case for regulating animal welfare might rely on the following propositions<sup>15</sup>:

- that there is a need to protect the welfare of animals,
- that there is sufficient community wide agreement on basic principles about animal welfare that provide a basis for regulation, namely that use of animals is acceptable, as long as it is humane,
- that animal welfare can be genuinely promoted through regulation, and
- that the protection of animal welfare cannot be conveniently achieved in some way other than regulating it, principally because private and third parties cannot, through the legal system, satisfactorily vindicate those interests and because the unregulated market is incapable of delivering that outcome.

This next section of the paper seeks to make this case by establishing those propositions.

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<sup>15</sup> The United Kingdom Better Regulation Task Force has established five 'Principles of Good Regulation' which cover similar ground to these propositions (2003). The five principles are proportionality, accountability, consistency, transparency and targeting. The principles are a useful toolkit for assessing and improving the quality of regulation.

## **5.2 The modern interest in animal welfare**

Modernisation has generated more wealth and an improved standard of living, where citizens have greater periods of leisure and increasingly seek entertainment outside of working hours. It is also inherently leading to increased social complexity and job specialisation and larger systems through urbanisation, rapid technological change, impersonality, and the capacity to harm more interests of more people on an industrial, or equally broad, scale. This phenomenon has called forth more interest in regulation.

The industrialisation of agriculture in the modern era has drastically increased the size of herds, the geographical dispersion of smaller gene pools, and intensified herd productivity. It has also provided for far greater geographical dispersion of animal products from common sources, yet at the same time a reduction in the proportion of the population actually involved in agricultural production systems. This has led to increased perceptions of health risk from animal products by the public.

As with many risks in our society, it appears that the actual health risks from consuming animal products are far lower than perceived<sup>16</sup>. Such perceptions and realities of risk have created more political scope for regulatory intervention into the treatment of animals. Nevertheless, a 'zero risk' approach to food safety is unachievable therefore legitimate concerns remain.

The growth of science has been able to inform more effective regulation by providing more accurate information about the risks and harms of activities and the levers for change, for example, tobacco and certain chemicals have been linked to cancer and other environmental illnesses. Animal welfare science is providing greater information about animal welfare, in particular indicators of the welfare status of animals or animal populations and factors that affect it.<sup>17</sup> The AAWS recognises the crucial role of science in promoting animal welfare through its objective to "maintain and improve the scientific basis for animal welfare standards" (DAFF, 2005, 15).

At this time however there is still no agreed approach to measuring animal welfare in a comprehensive and objective sense, therefore welfare assessment for one species under one set of circumstances may not provide sufficient information on which to base welfare regulations for that species across a number of differing systems and circumstances.

The development of technology in the modern era has opened possibilities for agricultural and other animal use practices that did not exist before and which pose new animal welfare issues. In particular, the advent and development of intensive

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<sup>16</sup> "A huge gap exists between experts and consumer on food safety: while the general public has the impression that food safety can not be trusted, food has never been as safe as nowadays. The consumer demands policy to do more, while farmers and food companies complain that relation with real risks is lost." (Flanagan, Cunningham and Butter, 2003, 118). See also Powell and Leiss (1997).

<sup>17</sup> Griffith and others report on how, throughout the evolution of regulation of the pig industry, science has been used as the umpire on animal welfare disputes (Griffith and others, 1985).

animal production systems, which offer possibilities for greater efficiency and economy, have raised new animal welfare issues. This in itself has led to increased regulation.

### **5.3 Community wide agreement on animal welfare principles**

In the face of forces in the modern era to realise animal welfare interests, are there any generally agreed principles as to what those interests might or might not be? Note that it is not the intent of this question to assess normative questions of the value of any agreed principles. Rather the intent is descriptive, to ascertain whether any principles exist on animal welfare that command enough community agreement to be a basis for animal welfare regulation.

The Banner Committee, commissioned by the UK Government to report on the ethical implications of emerging technologies in the breeding of farm animals, stated that it considered UK animal protection legislation to be based on the broad principle that it is acceptable to make use of animals, “provided the use is humane.” This principle “represents the culmination of a long tradition of moral reflection, as well as expressing the views of most members of society, that the use of animals is, morally speaking, neither absolutely impermissible, nor a matter about which one should be indifferent” (quoted in Radford, 2001, 118).

The Banner Committee considered that the law reflects three more detailed principles centred on ‘harm’, which extends beyond physical mistreatment to include, for example, treatment which is degrading:

- (a) harms of a certain degree and kind ought under no circumstances to be inflicted on an animal. In other words, there are situations in which cost/benefit analysis or utilitarian calculation should not be regarded as the sole test of acceptability; they must be augmented by a consideration of whether the action which is proposed, either in itself or in virtue of its particular consequences, ought not to be done’
- (b) Any harm to an animal, even if not absolutely impermissible, nonetheless requires justification and must be outweighed by the good which is realistically sought in so treating it.
- (c) Any harm which is justified by the second principle ought, however, to be minimised as far as is reasonably possible (quoted in Radford, 2001, 119)<sup>18</sup>.

The Farm Animal Welfare Council, in a UK Government commissioned report on the implications for cloning for the welfare of farmed animals adopted the Banner Committee’s principles, suggesting that a procedure may be considered intrinsically objectionable within (a) above:

- (i) if it inflicts very severe or lasting pain on the animals concerned;
- (ii) if it involves an unacceptable violation of the integrity of a living being;

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<sup>18</sup> This concept of harm minimisation is closely related to the ethical considerations that led to the development of the principle of the ‘3 Rs’ for use in the research environment. See below in this section.

- (iii) if it is associated with the mixing of kinds of animals to an extent which is unacceptable; and
- (iv) if it generates living beings whose sentience has been reduced to the extent that they may be considered to be mere instruments or artefacts (FAWC, 1998, paragraph 17).

Without having conducted the necessary empirical research to be certain, it would appear that similar principles obtain in Australia and are behind the AAWS, which also endorses the acceptability of making use of animals within an ethical framework (DAFF, 2005, 5-6). Another Australian example of this approach is found in the *Australian code of practice for the care and use of animals for scientific purposes (7th edition)* (NHMRC, 2004), which covers the use of animals for research and teaching. The Code requires those subject to it to consider the internationally recognised “3Rs” when considering the appropriate use of animals for scientific research and/or teaching purposes:

- the Replacement of animals with other methods;
- the Reduction in the number of animals used; and
- the Refinement of techniques used to reduce the adverse impact on animals (NHMRC, 2004, 5).

#### **5.4 Animal welfare as a subject of protective regulation**

In the previous two sections, it has been argued that the modern era has given rise to significant animal welfare issues, and that there exists in Australian society a widely held belief that it is acceptable to make use of animals, provided the use is humane. It is necessary now to enquire whether animal welfare outcomes are amenable to being realised through regulation. This enquiry is necessary because there are some outcomes that cannot be achieved through regulation, and any attempts to achieve those outcomes will be at best in vain and at worst burdensome.

Regulation may be defined as obligations to act or refrain from acting in a certain way, with the potential to suffer some form of punishment for failure to comply (although see below for an alternative view of regulation embodying social processes). Regulation may take the form of statutes, regulations, policies, codes and standards. Regulation comes from government, and is distinguished from co-regulation/quality assurance, and self-regulation.

Animal welfare regulation is generally protective in nature. Protective regulation is designed to prevent physical harms, dangerous deficiencies, and injustices. The other main form of regulation is economic regulation, which is designed to foster competitive markets and deter abuse of market power. This paper does not examine economic regulation as applied to animal welfare, which generally has a minor effect on animal welfare.<sup>19</sup>

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<sup>19</sup> That is not to say that economic issues or economic regulation do not have a major effect on animal welfare in many settings but merely to say that animal welfare itself is not often the direct subject of economic regulation.

Protective regulation is often made when the market and the threat of private lawsuits fail to achieve this result, although there may be other motivations (Kagan, 2004, 213). Protective regulation may be negative in form, as in the case of crimes prohibiting homicide, or standards prohibiting pollution. Protective regulation may also be positive in form, as in the case of duties imposed on parents and others in charge of those lacking important capacities to provide care, and occupational health and safety duties on employers to provide a safe system of work. In the context animal welfare, negative protective regulation includes offences prohibiting cruelty to animals and positive protective regulation includes animal welfare duties on those in charge of an animal to provide food drink or shelter<sup>20</sup> or, to a certain extent, the effective duty on those subject to model codes of practice to comply with those codes.

Protective regulation tends to place burdens on industry, through costs of compliance. It is not surprising, therefore, that representatives from the agriculture industry are often opposed to it. The United Kingdom Egg Producers Association argues that, "There is no need for welfare legislation. It simply gets in the way of scientific development of better conditions of livestock" (quoted in Radford, 2001, 108). While it is not possible to answer the question posed at the beginning of this section definitively, and contrary to the opinion of the United Kingdom Egg Producers Association, it is asserted that the large amount of existing animal welfare legislation has at least some beneficial effect making it a proper subject of protective regulation.

### **5.5 *Inadequacy of private or third party litigation***

Kagan argues that socially valued interests deserving of protection, such as animal welfare, are often protected by regulation where they derive inadequate protection from private or third party litigation or the market (Kagan, 2004, 213). In investigating the case for regulating animal welfare, and following Kagan, it is therefore necessary to review the adequacy of protection afforded to animal welfare by private or third party litigation of the market.

Looking first at the capacity of private or third party litigation to protect animal welfare interests, the first thing to note is that private parties have a very limited capacity to bring a private law action to protect the welfare of an animal.<sup>21</sup> In civil

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<sup>20</sup> For example, POCTAA, section 8.

<sup>21</sup> The capacity of private persons to bring a private law action should not be confused with the capacity of private persons to bring a private prosecution under some animal welfare statutes. This latter form of action is a public law action (because it involves a criminal offence), albeit one that may be brought in certain circumstances by a private person, through a private prosecution. On the one hand, it has been argued that, in the Australian regulatory context, the right to initiate private prosecutions against animal owners under anti-cruelty legislation is one way to allow for representation of the animals' interests without imposing an additional regulatory burden. Since the majority of animal use industries occur out of the public view and on private land, and since animals themselves are unable to bring an action, it is common for private prosecutions to be preceded by unlawful activities such as trespass in the process of gathering information about a potential offence,

litigation harm to animal welfare in itself is not an actionable complaint, a situation that is obviously bound up with the fact that only animals have a direct interest in animal welfare and animals do not have standing in law to bring an action. The closest thing to a private right to bring legal complaint about animal welfare is probably the right of an owner to protect the value of their property rights in an animal. There are major limitations to this right as a means of protecting animal welfare. Firstly, an otherwise actionable harm to an animal's welfare by a third party may not reduce the property value of the animal, and so may not ground a legal complaint by the animal's owner. Secondly, only owners have the right to sue over a reduction in the value of their animals, while a significant proportion of the alleged harms to animal welfare are caused by owners themselves. Accordingly, there are many animal welfare interests that cannot be protected through private or third party litigation.

### **5.6 Inadequacy of the market**

The second non-regulatory potential source of protection for animal welfare is the unregulated market. George Soros holds that "economic values, on their own cannot be sufficient to sustain society" because they "express only what an individual market participant is willing to pay another in free exchange for something else." In such a situation, "anonymous market participants are largely exempt from moral choices". Because "social values do not find expression in the market behavior of individual participants" there is a need for them "to find some other form of expression." A market economy "does not function as a community and a global economy even less so" (quoted in Radford, 2001, 108-109).

Soros's general argument about the inability of markets to express social values is particularly compelling in the case of the capacity of the market to express the community's values about animal welfare. It is basic market theory that, for a market to function properly, among other things, the purchaser must have a high level of knowledge about the factors that are relevant to their purchasing decision. Recent DAFF commissioned research into attitudes towards animal welfare in the Australian community found a "shallow understanding of the issues" (TNS Social Research Consultants, 2006, 12), clearly falling short of the level of knowledge required for an effective market. Mike Radford argues that,

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argued to be acceptable on the grounds of civil disobedience. On the other hand, the practical considerations related to exercise of this capacity provide scope for it to be misapplied and in fact cause harm to the welfare of the animals in question. Some relevant issues are: the competence of private parties to assess an animal's welfare; legality of access to perform that assessment; the potential for undue disturbance to the animals and the entire production enterprise; and the right of redress for animal owners for vexatious or unwarranted activity causing disturbance to lawful animal use. In addition, and of particular relevance to intensive animal industries, is the potential for that activity to risk compromising the biosecurity status enjoyed by the production facility that allows the animals a higher disease-free status than is the general case in that animal population. In New South Wales, the capacity to bring a private prosecution under POCTAA was recently removed by the insertion of section 43AA of POCTAA, pursuant to the *Prevention of Cruelty to Animals Amendment (Prosecutions) Act 2007 (NSW)*.

Even assuming they were to be sufficiently informed about the relevant issues and the nature of the products, which the vast majority are not, it is simply unrealistic to expect the average shopper, preoccupied with more immediate concerns, to consider and weigh all the relevant moral questions connected with each purchase before making a choice and selecting a specific item. They are much more likely to be swayed by a spontaneous response to the price, appearance, advertising, or simply the force of habit. The imposition of common minimum standards through legal regulation overcomes this problem: by reflecting society's perceived collective values, it removes from the individual the responsibility of making a moral decision in respect of every purchase (Radford, 2001, 108).

Because there are so many determinants of which products a consumer buys, and because price is so often the dominating factor, it is hard even for well-informed consumers to express any animal welfare values they might have through their purchasing decisions. Accordingly, it appears that an unregulated market also leaves many animal welfare interests unprotected.

In economic terms, regulation can make regulated entities include in their consideration factors that would otherwise be externalities. The imposition of a carbon emissions trading scheme is an example of creating an economically relevant factor out of the externality of carbon emissions. A requirement for people in animal use industries to comply with model codes of practice for the welfare of animals is another. The inclusion by regulation of factors that would otherwise be externalities ensures that all are required to realise a socially valued interest, rather than just those voluntarily disposed to do so. It also raises the question of whether the regulation has a sound scientific and ethical basis, and whether it actually achieves (or even could be shown to achieve) the desired outcome.

## **6. Politics and regulation**

Most pro-regulatory movements also stimulate a political counter-reaction, as regulated enterprises seek to limit the effect of regulation. Because regulated entities are a key source of information to regulatory agencies, and because they often seek the appointment of "pro-industry" officials, some scholars advance the "capture theory", that is, that regulations favour dominant firms in an industry rather than the public (Ayers and Braithwaite, 1992).

Later researchers have cast doubt on capture theories, especially for highly visible programs - protective regulation - for example, environmental protection, workplace safety, and anti-discrimination - where not for profit advocacy organisations are empowered to advocate for constituencies that are intended to benefit from the protection of the regulations (Kagan, 2004, 217-218).

The contest over animal welfare policy in Australia, including industry and community groups, is an example of this dynamic regulatory process.<sup>22</sup> Seeking to minimise external conflict, the AAWS aims to “[e]ncourage the use of effective consultative and communication mechanisms to engage” virtually all stakeholders “in developing animal welfare policies, standards and education” (DAFF, 2005, 13).

Some government programs contain elements of “gesture politics” where politicians are keener to announce new regulatory measures than to resource them adequately. It may however be difficult to know in advance what an adequate level of resource for enforcement and compliance activities will be. In addition, in a democratic political environment there will be conflicting messages about this matter. Advocates of a regulatory approach will tend to understate such costs to increase the likelihood of the adoption of further regulation, opponents would likely do the opposite.

While it is rare for any regulatory measures to be enforced in ways that advocates regard as optimal, many regulatory regimes have sufficient backing and broad in-principle support to bring about major changes in behaviour, for example, food safety and quality, therapeutic goods, banking, motor vehicles, and the environment.

Partisan politics also plays an ongoing role in regulatory experience by expanding or contracting staffing and other resources through budget allocations, parliamentary oversight hearings, and by giving directions on policy and administration of policy. In Australia, it does not appear that animal welfare has generally been an issue that has been strongly contested in a partisan way, and in fact the AAWS has enjoyed bipartisan support since its implementation commenced in 2005.

In Western democracies, political action and legal action by community groups can challenge electoral politics in their influence over regulatory agency activity. An example of this is the campaign by Animals Australia against livestock export. The campaign has included publicising footage of alleged poor animal welfare practices associated with livestock export on widely viewed current affairs programs such as *60 Minutes*, and initiating legal action against the Western Australian Government alleging a failure of that Government to carry out its legal duties regarding enforcement of that State’s animal welfare legislation in relation to a consignment of sheep on the MV Al Kuwait in November 2003. The campaign has apparently prompted additional regulatory activity, including the Australian Government’s suspension of live export to Egypt in 2006 and the Western Australian Government’s prosecution of the MV Al Kuwait exporter.<sup>23</sup>

Conversely, where those to be protected lack the capacity for sustained political organisation and pressure, regulatory implementation is more likely to be subject to

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<sup>22</sup> For an account of the modern history of the politics of regulation of animal welfare, particularly in the United Kingdom, see Garner, 2005.

<sup>23</sup> *Department of Local Government & Regional Development v Emanuel Exports P/L and others* (Magistrates Court of Western Australian, 8 February 2008)

the political influence of regulated enterprises. A number of advocates in the animal protection movement claim that the content of agricultural codes has been disproportionately influenced by the agriculture industry to the extent of industry capture (Caulfield, 2007/08; Sankoff, 2005; Sullivan and Wolfson, 2008).<sup>24</sup>

## 7. Regulatory approach

There are two major approaches for government regulation in enforcement or implementation: legal process and social process (Kagan, 2004, 221). The legal process approach, also known as “command and control”, views regulations as authoritative legal norms whose breach demands punishment. The social process approach provides for cooperative government-regulated industry problem solving and a remedial response to breaches.

Research shows that most regulated entities are committed to regulatory compliance, mostly for good business reasons (Gunningham, Kagan and Thornton, 2003). Most breaches are not committed as ends in themselves but as side-effects of legitimate, socially valuable business operations (Kagan, 2004, 222). In addition, because regulatory rules are often over-inclusive and made to cope with a range of non-compliance including the worst sort of breaches, most regulatory breaches do not appear to regulators to deserve serious legal punishment (Kagan, 2004, 222). Breaches that do cross that line often involve criminal activity as well and can therefore be dealt with through the formal criminal prosecution process.

Similarly, most regulatory breaches are more technical than substantive, and usually do not involve immediate or tangible harm to others. For these, the harsh punishment and moral obloquy of criminal sanctions often seem excessive, while legal actions are expensive for regulators and always entail the risk of a loss in any case. The primary role for regulation is not to establish absolutes of right and wrong, but “to get the work of society done” by refashioning “human and other resources so that a particular outcome will be achieved” (Selnick quoted in Kagan, 2004, 221). Different issues may best be regulated at different points along the legal-social process spectrum. (Kagan, 2004, 222).

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<sup>24</sup> In *New Jersey Society for the Prevention of Cruelty to Animals and ors v. New Jersey Department of Agriculture and ors* (Supreme Court of New Jersey, 30 July 2008), certain animal protection organisations challenged the lawfulness of the New Jersey Department of Agriculture’s regulations on animal welfare which, to comply with the empowering statute, were required to be “humane”. One ground for complaint was that the regulations, in permitting any activity amounting to “routine husbandry practices” – defined as “techniques commonly taught by veterinary schools, land grant colleges, and agricultural extension agents” – were so broad and all-encompassing that they amounted to an improper delegation of the agency’s authority to veterinary schools, land grant colleges, and agricultural extension agents, contrary to the legislative mandate. The court upheld this ground, finding the definition of the term “routine husbandry practices” to be invalid. Of particular relevance to the issue of alleged industry capture, the court at 47-48 found that “the Department did not simply engage in a subdelegation, but did so in favor of some entities that also might be described as private interests.” These interests are largely aligned with animal use industries.

Cooperation is usually cheaper and better than punishment, as long as the threat of punishment is available. The threat of punishment tends to be most effective (and is accepted as more 'equitable') in the form of a "pyramid of sanctions" – including warning letters, intensified surveillance, administratively imposed fines, then larger, court imposed penalties, and only then criminal penalty or revocation of a licence (Kagan, 2004, 222).

In relation to achieving the aims of the AAWS, Shiell, apparently coming from an industry perspective<sup>25</sup>, argues that:

The overall intention in progressing the AAWS is to achieve the adoption of sound animal welfare standards and practices with continuous improvement, yet the main regulatory instruments in place are aimed at creating an offence of animal cruelty. Establishing cruelty offences and applying penalties does not necessarily lead to the application of sound animal welfare practices or the adoption of new practices leading to continuous improvement (Shiell, 2006, 47).

Instead, Shiell advocates: the accrediting by government, in co-operation with industry, of industry programs currently operating in isolation; quality assurance schemes being referenced in appropriate regulation separate from animal cruelty legislation, with compliance mandatory for those who elect to be subject to the relevant scheme; and an obligation to notify serious failings in animal welfare to regulatory bodies.

Interestingly, apparently coming from a more animal rights perspective, Sankoff<sup>26</sup> comes to conclusions relatively similar to those of Shiell. Sankoff is disappointed with the first five years of the new animal welfare regime in New Zealand under the *Animal Welfare Act 1999 (NZ)*, finding that it has had "less than sterling results for animals in New Zealand" with "initiatives that have been introduced to improve standards" having "the opposite effect" (Sankoff, 2005, 25). The New Zealand regime seems to follow the legal process approach to regulation described above and the consequences, as Sankoff sees them, have been fewer prosecutions, and those there have been have been burdened by increasingly complicated applications, lower sentences and a code system that has been "plagued with paralysis". With some hesitation, Sankoff advocates consideration of "shifting, at least in part, to a regulatory or administrative regime in which prosecutions would be summary proceedings, even if this results in lower maximum penalties" with most crimes against animals being treated "like highway traffic violations for speeding, with a fine and, in the case of repeat offending, imprisonment" (Sankoff, 2005, 36-37).

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<sup>25</sup> Kevin Shiell was formerly director of Livecorp, the industry body representing the livestock export trade.

<sup>26</sup> Peter Sankoff was formerly Co-Chair of the Executive Committee of the Animal Rights Legal Advocacy Network (ARLAN), a New Zealand group of lawyers and law students working on animal welfare issues.

Coming from different ends of the spectrum, both Shiell and Sankoff seem to agree that a strong “legal process” approach which, as noted, views regulations as authoritative legal norms whose breach demands punishment, is not a successful regulatory model for animal welfare. While both agree that offences to deal with cruelty must remain, both see a greater role for a more regulatory or administrative approach to maintaining and improving standards. This approach would involve transferring the provisions that enunciate standards or codes out of the legislation that creates criminal offences in relation to animal welfare such that breaches of the standards would not automatically constitute a crime. This approach is more akin to the social process model identified above, typified by cooperative government-regulated industry problem solving and a remedial response to breaches.

Interestingly, Radford takes the opposite view to Shiell and Sankoff, arguing that “for the foreseeable future, the protection of animals in Britain can best be promoted by ... [among other things] the imposition of detailed and binding positive duties on those who assume responsibility for them.” (Radford, 2001, 104) He makes this point in the course of disagreeing with an animal rights approach, so perhaps the context of his comment makes it difficult to compare.

## 8. Forms of regulation

Regulation will necessarily take different forms depending on the specific regulatory issue to be addressed. This section looks at different forms of regulation that have been applied to animal welfare.

### 8.1 *Administrative vs criminal approach*

It is likely that the reasons are historical for the current legislative approach of constituting a breach of animal welfare standards (that is, MCOPs) as a potential animal cruelty offence. The first legislation in the United Kingdom (the historical source of Australian law) dealing with animal welfare of any kind was anti-cruelty legislation designed mainly to penalise egregious acts of cruelty (Radford, 2001). It appears that when the desire arose in the legislatures to regulate standards of animal welfare, those standards were placed in the only extant related legislation, the anti-cruelty statutes. In retrospect, this may have been an inappropriate frame in which to place those particular provisions.

There are a number of important implications of regulating compliance with animal welfare standards through the framework of anti-cruelty offence legislation.<sup>27</sup> Firstly,

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<sup>27</sup> It is recognised that, in strict legal terms, animal welfare legislation creates a more complicated and less direct relationship between breach of a model code of practice and commission of the offence of animal cruelty. For example, section 34A of POCTAA relevantly provides:

- (1) The regulations may prescribe guidelines, or may adopt a document in the nature of guidelines or a code of practice as guidelines, relating to the welfare of species of farm or companion animals.

...

because criminality is the peak of the pyramid of possible sanctions, it immediately escalates breach of animal welfare standards to that peak. An agricultural enterprise may be in technical breach of an MCOP, or it may be in breach of a significant but not a fundamental element of an MCOP that would render the breach cruel. Owing to the construction of POCTAA, that enterprise would be at risk of criminal prosecution under POCTAA. This situation does not accord with the basic principle of animal welfare regulation posited by the Banner Committee referred to above that overall, our society regards use of animals as acceptable as long as it is humane. The haze of potential criminality hanging over what is a lawful and socially valued activity seems to put the wrong regulatory frame on the activity in question. Second, if animal industry representatives, when making submissions on the content of an MCOP, have in mind the possibility of prosecution for breach of that MCOP, it may lead them to argue for lower standards of animal welfare in the MCOP than they expected to attain, in order to minimise the possibility of prosecution. This directly counters the aim of the AAWS to seek “improvements in animal welfare outcomes” (DAFF, 2005, 7).

Finally, by placing animal welfare in a criminal framework, the remedies for a breach of welfare codes such as a fine or imprisonment are intrinsically negative and backwards looking. They are concerned with the harm caused, rather than future harms to be prevented (or even promotion of future welfare) and their orientation is punishment, rather than reform and help with improvement in conduct. It may well be that, in certain cases, criminal remedies are appropriate but without a parallel administrative framework, the criminal framework must remain a blunt instrument for the improvement of animal welfare.

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- (3) Compliance, or failure to comply, with any guidelines prescribed or adopted by the regulations for the purposes of subsection (1) is admissible in evidence in proceedings under this Act of compliance, or failure to comply, with this Act or the regulations.

Clause 24(1) of the *Prevention of Cruelty to Animals (General) Regulation 2006 (NSW)* (**POCTAGR**) provides that the eight Model Codes of Practice (**MCOPs**) listed in that clause are adopted as guidelines for the purposes of section 34(1). The omission from the list in clause 24(1) of ten of the existing MCOPs is difficult to explain except as an oversight on the part of the regulator but it does beg the question of the significance of compliance with the omitted MCOPs to any determination of compliance with POCTAA.

For those MCOPs that are adopted by POCTAGR, it is not the case that compliance with an MCOP serves as compliance with POCTAA, or that compliance with an adopted MCOP is a defence to what would otherwise be an offence under POCTAA. Rather, the fact of compliance, or failure to comply, with an MCOP is admissible in evidence in proceedings under POCTAA of compliance, or failure to comply, with POCTAA or POCTAGR. Theoretically, this means, among other things, that it would be possible to comply with an adopted MCOP but still be in breach of POCTAA or POCTAGR. Despite the nicety of the foregoing distinctions, it is submitted that the practical effect of section 34A(1) is that, in most cases, compliance with an adopted MCOP (and probably any other MCOP) probably does constitute a defence to an offence created by POCTAA or POCTAGR.

The effect of the approach posited would be to return POCTAA to being legislation that more purely criminalises cruelty, and to create new legislation with an administrative purpose to regulate compliance with animal welfare standards for socially sanctioned activities.

There is a risk that removing regulation of standards from anti-cruelty legislation may send a message of a downgrading of the importance of animal welfare. It may seem that, without the frame of criminality, failure to comply would be less significant. It is important to note, however, that a charge of cruelty to animals could still be brought against for anyone whose failure to comply with an MCOP did, in fact, constitute cruelty as defined under POCTAA. It is suggested that, in creating a separation in regulatory terms between the two, this more accurately reflects society's view of the relationship between regulation of compliance with MCOPs and the like, and the commission of an offence of cruelty.

The idea of separating the regulation of animal cruelty from the regulation of animal welfare, and treating the former in a criminal framework and the latter in an administrative framework, appears to be structurally in line with AAWS philosophy. The AAWS states that 'Australia's approach to animal welfare, through adoption of the Strategy, is to ensure that due consideration is accorded to a multitude of factors (including science, practicability, culture, economics, ethics, societal values of the whole community, education and awareness, innovation and international developments). These considerations are relevant to the establishment and promotion of sound animal welfare standards' (DAFF, 2005, 18).

The AAWS seeks to "facilitate the timely development, and revision of ,... standards and guidelines ..." (DAFF, 2005, 11), a process that will be overseen by Animal Health Australia.<sup>28</sup> This first such standards and guidelines that are in the process of

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<sup>28</sup> Animal Health Australia (AHA) has advised, for the purpose of this paper, that AHA "was incorporated as a not-for-profit company in 1997. Its shareholders comprise the Australian and State/Territory governments, together with each of the national livestock industry organisations and a number of service providers. In 2006, AHA developed a plan, *Future Regulation and Management of Livestock Welfare* in response to the perceived need for more transparent and consistent national regulation of animal welfare in the livestock industries. It was agreed that this plan would be tested in the development of animal welfare standards and guidelines for the land transport of livestock. Based on this experience, a revised plan would then be used for the progressive conversion of each of Australia's existing Model Code of Practice for livestock animal welfare into science-based standards and guidelines.

"It has been generally accepted that AHA, with its breadth of industry and government membership and strong linkages with other industry and community stakeholders, including non-government organisations that are not shareholders in the company, is the appropriate 'custodian' and will have primary responsibility for developing animal welfare Standards and Guidelines. It is intended that the content and quality of the standards and guidelines will reflect the input from and joint ownership by all stakeholders. It is however important to recognise that the incorporation of the welfare standards into legislation will still rest with the respective jurisdictions due to Australia's constitutional arrangements.

development are the *Australian standards and guidelines for the welfare of animals – Land transport of animals, Public consultation version, 29 February 2008* (Primary Industries Ministerial Council (PIMC), 2008) (**Standards and Guidelines**).

The Standards and Guidelines are set out in the following format:

- *Heading*
- *Objective* — The intended outcome(s) for each section of the standards and guidelines.
- *Standards* — The acceptable animal welfare requirements designated in this document. The requirements that must be met under law for livestock welfare purposes.

The standards are intended to be clear, essential and verifiable statements; however, not all issues are able to be well defined by scientific research or are able to be quantified. Standards use the word 'must'.

- *Guidelines* — The recommended practices to achieve desirable animal welfare outcomes. The guidelines complement the standards. They should be used as guidance. Guidelines use the word 'should'. Noncompliance with one or more guidelines will not in itself constitute an offence under law.
- *Notes* — Explanations of the context of the standards and guidelines (the notes are advisory statements for selected background information) (PIMC, 2008, 2).

This format combines mandatory components, set out as standards, with recommended practices, set out as guidelines. While the Standards and Guidelines state that standards must be followed as a matter of law, it remains to be seen which law and what the consequences of breach will be. See the discussion above about the manner of adoption of MCOPs in the various anti-cruelty statutes across Australian jurisdictions. If the Standards and Guidelines follow the approach explored in this paper, breach of standards would not necessarily render a person in breach of anti-cruelty legislation. Instead, a more administrative response would ensue, but one which would also permit criminal prosecution in appropriate cases.

There are some animal use practices described in a standards and guidelines document, the breach of which, by their very nature, ought to justify prosecution for cruelty. Routinely keeping certain animals in spaces below certain dimensions or supplying manifestly inadequate food and water are examples. For these practices,

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"AHA has also developed a series of nationally applicable animal health and animal welfare 'performance standards' for both industries and Governments. These standards are to be independently audited at regular intervals. The most recent such audit for animal welfare performance occurred in 2007."

a breach of a standard (or guideline) should readily lead to the possibility of prosecution for animal cruelty, as well as administrative penalties.

The administrative approach to regulating animal welfare is also appropriate for a context in which the setting of standards often takes several years. The standards and guidelines, when released, may seek to articulate best practice as recognised at the time of release. Changes to animal use practices, and changes to our understanding of animal welfare may render those standards inappropriate, inapplicable, or short of best practice. Making compliance with some aspects of guidelines mandatory may require animal industries to engage in practices that actually result in comparatively poor animal welfare.

## **8.2 Regulation by license**

Some forms of regulation apply to anyone who engages in the relevant activity. The cruelty offences in POCTAA are an example of this, in that they apply to anyone who treats an animal with cruelty as provided under the Act. Other forms of regulation apply to a select group, marked out by having applied for and obtained a licence for the relevant activity. Licensees tend to have made a particular commitment to engaging in the licensed activity, including by capital investment or completion of education or training, and they are expected not only to refrain from activities that constitute poor conduct, but to engage in positive activities that constitute acceptable conduct. By acquiring a licence, licensees are 'opting in' to a regulatory system that does not apply to the community generally. Regulation is often administrative, in addition to criminal, and goes beyond statute, into more detailed regulation and policy.

By making the holding of a licence a condition to engaging in the activity, the regulator creates a privilege which may be revoked if the regulated entity fails to comply with regulation to the requisite degree. This can both be a useful tool to encourage compliance and it can make it easier to stop a regulated entity in breach from engaging in the activity at all. Licensing is often a more resource intensive method of regulation, requiring a government administration to manage the licensing system, including assessment and granting of licence applications, renewals, monitoring of compliance, and sanctions for breach.

One alternative to monitoring compliance through inspections by the regulator is an independently audited integrated quality assurance scheme. This can be a cost-effective way of satisfying the regulator and the general public of regulatory compliance. This tool may be part of a licensing system, although it has applications beyond that.

Regulation through a licensing scheme is a common method of regulation, and is used in areas as diverse as operation of private hospitals, car registration, the building industry, regulation of the professions and commercial fishing. Some licensing schemes in Australia are intended to achieve animal welfare outcomes,

among others. These include the animal research industry<sup>29</sup> and operators of zoos and circuses.<sup>30</sup> There are other examples of animal industries that are regulated by licence where animal welfare is not a major regulatory purpose, for example the dairy industry<sup>31</sup>, where regulation is primarily concerned with food safety and quality.

It appears that effective licensing for animal welfare must be based on the competence of those responsible for the welfare of animals. One of the objectives of the AAWS is “to enhance the attitudes, skills and knowledge of animal carers and handlers and all other people whose actions have a potential effect/impact on animals such as wildlife or introduced animals by developing, where appropriate, national training competencies and standards” (DAFF, 2005, 15). There is a national vocational and educational training system in Australia (the VET system) for the type of training that is often relevant to animal welfare skills. This is underpinned by the Australian Quality Training Framework which is intended to support the uniform quality of training and assessment for the VET system in all Australian jurisdictions.

### **8.3 Disclosure and labelling**

Mandatory disclosure of risks and other relevant information is sometimes an alternative to “command and control” protective regulation. The regulation of public companies owes a great deal to regulation by open disclosure, providing investors and other stakeholders the greatest possible information with which to pursue their interests and enabling them to protect themselves. For an industry where it is not practicable for the regulator to inspect regulated entities frequently, duties of disclosure, coupled with penalties for failure to disclose or misleading disclosure, can offer attractive regulatory benefits.

Disclosure regimes impose burdens on the discloser to collect and report the required information, a burden that is all the greater if that information would not otherwise have been collected. The AAWS includes an element of disclosure in seeking to “facilitate the development, collection and collation of national statistics on animal welfare standards as a basis to benchmark Australia’s animal welfare outcomes” (DAFF, 2005, 18).

As a method of regulating animal welfare, disclosure has a parallel in schemes, existing and proposed, for labelling the animal welfare credentials of animal products. This raises generic problems of reducing the complexity of animal welfare concepts to the most basic measures, such as a traffic light rating of green, yellow and red<sup>32</sup> but this has been attempted, achieved and implemented in other complex areas, such as rating the nutrient profiles of food products promoted to children (Rayner, Scarborough, and Stockley, 2004; Food Standards Authority (UK), 2008). The European Union is considering establishing an “EU label for animal welfare ... in order to support the consumers’ desire for choice with objective and scientifically

<sup>29</sup> *Animal Research Act 1985 (NSW)*

<sup>30</sup> *Exhibited Animals Protection Act 1986 (NSW)*

<sup>31</sup> *Food Act 2003 (NSW)*

<sup>32</sup> As proposed by Voiceless, 2007.

based information ...” (Commission of the European Communities, 2006, 11). A quality assurance and labelling scheme already exists in relation to the production system for eggs for sale in Australia, developed jointly by the Australian Egg Corporation Limited and State and Territory Governments in 2001. Under the scheme, each egg carton must display the words “cage eggs”, “barn laid eggs” or “free-range eggs” (Australian Egg Corporation Limited, 2008).

Labelling clearly has a lot to offer in protecting the interests of consumers to know what they are buying but, on its own, it is a blunt and ineffective instrument for regulating animal welfare. As discussed above, the shortcomings of relying on the market to protect animal welfare interests include that the definition of animal welfare in a consumer setting is necessarily highly reductive often across multiple production systems, and that animal welfare considerations in purchasing decisions are often mixed in with several other, possibly more immediately compelling considerations, such as price, appearance, advertising and force of habit.

#### **8.4 Non-government standards**

There is scope for voluntary compliance with standards produced by non-government organisations or for industry self-regulation as a method of achieving results that otherwise might require regulation. Examples of non-government or industry generated codes or standards that address animal welfare include the RSPCA(UK)’s Freedom Food scheme, a voluntary animal welfare farm assurance and food labelling scheme applying to animals in the United Kingdom (RSPCA(UK), 2008); and the Australian Egg Corporation Limited’s Egg Corp Assured scheme, ECA, a national integrated egg quality assurance program (Australian Egg Corporation Limited, 2008a).

Higher standards of animal welfare usually add to the cost of production. Also, compliance with non-government regulation is voluntary and therefore often not industry wide. Because of these two factors, for members of industry to comply with non-government animal welfare codes or standards, compliance must either be cost-neutral, provide an intangible but nonetheless real benefit to adoptors (for example, perceived future proofing), or permit charging of a market ‘premium’ associated with compliance.

For example, ECA covers animal health & welfare, biosecurity, food safety, egg labelling and environmental management in a series of ‘modules’. It requires independent third party audit and baseline performance to pass an audit that is above the level of compliance with statutory requirements. ECA standards cover different production systems, including ‘free range’ layer hens as well as those in cage systems.

Producers who meet ECA standards can use the registered ‘Egg Corp Assured’ logo on all packaging and promotional materials to promote their eggs in the marketplace as a ‘value added’ product that meets objectively assessed animal welfare outcomes above the legally required standards.

## 8.5 Co-regulation

The co-regulation model is somewhere between regulation and non-government standards. Co-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. As for other regulatory models, success relies on the existence of defensible mechanisms for objective assessment of operational integrity and desired outcomes (May, 2005).

The AQIS Export Meat Program is a model of co-regulation that is intended to “meet the requirements of all stakeholders including government, customers, producers, processors and Australia’s trading partners” (Australian Quarantine and Inspection Service, 2008). Under the Program, it is the responsibility of the establishment occupier to develop, implement and maintain the establishment’s approved arrangement to meet food safety and product integrity requirements and facilitate market access. They must do this in an agreed way that permits for standardised verification and certification by the Australian Quarantine and Inspection Service.

Some parts of the live export trade have also been regulated in a co-regulatory manner.<sup>33</sup> Live export has proved a more complex and challenging area for co-regulation, when compared to export of meat. In both co-regulatory models, the regulatory involvement of government officers is, among other things, through scheduled assessments at specific points in the process.

For regulation of meat safety, this ‘snapshot’ approach seems well adapted to the assessment task, since meat that is objectively fit for human consumption at the time of the government inspection is likely to have been properly handled during the time leading up to the inspection, and the record keeping requirements for export meat processors allow for investigation of the history of the product relevant for food safety outcomes. By contrast, the assessment of the welfare of live animals requires a qualitative assessment of their welfare over a period of time, and the inspection of animals by a government officer at a specific point in the process may not necessarily reveal any shortcomings in their treatment before the time of inspection, let alone after the time of inspection.<sup>34</sup>

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<sup>33</sup> See the Live Export Review, 2003, for a summary of the complex regulatory regime applying to live export.

<sup>34</sup> It appears that recognition of this issue led to the decision by the then Australian Minister for Agriculture, Fisheries and Forestry, Mr Warren Anderson, to require Australian veterinarians to be on board on all live export voyages to the Middle East reporting “directly to the Australian Government’s Australian Quarantine and Inspection Service ... and ... personally sanctionable for false reporting” (Australian Minister for Agriculture, Fisheries and Forestry, 2004). See also the Live Export Review, 2003, 39-41.

## 8.6 *Regulating the regulators*

The economic impacts of protective regulation, together with pressures for economic efficiency stimulated by intensification of competition in increasingly open and globalised world markets, have often lead governments to create bodies that “regulate the regulators”, subjecting existing and proposed regulations to cost-benefit analysis. Examples include the ombudsman, regulatory impact statements and ministerial advisory committees.

The AAWS also recognises the economic impacts of animal welfare legislation and the need to minimise unnecessary cost burdens associated with compliance, in particular due to differences in regulation across different jurisdictions. It seeks to “promote the adoption of a harmonised approach to the development and application of clear, contemporary, adequate and consistent animal welfare legislation and codes of practice across all state, territory and local government jurisdictions...” (DAFF, 2005, 11).

Bodies that review the regulators are common in animal sectors, but have variable effectiveness in achieving changes in regulatory processes. In most instances the standing bodies involved are purely advisory in nature, and there is no obligation on governments to take their expressed views into account when reviewing regulatory approaches and policies.

The National Consultative Committee on Animal Welfare (**NCCAW**) sits separately from DAFF in its role as independent advisor to the Federal Government, including advice on the performance of DAFF. Its role includes “assess[ing] and advis[ing] the Federal Government on the national implications of welfare issues affecting animals; and to advis[ing] on the effectiveness and appropriateness of national codes of practice, policies, guidelines and legislation to safeguard or further the welfare of animals and protect the national interest” (DAFF, 2008). Similar bodies (Animal Welfare Advisory Committees or AWACs) exist at State and Territory levels.<sup>35</sup>

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<sup>35</sup> For example, the Exhibited Animals Advisory Committee under *Exhibited Animals Protection Act 1986 (NSW)* and the Animal Research Review Panel under *Animal Research Act 1985 (NSW)*.

## **9. Conclusion: Five Considerations for Regulators**

In conclusion, just as the Five Freedoms encapsulated the key animal welfare considerations for the handling of animals, the Five Considerations for Regulators, derived from this paper, seek to encapsulate the key considerations for regulating animal welfare<sup>36</sup>.

### **1. Understand the specific features of animal welfare relevant to regulating animal welfare**

Regulation of animal welfare is a complex topic in a complex context. There is no magic regulatory formula that will fit all circumstances. It will help, however, if regulators understand the specific features of animal welfare in any regulatory exercise.

### **2. Have a good reason for imposing additional regulations, taking into account non-regulatory measures**

Starting from a position that regulations are always additional burden on those regulated, there must be a good reason for regulating and options other than regulating should be considered.

### **3. Treat regulation of animal welfare and regulation of animal cruelty as separate, though related, topics**

Past and existing regulation of animal welfare has treated animal cruelty and animal welfare as one topic, largely deserving the same form of regulation. This approach may have impeded securing both reduced animal cruelty and improved animal welfare.

### **4. Aim to move regulation of animal welfare away from the legal process end of the spectrum and towards the social process end of the regulatory spectrum**

Regulating compliance with animal welfare standards is currently in legislation which, at base, is for criminal prosecutions. This is an unfortunate frame for promotion of animal welfare standards. Since promotion of animal welfare applies mainly to those in lawful and socially sanctioned animal use industries, and largely depends on their voluntary compliance, a social process of joint problem solving between regulators and industries is most likely to be effective in most cases.

### **5. Consider the suite of regulatory forms for regulating animal welfare**

There are a suite of regulatory formats for regulating animal welfare, including administrative or punitive frameworks, licensing, mandatory disclosure, labelling, non-government standards, co-regulation and regulating the regulators. Many of these options have been adopted for differing animal welfare issues and provide ideas for future issues. Despite the usefulness of regulatory precedents, it is vital to maintain a creative approach to regulation.

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<sup>36</sup> Thanks to Ivan Caple for the idea of formulating an equivalent to the Five Freedoms but for regulation.

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