

## CHAPTER 1

### **Introduction**

#### *An overview*

**1.1** Although there have been encouraging changes and some progress, the law in Australia which seeks to reduce or prevent cruelty to animals, particularly intensively farmed animals, is in need of some improvement. Its development has been constrained by many influences, perhaps most importantly a lack of interest. There is a view that animal cruelty laws and particularly their relationship to intensive farming practices and live export, although of some importance, have less of a priority than laws which deal with “human” issues. The evolution of Australian animal cruelty law has also arguably been hindered by the complex State / Territory / Commonwealth government and legislative system and to date a failure to achieve anything like a uniform legislative approach to animal cruelty. This has resulted in 9 very different sets of laws relating in various respects to animal cruelty. A further very important influence in shaping animal cruelty law is the vested interest of the powerful players who make substantial sums of money out of subjecting animals to conditions which many would regard as cruel. The billions of dollars of income to industries which carry out intensive animal farming influences governments to listen to their voices; often, there is pressure to legitimise what the industry regards as acceptable husbandry practices and the result is legislation which endorses and permits those practices. Finally, there is often (but not always) poor enforcement of anti-cruelty legislation. In most cases, responsibility for law enforcement is effectively delegated to a private association (ie the RSPCA in its various embodiments), which is not accountable (in the way the police, for example, would be) to the community, or parliaments, and could be said to be subject to the whims of whoever happens to be running it.

#### *Scope and layout*

**1.2** This book is not meant to be a definitive reference source on Australian law as it applies to animals. Rather, the intention is that it should focus on areas of Australian animal law which, by reason of various deficiencies, result in the furtherance, acceptance and legalisation of increasing levels of cruelty to significant numbers of animals.

**1.3** In Australia, the preponderance of cruel acts committed on animals, whether cruelty is measured by degree or by number, occurs in industries which keep and use animals for profit. By far the biggest such industry is the animal farming industry. The cruel practices concerned are concentrated in the intensive industries involving pigs and chickens, in the dairy and wool industries and in the live export

of food animals. There is obvious potential for animal cruelty where the law sanctions animal killing, whether it be slaughter of food animals, killing “pests” or killing animals for pleasure. Cruelty to animals is also carried out on a large scale as part of scientific experimentation, both as part of basic scientific research and research which is at least on its face directed towards human or animal disease processes. These areas constitute the main focus of this book.

**1.4** That is not to deny that there are significant cruelty issues in relation to companion animals. The law relating to companion animals will not be dealt with here; it is covered well in the relevant entry in *Halsbury's Laws of Australia*, as recently updated by Steven White of Griffith University.<sup>1</sup>

**1.5** Australian laws relating to animals are many and varied across the State, Territory and Commonwealth legislatures. Given the large amount of “animal law” in Australia, it is immediately obvious that one of the oddities in this area is the lack of reported case law (ie from the superior courts; all animal cruelty prosecutions are initiated in magistrates courts or the equivalent). One could perhaps speculate that this is a result of the fact that much of the enforcement is directed at pet owners. Although it is difficult to be sure (because there are no national figures relating to animal cruelty prosecutions) it appears that there are very few prosecutions of those involved in intensive animal farming industries. As business and corporate concerns can be expected to have greater financial resources than the average pet owner, they might be expected to appeal findings against them in the lower courts. Perhaps the dearth of reported animal cruelty cases in the superior courts reflects a low level of prosecution of business and corporate animal users.

**1.6** What this means is that a book on animal law in Australia, as applied to the intensive animal farming industry, live export and the like, which sets out to analyse the application of the law by reference to reported cases would be a very short book indeed. That is why in this book, there is often illustration of the application of the relevant law not by reference to cases, but by reference to alternative legal strategies used to either attempt to have the law enforced against those who are the major perpetrators of animal cruelty, or to bring to the attention of the public the inadequacies in the relevant law and its enforcement.

**1.7** The author felt it was important to try and present the legislative detail of the various laws in the States and Territories (and the Commonwealth, as appropriate). This detail is set out in each chapter<sup>2</sup> after a brief summary and overview which sets out the salient and important points.

### ***A brief history of animal cruelty law***

**1.8** The power of the human race over other animal species has led to the

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1 See sub-section 2 of the “Animals” section  
2 with the heading “The Law - Detail”

exploitation by humans of animals. That exploitation has in many cases been associated with animal cruelty. The awareness that cruelty to animals is not acceptable and the expression of this awareness in anti-cruelty legislation is comparatively recent.

**1.9** At least so far as the western world is concerned, the development of laws relating to animal cruelty has been largely in the context of the view that animals have no legal status, other than being the property of humans. This is perhaps unsurprising, given the Christian view that animals, as inferior beings, were made for the benefit of humankind.<sup>3</sup> While this message has been said to have been based on divine revelation, in truth it reflects a narrow and anthropocentric view of life and the world in general.<sup>4</sup>

**1.10** The endemic animal cruelty evident in 19th century European societies was probably more a reflection of the state of those societies than anything else. The (literally) revolutionary changes in that century which liberalised thinking, recognised the concept of human rights and ultimately led to the abolition of slavery and universal suffrage, were paralleled by the development of an awareness that animal cruelty was not something which should be tolerated.

**1.11** As Radford points out,<sup>5</sup> these changes had their roots in several events, including the (then) shocking revelation that the human species was not in quite the central position in the universe which had previously been thought to be the case. Not only did the sun not revolve around the earth, but (worse still) human beings were not created by God in the garden of Eden. In setting out the scientific basis of evolution, Charles Darwin undermined any claim that animals were put on the planet solely for the benefit of humans and underlined the close similarities between humans and animals.

**1.12** Jeremy Bentham's reflections on the subject of animal cruelty, which were a product of that intellectual incubation process of the 19th century, were especially influential. Bentham's utilitarian views, based on the idea that morals and legislation should be founded on that bringing the greatest happiness of the greatest number, had special significance when focused on animal cruelty. He said in this regard:<sup>6</sup>

*“...But is there any reason why we should be suffered to torment them? Not any that I can see. Are there any why we should not be suffered to torment them? Yes, several. The day has been, I grieve to say in many places it is not yet past,*

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3 see, for example the pronouncement of Cardinal Newman on the subject: JH Newman (1858) *Sermons preached on various occasions* 2nd ed. (London)

4 For a scholarly and readable account of the historical development of animal cruelty law see M Radford (2001) *Animal Welfare Law in Britain – Regulation and Responsibility* Oxford University Press: Oxford, New York

5 Footnote 4

6 From “An Introduction to the Principles of Morals and Legislation” (1789), quoted in PAB Clarke & A Linzey (1990) (eds) *Political Theory and Animal Rights* London, Winchester: Pluto Press

*in which the greater part of the species, under the denomination of slaves, have been treated by the law exactly upon the same footing, as, in England for example, the inferior races of animals are still. The day may come, when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may come one day to be recognized, that the number of the legs, the villosity of the skin, or the termination of the os sacrum, are reasons equally insufficient for abandoning a sensitive being to the same fate? What else is it that should trace the insuperable line? Is it the faculty of reason, or, perhaps, the faculty of discourse? But a full-grown horse or dog, is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even a month, old. But suppose the case were otherwise, what would it avail? The question is not, Can they reason? nor, Can they talk? but, Can they suffer?<sup>7</sup>*

**1.13** Attempts to pass the first English laws to deal with cruelty were made in the early 19th century.<sup>8</sup> The first Bills concerned the prohibition of bull-baiting. In 1809 Thomas Erskine sought to have an Act passed to prevent “malicious and wanton cruelty” to animals. Although this did not become law, it paved the way for the first anti-cruelty statute: “Martin’s Act”. MP William Martin’s first attempt to have his Bill made law failed in the House of Lords (having been passed by the Commons); but in 1822 his re-introduced Bill succeeded in passing both Houses.<sup>9</sup>

**1.14** While the first moves towards anti-cruelty laws were driven by an increasing awareness of the immorality of cruelty to animals, another, equally powerful motivator was a concern about the impact of cruel practices on social discipline.<sup>10</sup> Early 19th century England was in a state of social upheaval, and those in power were interested to ensure that social order was maintained, particularly given the revolutionary events which had recently occurred on the other side of the English Channel. It is no coincidence that England was actively exporting convicts to the recently-founded colony of Australia at this time – simply because there was not enough space in the jails and prison hulks for the burgeoning convict population.<sup>11</sup>

**1.15** Reflecting the status of animals in the English law it inherited, it is true to

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7 Note, though, that Bentham apparently changed his stance in later years, taking the view that animal cruelty should be condemned solely because it could give rise to indifference to human suffering: see J Passmore (1975) *The Treatment of Animals Journal of the History of Ideas* 36, 195 (at 211)

8 Radford gives a detailed and interesting review of the history of legal developments at this time: see Footnote 4 (Chapter 3)

9 The Act made it an offence for a person to “wantonly and cruelly beat, abuse, or ill-treat any horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep or other cattle”

10 See Radford (Footnote 4), Chapter 3

11 see R Hughes (1988) *The Fatal Shore* Random House

say the overwhelming majority of Australian law, in all of its various guises, regards animals as property. Some, like Gary Francione, argue that the interests of animals will never be properly advanced while this is the case.<sup>12</sup> This has the ring of truth if one accepts that humanity is incapable of viewing the interests of animals independently of its own. The very laudable efforts by Steven Wise in the USA to use the common law to gain recognition of rights of some primates<sup>13</sup> appears unlikely to succeed in the event it is attempted in Australia. Radford has pointed out that the development of the common law in this way will probably be thwarted in countries (like Australia) where the courts are in essence subordinate to the relevant parliament.<sup>14</sup>

**1.16** Whatever the situation, change is already afoot. For example, the European Community Protocol on Animal Welfare (in the 1997 Amsterdam Treaty) has stated the desire “to ensure improved protection and respect for the welfare of animals as sentient beings.”<sup>15</sup> The European Constitutional Treaty of 2004 picks up this Protocol and transforms it into a Treaty Article.<sup>16</sup>

### *The definition of “animal welfare”*

**1.17** The advocates of animal use in the farming industry have been quick to “science” to further their cause to justify inflicting cruelty on animals. The first line of attack is semantic. It uses the word “welfare” as opposed to “cruelty”, seeking to establish that animal “welfare” laws are somehow better than animal “cruelty” laws. Part of the basis of this (they say) is that an obsession with preventing animal cruelty, being the province of animal rights activists, is therefore somehow the province of an extremist fringe. Much better is the emphasis on animal welfare, because this acknowledges the reasonable use and exploitation of animals. Hugh Wirth,<sup>17</sup> for example, has sought to give this viewpoint respectability by attributing it to William Wilberforce, the eminent 19th century campaigner for the consideration of human and animal suffering.<sup>18</sup> Nobody would criticise the real contributions of Wilberforce (or Dr Wirth for that matter) to the cause of reducing animal cruelty, but it is probably time to move on from a viewpoint which was shaped in the social, moral and ethical environment of the 19th century. To exclusively endorse a welfare-oriented approach to the issue, while being unprepared to engage constructively with any approach which contemplates animal rights, is

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12 see G Francione (1995) *Animals, Property and the Law* Philadelphia: Temple University Press

13 see for example SM Wise (2008) The basic rights of some non-human animals under the common law *Reform* 91, 11

14 see Footnote 4, page 104

15 See T Camm & D Bowles (2000) Animal welfare and the treaty of Rome – legal analysis of the protocol on animal welfare and welfare standards in the European Union *Journal of Environmental Law* 12, 197

16 see M Miele, J Murdoch & E Roe (2005) Animals and ambivalence: governing farm animal welfare in the European food sector in *Agricultural Governance: Globalization and the New Politics of Regulation* V Higgins & G Lawrence (eds) London, New York: Routledge (p 169)

17 President of RSPCA Victoria, Senior Vice-President of the World Society for the Protection of Animals (WSPA) and former President of RSPCA Australia

18 see H Wirth (2007) The animal welfare movement and consumer-driven change *Farm Policy Journal* 4, 1

divisive (insofar as it concerns those who want to improve the lot of animals).

**1.18** Most people interested in reducing cruelty to animals would acknowledge that scientific knowledge of the state of contentment of an animal is an invaluable aid to establishing which practices carried out on animals are cruel and in need of legal regulation. That is not to say that all such science is useful in this regard. Much of it may be over-simplistic or (and) based on false premises. Having said that, there are modern animal welfare scientists who undoubtedly have made a serious positive contribution in the area, including Webster,<sup>19</sup> Broom,<sup>20</sup> Dawkins<sup>21</sup> and Duncan<sup>22</sup>.

**1.19** The first scientific question is “what is welfare”? Fraser and Broom have said it is “a state of body and mind as the sentient animal attempts to cope with its environment.”<sup>23</sup> Webster has said that “good welfare” is where a sentient being is “fit and happy”.<sup>24</sup> This last suggestion is very important, because it raises the obvious inference that what is important in animal welfare is the subjective feelings of an animal, which in turn leads to the conclusion that animal welfare (and animal welfare law) relates to beings which are aware of their condition.<sup>25</sup> No animal behavioural scientist worth that description would, in the author's opinion, disagree with that position. Indeed, it is interesting to note that Guidelines on pain relief in animals used for research (which have recently been released by the National Health and Medical Research Council) include a “judgement about how the animal feels” in its definition of “animal welfare”.<sup>26</sup>

**1.20** A real step forward, at least in terms of setting out a platonic ideal state, was the enumeration of the “Five Freedoms” necessary for good (farm) animal welfare proposed by Webster<sup>27</sup> (and adopted by the UK Farm Animal Welfare Council). They are:

- freedom from thirst, hunger and malnutrition – ready access to fresh water and a diet to maintain full health and vigour;
- freedom from discomfort – by providing a suitable environment including shelter and a comfortable resting area;
- freedom from pain, injury and disease – by prevention or rapid diagnosis

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19 see for example AJF Webster (1994) *Animal welfare: a cool eye towards Eden* Oxford: Blackwell

20 see for example DM Broom & KF Johnson (1993) *Stress and Animal Welfare* London: Chapman and Hall

21 see for example M Dawkins (1980) *Animal suffering, the science of animal welfare* London: Chapman and Hall

22 see for example IJH Duncan (1993) Welfare is to do with what animals feel *Journal of Agriculture and Environmental Ethics* 6, 8

23 D Fraser & DB Broom (1990) *Farm Animal Behaviour and Welfare* Wallingford: CAB International

24 AJF Webster (2005) *Animal Welfare: Limping Towards Eden* Oxford: Blackwell

25 see MS Dawkins (1990) From an animal's point of view: motivation, fitness and animal welfare *Behavioural and Brain Sciences* 13, 1

26 Guidelines to promote the wellbeing of animals used for scientific purposes: the assessment and alleviation of pain and distress in research animals: <http://www.nhmrc.gov.au/publications.synopses/ea18syn.htm>

27 AJF Webster (1984) *Calf husbandry, health and welfare* London: Collins

- and treatment;
- freedom to express normal behaviour – by providing sufficient space, proper facilities and company of the animal's own kind;
- freedom from fear and distress – by ensuring conditions which avoid mental suffering.

**1.21** The archetypal example of bad animal welfare science is the uncritical use of measurements of blood levels of stress hormones in animals (and in particular the adrenocortical steroid cortisol – or the natural stimulant for its release, the pituitary hormone ACTH), whereby elevation of cortisol is said to be strongly indicative that the animal is stressed and therefore in a bad welfare state, while conversely unchanged cortisol levels can be said to indicate that all is well from the welfare point of view. The first problem with this is that it confuses stress with suffering. The “stress response” is not a measure of suffering; it is a physiological response to stressor(s), and operates as a coping mechanism. Suffering occurs when the animal fails to cope with those stressors.<sup>28</sup> A further important point is that release of such hormones following stimulation of the hypothalamic-pituitary-adrenocortical (HPA) axis is not invariably a response to stress; these systems are primarily concerned with metabolic homeostasis and regulation of energy availability. Consequently, an increase in the activity of the HPA axis *may* be a response to stress, but it equally may be a response relating to homeostatic changes.

**1.22** It is useful to consider the nature of the stress response involving elevation of corticosteroids. Initially, there is an alarm phase during which heart rate and blood pressure increase and hormones such as catecholamines (adrenaline is one) and cortisol are released. There is then an adaption phase, during which there may or may not be a reduction in the effects of the stressor (associated perhaps with impaired function, decrease in reproduction, increase in hormones like cortisol and suppression of the immune system). However, if the animal cannot adapt to the stressor, there is an exhaustion phase, when (amongst other things) there may be a decrease in the release of cortisol in response to a stress event. From this it can be seen that levels of hormones like cortisol in the blood may reflect the stress response during the alarm phase (although in a very non-specific way – and may indeed be confused with responses which represent excitement, rather than, for example, pain sensation), while a failure to record a change in cortisol levels may reflect the animal being in the exhaustion phase. Moreover, measurements of corticosteroids are not measures of suffering, if only because most suffering probably arises from the cost of adaptation or exhaustion (ie once the alarm phase, and the cortisol response, has subsided).<sup>29</sup> For example, cortisol levels increase after feeding, which cannot be said to involve suffering.<sup>30</sup> Indeed, it is well established that seemingly stressful situations

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28 AJF Webster (1998) What use is science to animal welfare? *Naturwissenschaften* 85, 262

29 AJF Webster (2007) *New trends in animal welfare* Proceedings of the XIII International Congress on Animal Hygiene

30 P Mormede, S Andanson, B Auperin et al (2007) Exploration of the hypothalamic-pituitary-adrenal function as a tool to evaluate animal welfare *Physiology & Behavior* 92, 317

(eg long-term tethering of bulls) can be associated with lowered cortisol responsiveness.<sup>31</sup> Furthermore, corticosteroid levels do not necessarily vary in proportion to the intensity of the perceived stress. For example, exposure of a pig to a novel environment increases blood cortisol to maximal levels (although levels of ACTH may be more graded with stimulus intensity).<sup>32</sup>

Clearly, measurements of these hormones alone cannot be taken as measures of an animal's welfare.

**1.23** The recent review process leading up to the adoption by the Commonwealth of the code of practice relating to the farming of pigs illustrates how the science of animal welfare can be used inappropriately. The review adopted a standpoint that any changes in practices relating to the keeping of pigs had to be supported by scientific evidence. Views based on “emotion alone” were not admissible.<sup>33</sup> This sort of view might be supportable were science in the position to know what a farm animal is thinking and feeling. Current scientific knowledge is, the author suggests, some way short of being in that position. Until it is able to do that, it is in the view of the author not only acceptable but desirable that a reasonable person's view on what an animal might be experiencing is entirely valid and admissible in considering how to legislate to control arguably cruel animal farming practices.

**1.24** Note in this regard the following statement from the National Health and Medical Research Council *Australian code of practice for the care and use of animals for scientific purposes*.<sup>34</sup>

*“pain and distress cannot be evaluated easily in animals and therefore investigators and teachers must assume that animals experience these in a manner similar to humans unless there is evidence to the contrary. Decisions regarding the animals' welfare must be based on this assumption.”*

In the author's view, this “precautionary principle” regarding the application of science to the assessment of pain and distress, and thereby to animal welfare, should be incorporated in animal welfare legislation across the board.

### *Attitudes to animal welfare*

#### **Increasing public concern**

**1.25** It could be said that many people have an ambivalent attitude towards

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31 see for example I Veissier & A Boissy (2007) Stress and welfare: two complementary concepts that are intrinsically related to the animal's point of view *Physiology and Behavior* 92, 429

32 see Footnote 25, 320

33 see M Caulfield & H Cambridge (2008) The questionable value of science-based “welfare” assessments in intensive animal farming – sow stalls as an illustrative example *Australian Veterinary Journal* 86, 446; see also the submission to the Productivity Commission Australian Pig Meat Industry Public Inquiry made by Australian Pork Limited (No 2, 2004)

34 7th edition, 2004



exploiting animals, whether it be raising and killing them for food or for other purposes. In the modern Western world, most people do not come into contact with farm animals,<sup>35</sup> so they usually have little idea of the treatment those animals are subject to. Also, recent trends in marketing animal protein as food have been towards “concealing and changing the animal form, so that people are scarcely reminded of this origin.”<sup>36</sup>

**1.26** Public interest in animal cruelty issues, and in particular in animal cruelty associated with agribusiness, is at an all-time high and is likely to continue increasing. The change in public attitudes has its roots in the 1960s and 1970s. Ruth Harrison in 1964 published a book called *Animal Machines*<sup>37</sup> in which she set out and criticised the factory farming of animals. The UK government responded by establishing the Brambell Committee to enquire into housing conditions and practices in intensive animal farming and to address the question of whether standards should be set in the interest of the welfare of the animals concerned.<sup>38</sup>

**1.27** The pressure for change continues and there is increasing recognition of animal welfare as a valid concern. His Honour Justice Michael Kirby of the High Court has said “...concerns about animal welfare are clearly legitimate matters of public debate across the nation. So are concerns about the export of animals and animal products. Many advances in animal welfare have occurred only because of public debate and political pressure from special interest groups. The activities of such groups have sometimes pricked the conscience of human beings.”<sup>39</sup>

**1.28** Richard Dawkins has recently discussed the basis for the shift in the spirit of the times regarding a range of moral issues, including universal suffrage for women and recognition of the unacceptability of racism.<sup>40</sup> He concludes that contributions to such moral advances come from leaders and thinkers, as well as increased education. Importantly, he notes that past bad treatment of black people, women, Jews and so on often occurred because they were not perceived at the time as fully human. The parallels with animals are obvious and the rational conclusion by philosophers such as Peter Singer that all sentient beings should be treated humanely is inevitable. Dawkins says, tellingly, “perhaps this hints at the direction in which the moral *Zeitgeist* might move in future centuries. It would be a natural extrapolation of earlier reforms like the abolition of slavery and the emancipation of women.”

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35 see for example L Holloway (2001) Pets and protein: placing domestic livestock on hobby-farms in England and Wales *Journal of Rural Studies* 17, 293

36 CT Hoogland, J de Boer & JJ Boersema (2005) Transparency of the meat chain in the light of food culture and history *Appetite* 45, 15

37 London: Vincent Stewart Ltd

38 FWR Brambell (1965) *Report of the Technical Committee to Enquire into the Welfare of Animals Kept Under Intensive Husbandry Systems* London: HMSO

39 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199

40 R Dawkins (2006) *The God Delusion* London: Transworld Publishers

**1.29** However, legislation and regulation advances slowly. This is largely because those who stand to benefit commercially from continuing cruel practices in animal farming and associated activities make serious efforts to hide their activities from public scrutiny and at the same time convince the public that in fact there is nothing wrong. Governments are complicit in this, being in the main unwilling to pass effective legislation, and preferring to give immunity to prosecution to persons who exploit animals commercially, passing the responsibility for animal welfare to the industry itself, and turning a blind eye where there are breaches of anti-cruelty laws. This is hardly surprising, given the amount of money involved. Governments can hardly be expected to lead the way morally; one only need reflect on the fact that all governments agree about the proven health risks of smoking, yet continue to allow the sale of tobacco products (no doubt in order to benefit from the tax revenue associated with it).

**1.30** While most would agree that there is an increase in public concern about animal welfare as a moral issue, it is interesting to note that some of that concern may be influenced by concern about human, rather than animal wellbeing. One European study concluded that consumers seem to use animal welfare as an indicator for those product qualities that might have an effect on themselves, such as food safety, healthiness and quality.<sup>41</sup>

**1.31** Another factor which is slowly gaining public recognition is that cruelty to animals is often associated with other aberrant behaviour, including violence towards other people. This is recognised in the highly-regarded American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders.<sup>42</sup> There is considerable evidence that previous or concurrent cruelty to animals was or is carried out by perpetrators of homicide and rape.<sup>43</sup> This appears to be the case with notorious Australian murderers, including Martin Bryant, who was responsible for killing 35 people at Port Arthur in 1996. There is also evidence that domestic violence and child abuse is often linked with those who have been cruel to animals.<sup>44</sup>

### ***The influence of the farming sector***

**1.32** The development of the law in Australia as it relates to farming of animals has been greatly influenced by the dominant position of the agriculture sector in economic terms. However, things are changing. Until about 1950, agriculture accounted for about a quarter of output and something like 80% of exports. In the last two decades agriculture's share of gross domestic product has been between 4%

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41 GC Harper & SJ Henson (2001) Consumer concerns about animal welfare and the impact of food choice *EU FAIR CT98-3678*

42 see P Wilson & G Norris (2003) Relationship between criminal behaviour and mental illness in young adults: conduct disorder, cruelty to animals and young adult serious violence (presentation at the International Young Adult Mental Health Conference 2002: [http://epublications.bond.edu.au/hss\\_pubs/30](http://epublications.bond.edu.au/hss_pubs/30))

43 Footnote 42

44 F Becker & L French (2004) Making the links: child abuse, animal cruelty and domestic violence *Child Abuse Review* 13, 399

and 6%, while agricultural exports were down to about 20% of total exports in 2003-04.<sup>45</sup>

**1.33** Moreover, the political influence of farmers may also be waning. In Western Australia, for example, a Labor government recently succeeded in redressing the bias towards rural communities in the electoral system. An earlier Liberal government had entrenched a situation where rural constituencies had, in the main, considerably fewer voters than urban constituencies. In other words, a rural (ie a farmer's) vote was worth more than the vote of a city dweller.<sup>46</sup>

**1.34** Regardless of this diminishing contribution, the agriculture industry has had a huge influence in the way the law relating to the treatment of animals in the industry has developed. This appears to be the result of a view, largely held by politicians, that farmers have an importance which is much greater than their economic importance. For example, in May 2005 the then Prime Minister, John Howard, described "rural people" as "part of this country's identity and part of the character of this country".<sup>47</sup> Quoting this statement, journalist George Megalogenis pointed out that it is completely fallacious, not least because Australia is the most urbanised nation in the developed world.

**1.35** In large part, the position today is that the use of animals by the agriculture industry is the subject of minimal regulation. Many cruel practices which farmers and the industry have succeeded in presenting as "acceptable husbandry practice" have one way or another become exempt from the application of the law. There is clear evidence of a lack of willingness of government departments in states and territories which are charged with the administration of the law to rigorously enforce it where industry interests are concerned. Despite this, the industry interests concerned continue to complain loudly that animal welfare laws applied to them are far too stringent and represent a regulatory burden which is too severe.<sup>48</sup>

**1.36** The farming industry, in responding to the increasing public awareness of cruel practices it inflicts on animals, has responded with a well-orchestrated public relations and lobbying campaign. One manifestation of this is to paint animal industries as "welfare friendly". The logic employed here is that the farmer, given he or she stands to make money out of animals, must have a vested interest in looking after his or her animals' welfare, because after all (in essence) "a happy animal is a productive animal". But the "welfare" which the farmer wants to improve is by this definition the "welfare" which increases productivity. This is not the same as the "welfare" which is relevant to the animal itself.

**1.37** Intensive animal farming interests have also been relying on the advice of

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45 Productivity Commission (2005) *Trends in Australian Agriculture*

46 See D Hodgkinson (2006) Geoff Gallop as Premier of Western Australia 2001-2006 *The New Critic* 2

47 George Megalogenis, September 29 2007 "Few farms, lots of bull" *The Australian*

48 Productivity Commission (2007) *Annual Review of Regulatory Burdens on Business: Primary Sector*

public relations specialists. One result is that animal agribusiness has been very active in seeking to paint those interested in animal welfare in farming as extremists and therefore not to be taken seriously. This sort of strategy has a long and venerable history. In the 19th century, each proposal to increase legislative protection to animals was greeted with ridicule.<sup>49</sup>

**1.38** Another tack which the animal farming industry has adopted is to promote the view that anti-cruelty laws are out of date (at least so far as they apply to animal farming), because they focus on the individual animal “versus caring for the herd”.<sup>50</sup> It is difficult to follow this argument. Animal cruelty laws focus on cruelty to individual animals because that is what society has decided is important.

**1.39** The animal farming industry has also tried to convince the regulators that, while consumers may say they don't like cruelty to animals in intensive animal farms, they are not willing to pay the increased price for animal-derived goods (primarily food) which are produced by processes which increase animal welfare. These days, introduction of any new regulation is preceded by an assessment of the economic cost, to be weighed against the benefits. Typically this will involve a “regulation impact assessment” or something of the sort.<sup>51</sup> One way of assessing the “benefits” of improved animal welfare to people is to consider how much they are prepared to pay for that improvement.<sup>52</sup> However, it is arguable whether this is appropriate; many may regard it as “abhorrent to try to place a money value on things that they see as primarily moral issues”.<sup>53</sup> Indeed, at one level if improved animal welfare can in fact be measured by “willingness to pay”, then it could be argued that there is no need for laws to improve farm animal welfare, because market pressure will result in consumers choosing to purchase “welfare-friendly products” to the exclusion of products from cruel processes.<sup>54</sup> However, this is somewhat different from saying that animal farmers should consider changing their ways to exploit the commercial opportunity offered by supplying “welfare-friendly” or “cruelty-free” product. That is entirely rational and is what seems to be happening anyway in some markets.<sup>55</sup>

**1.40** The utilitarian focus on concepts such as “willingness to pay” and “free riding” may be applicable in the context of farm animal welfare for some people. However, there is growing evidence that altruistic forces are at work and are

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49 see B Harrison (1973) *Animals and the State in Nineteenth-Century England* *The English Historical Review* 88, 786

50 K Plowman, A Pearson & J Topfer (2008) *Animals and the law in Australia: a livestock industry perspective* *Reform* 91, 25

51 see D Pearce & S Argument (2005) *Delegated Legislation in Australia* Chatswood: LexisNexis Butterworths

52 see RM Bennett, J Anderson & RJP Blaney (2002) Moral intensity and willingness to pay concerning farm animal welfare issues and the implications for agricultural policy *Journal of Agricultural and Environmental Ethics* 15, 187

53 Footnote 52, p199

54 H Grethe (2007) High animal welfare standards in the EU and international trade – how to prevent potential “low animal welfare havens”? *Food Policy* 32, 315

55 For example, Smithfield Foods, the largest pork producer in the USA (and the world) has announced it is phasing out sow stalls, largely in response to consumer demand (from retailers such as McDonalds)

increasing. For example, consumers are purchasing more products which appear to reflect social consciousness, such as dolphin-safe tuna.<sup>56</sup> Moreover, economists are starting to suggest that animal welfare issues can be categorised as “psychological externalities”, rather than as a public good.<sup>57</sup> As a consequence, willingness to pay considerations are probably irrelevant. While the author does not necessarily agree with this contention (he thinks that animal welfare does constitute a public good), it nevertheless illustrates the active consideration being given to this problem.

The reality is that it can be assumed that market forces themselves will not succeed in supplying a socially-acceptable level of animal welfare in the animal farming industry.<sup>58</sup>

**1.41** Yet another strategy of the farmers and others who make money out of exploiting animals has been to paint themselves as embattled and hard done by, such that imposing animal welfare driven regulation on their practices will simply allow increased competition by imported products from countries which do not have that regulation. For example, in a submission to the Productivity Commission, Australian Pork Limited (the representative body for pig farmers) made precisely this claim.<sup>59</sup> There is no justification for this.<sup>60</sup> It is not rational to hold back from making a morally justified legislative change on the grounds “if we don’t do it someone else will”.

**1.42** However there is one aspect of this issue which is deserving of attention. If Australian farmers do have more stringent animal welfare requirements imposed on them, and that increases their costs, then it is likely this will provide a competitive advantage to imports from countries which do not have such stringent animal welfare standards.<sup>61</sup> The problem for farmers (and for animal welfare) is that Australia could not legislate to give favourable treatment to Australian animal products derived from welfare-friendly processes.

### **International barriers to decreasing cruelty to farm animals**

**1.43** Australia is a party to the agreement which established the World Trade Organisation (WTO).<sup>62</sup> That agreement re-enacted the General Agreement on Tariffs and Trade (GATT). It also enacted a series of collateral agreements which

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56 see JL Lusk, T Nilsson & K Foster (2007) Public preferences and private choices: effect of altruism and free riding on demand for environmentally certified pork *Environmental & Resource Economics* 36, 499 (and references therein)

57 S Mann (2005) Ethological farm programs and the “market” for animal welfare *Journal of Agricultural and Environmental Ethics* 18, 369

58 JL Lusk, T Nilsson & K Foster (2006) Public preferences and private choices: effect of altruism and free riding on demand for environmentally certified pork *Environmental & Resource Economics* 36, 499

59 Australian Pork Limited (2004 – submission No 2) *Productivity Commission Australian Pig Meat Industry Public Inquiry*

60 See the comment in Radford’s book (Footnote 4) at page 121

61 see H Grethe (2007) High animal welfare standards in the EU and international trade – how to prevent potential “low animal welfare havens”? *FoodPolicy* 32, 315

62 the “Marrakesh Agreement”: see <http://www.austlii.edu.au/au/other/dfat/treaties/1995/index.html>

provided an application of GATT rules in particular areas. The agreements which may be relevant in the context of animal welfare are those on Technical Barriers to Trade, Agriculture and the Application of Sanitary and Phytosanitary Measures.<sup>63</sup> Stevenson<sup>64</sup> has set out the GATT rules which raise problems for animal welfare legislation which could be said to have an impact of trade. In essence, these rules (or rather the way they have been interpreted) would prevent Australia from taking action which would inhibit the import of animal-derived goods or products which have been produced in a way which unacceptably compromised animal welfare. This is because the rule which relates to imports says that the import of a particular product must be accorded treatment which is no less favourable than “like products of national origin”.<sup>65</sup> In defining what this term means, the GATT tribunals have focused on the fact that process and production methods can not be considered when deciding which imported products are “like” a corresponding nationally-originated product. As Stevenson has pointed out, improvements in animal welfare in intensive farming will almost inevitably involve the process and production method of the product (eg the production of eggs from chickens housed in battery cages versus eggs from free range chickens). He has noted that the relevant WTO Appellate Body has set out principles which should be applied in interpreting “like products”, being the product's properties nature and quality, its end uses in a given market and consumers' tastes and habits.<sup>66</sup>

**1.44** Furthermore, the “exception provision” in GATT which appears to permit countries to take action to discriminate against the import of animal products derived using cruel practices (a measure found to be in breach may be adopted if it is necessary to “protect animal life or health”) has been interpreted narrowly and in such a way as to effectively exclude its application to allow discrimination against such products. This is because of rulings including those having the effect that an importing country can not take action which would amount to influencing events outside its territorial jurisdiction. There have also been very narrow interpretations of the meaning of the word “necessary”, again having the effect of preventing the application of the exceptions in the case of measures intended to prevent the import of products associated with animal cruelty. Stevenson's article gives several examples of how GATT rules have impacted negatively on animal welfare issues, including an attempt by the EU to ban the import of furs from countries allowing the use of leghold traps. He also points out that the current view of the GATT rules may serve to inhibit countries from legislating to improve animal welfare, with increased cost to their own producers, because they are unable to take steps to protect their producers from “animal welfare unfriendly” import competition.<sup>67</sup>

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63 see P Stevenson (2002) The world trade organisation rules: a legal analysis of their adverse impact on animal welfare *Animal Law* 8, 107; see also Radford's comments on this issue at pp132-137 – Footnote 4

64 Footnote 63

65 GATT Article III:4: see Footnote 63, page 110

66 Footnote 63, page 116

67 Footnote 63, page 134

**1.45** One potential strategy which would assist “animal welfare friendly” farmers to get a proper return on their increased investment is to put in place labelling programmes which apply a rating to, for example food products in relation to their “cruelty level” in production.<sup>68</sup> Such systems can be voluntary (unlikely to have much impact) or mandatory. In either case, there needs to be effective audit and certification arrangements. There is an argument that compulsory animal welfare labelling would fall foul of the WTO rules.<sup>69</sup>

**1.46** It can be seen from this that the WTO rules are a significant stumbling block to the development of improved animal welfare standards in the primary industry sector. Reform seems unlikely, given the poor response to the proposal by the European Union to the WTO on animal welfare in trade and agriculture, which called for the issue of animal welfare standards to be addressed by the WTO.<sup>70</sup>

### **Quality assurance compliance as a way of side-stepping animal cruelty law**

**1.47** Finally, the animal farming industry has been pushing hard for legal recognition of industry-controlled quality assurance schemes, compliance with which will exempt a farmer from prosecution for cruelty. It is hardly surprising this is what the industry would want, as it may enable the farmer to hide cruel practices behind closed doors, to have no independent monitoring or inspection and to be immune from the law. Alarming, governments appear to be prepared to move in this direction. For example, Peter Thornber, a senior officer in the Commonwealth Department of Agriculture, Fisheries and Forestry, recently said “DAFF believes the development of QA programs that incorporate animal welfare by the animal industries is the best means to reliably deliver acceptable animal welfare outcomes.”<sup>71</sup> The question is, of course “acceptable to whom?”

**1.48** However, it would be wrong to dismiss quality assurance schemes out of hand. The increase in average incomes in Western countries, coupled with a range of incidents involving food safety (for example BSE and bird 'flu) have served to increase consumer interest in the processes by which their food is produced.<sup>72</sup> Consumers have become more interested in food “quality assurance” and there is no reason why that “quality assurance” should not include assurances about animal welfare.<sup>73</sup>

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68 see for example A Gavinelli, C Rhein & M Ferrara (2007) European policies on animal welfare and their effects on global trade *Farm Policy Journal* 4, 11; P Thompson, C Harris, D Holt & E Pajor (2007) Livestock welfare product claims: the emerging social context *Journal of Animal Science* 85, 2354

69 see Footnote 61

70 AL Hobbs, JE Hobbs, GE Isaac & WA Kerr (2002) Ethics, domestic food policy and trade law: assessing the EU animal welfare proposal to the WTO *Food Policy* 27, 437

71 P Thornber (2007) Animal welfare is the responsibility of all *Farm Policy Journal* 4, 33

72 see CT Hoogland, J de Boer & JJ Boersma (2005) Transparency of the meat chain in the light of food culture and history *Appetite* 45, 15

73 see L Fulponi (2006) Private voluntary standards in the food system: the perspective of major food retailers in OECD countries *Food Policy* 31, 1

## The Australian Animal Welfare Strategy

**1.49** Perhaps the Australian Animal Welfare Strategy (AAWS) provides a prospect for improvement. It has been established under the auspices of the Commonwealth Department of Agriculture, Fisheries and Forestry (DAFF) with the laudable aim to “guide the development of new, nationally consistent policies” and to “enhance existing animal welfare arrangements in all Australian states and territories.”<sup>74</sup> It covers the “humane treatment of all animals in Australia.” Importantly, it recognises that for animal welfare, “science and ethics are both essential.”<sup>75</sup>

**1.50** The task sought to be addressed by AAWS is a difficult one. As with many areas of law in Australia, the distribution of responsibility for animal cruelty laws across the 8 states and territories jurisdictions will make it hard to achieve uniformity, particularly in the area of implementation and enforcement.

**1.51** The trouble with AAWS is that it undermines its credibility by its over-indulgence in breathless and enthusiastic prose. For example, it was recently said of AAWS that “strong characteristics of Australian animal welfare policy are the inclusive and transparent mechanisms for engagement and consultation between governments, the animal industries, animal researchers, animal welfare bodies and the community.”<sup>76</sup> Unfortunately, the converse is true. To give just a few examples:

- during the development of the new Code of Practice for pigs, Animals Australia questioned the industry's figures on the cost of replacing sow stalls, which had been accepted without demur by the consultant preparing the Regulatory Impact Statement. Industry refused to provide any figures on age of stalls or cost of replacement;
- the Commonwealth Department of Agriculture, Fisheries and Forestry (DAFF) has recently refused to release to Animals Australia (under the *Freedom of Information Act*) documents concerning potential breaches of live export licence conditions on the grounds that they may result in “third party intervention” which could “adversely affect the business interests” of those concerned;<sup>77</sup>
- officers in relevant States departments have informed Animals Australia that the Australian Quarantine and Inspection Service (AQIS) routinely refuses to provide information to them which may assist in prosecution of live exporters under the relevant anti-cruelty laws.

**1.52** Although the aims of AAWS are laudable, some might regard it as a Trojan horse. While the rhetoric is impressive, the actuality is that the results may well be to serve the purposes of the animal farming industry and give them what they want

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74 see <http://www.daff.gov.au/animal-plant-health/welfare/aaws>

75 Footnote 71

76 Footnote 71

77 currently the subject of a review application by Animals Australia to the Administrative Appeals Tribunal



– freedom to do what they like with animals without fear of being prosecuted. This is because, first, AAWS is run by the Commonwealth government department which looks after industry interests. Secondly, industry has a disproportionate influence in determining outcomes. Indeed, it has been said that now that “all stakeholders have been engaged”, there will be a movement to “the next stage of the process where industry takes over from government the responsibility for implementation and promotion.”<sup>78</sup> This sounds like a recipe for industry self-regulation.

**1.53** Another worrisome feature of the involvement of DAFF in overseeing the AAWS process is the way in which the development of Codes of Practice (now to be called "Standards" - at least so far as they are mandatory) for the Welfare of Animals is proceeding. These Codes are intended to be the basis of regulation of animal welfare in all of the farm animal industry (and will be if they are picked up in the legislation of the states and territories). DAFF has appointed Animal Health Australia (an organisation said to represent all governments, together with representatives from industry - note the absence of any independent parties with interests in animal welfare) to drive Code development. Despite the promise in the AAWS verbiage, this author believes that the end point if the "Standards" are developed and adopted will be a final acceptance of the many cruel processes inflicted on animals in agribusiness.

**1.54** To conclude, the future for animals in intensive farms and exported live is not promising. In the author's view, the Commonwealth government-led strategy has the features of a combined public relations exercise and procedure intended to endorse and insulate current animal farm industry practices. It would be good to be proved wrong.

**1.55** What is needed is a completely independent, nationally-based animal welfare commission, with responsibility for advising on legislation, and for enforcement. Achieving this would require co-operation and agreement between the various governments. While acknowledging that (at least as far as animal welfare is concerned) this is very unlikely, nevertheless this is exactly what has happened in many other areas where the states, territories and Commonwealth have all agreed that a particular area of law is of national importance. Examples are consumer protection (Australian Competition and Consumer Commission) and oversight of corporations (Australian Securities and Investments Commission).

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78 Footnote 71