Australian Animal Law

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Australian Animal Law

Context and Critique

Elizabeth Ellis

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For Ben, Libby and Molly Wren

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Preface

As I write, it is more than three years since the Northern Territory passed new animal protection legislation, seven years since the process began to convert the model code of practice for domestic poultry into contemporary animal welfare standards, and a decade or more since the model code of practice for livestock at slaughtering establishments was due to be reviewed. Not one of these processes has been finalised. The Northern Territory Act has still not commenced, the revised draft poultry standards await agreement by the state and territory agriculture ministers, and there appears to be almost no progress in relation to the development of livestock slaughter standards. In the case of the Northern Territory Act and the slaughter standards there is no publicly available information as to the reasons for the delay, while the last official progress report on the poultry standards is dated July 2021.

These inordinate delays are typical of the pace of change in animal protection in Australia. It is all the more remarkable given the very modest nature of the protections that animal reforms routinely contain. It may be that the poultry standards are finalised and the Northern Territory Act commenced by the time this book is published but their contribution to animal protection, while welcome, remains relatively minor. So, too, the various reviews of the legislative frameworks currently underway in a number of jurisdictions. Touted by governments as major reforms, they are largely limited by their

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terms to fiddling at the margins. Given the groundswell of community concern about animals in recent decades, an increasingly sophisticated scientific understanding of their welfare and the emergence of animal law as a field of significant academic study, it must be asked: why is it so difficult to achieve meaningful and timely animal protection reform in Australia?

This book seeks to address this question by emphasising the systemic nature of the problem. Although animals in some contexts receive greater protection than in others, the legal regulation of *all* animal use shares key characteristics. These include the disproportionate influence of industry in standards development and policy setting, the lack of independent administration of the resulting laws, inadequately resourced and problematic enforcement, fragmented and inconsistent legal and regulatory frameworks, lack of transparency about animal use and its regulation, and interminable delays in effecting even minor reforms. The focus on commonalities not only exposes the yawning gulf between official animal welfare narratives and the facts but also helps to pinpoint key changes required to achieve more meaningful protection for non-human animals.

The first imperative is to transfer responsibility for animal welfare to properly resourced independent statutory bodies, both within the states and territories and at federal level. This critical reform must go hand in hand with much readier public access to information about the actuality of animal treatment and the extent and manner of its regulation. This access should include images of lawful animal use, as well as unlawful conduct where this occurs in the context of government-supported industries. As it stands, we do not see animals – in more than one sense – nor do we see the uses the law permits or how legal powers are exercised. As set out in this book, the law contributes to this non-seeing in myriad ways, through its language, its processes and its substantive provisions. And through its absences. In doing so, the law not only reflects particular power dynamics but also helps to construct ideas about the relationship between human and non-human animals. With these ideas in a state of flux, references to different ways of seeing animals are interspersed throughout this book. They are integrated with the discussion of legal and regulatory failures to help readers appreciate that theories and assumptions about animals have

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real-world impacts. Uniting the diverse spectrum of views about the nature of the problem is the recognition that animals have interests and value independently of their utility to humans. In this respect, it is abundantly clear that the law has failed both to protect animals and to keep pace with contemporary thinking.

While I hope this book will be a useful resource for animal law students and teachers, it aims to provide a contextual critique that is also accessible to the general public, as well as to animal studies scholars and lawyers without specific expertise in this field. The law is as written at October 2021 but I have updated significant developments where possible during the final stages of the publication process. In writing this book, the purpose has been to expose the highly problematic state of Australian animal law and regulation, not to provide legal advice. The book should be used with that understanding.

Elizabeth Ellis
March 2022

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1
What is Animal Law?

On an autumn day in 2016, a pastoral company and its director were each convicted of one count of animal cruelty in the Magistrates Court of Western Australia. This case was unusual as most cruelty investigations don't result in prosecution and those which do are more likely to concern companion animals than cattle. Yet, paradoxically, this case and related litigation reveal a great deal about animal law and its practical operation. By examining these cases, we can begin to explore the complex features and issues that characterise the law and regulatory frameworks governing all Australian animals, not just cattle in Western Australia.[1] The facts of the case are set out in the decision of the Supreme Court of Western Australia which overturned the convictions on appeal.[2] The appellants were also successful in their appeal against the costs order.

1 As humans are also animals, the more accurate descriptor is non-human animals. While the more familiar term 'animals' will be employed for the most part in this book, reference will periodically be made to 'non-human animals' to remind the reader that the division between species is less marked than we tend to think.

2 *SAWA Pty Ltd v Swift* [2016] WASC 331.

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An animal law story

SAWA Pty Ltd held a pastoral lease on a cattle station managed by a director of the company. In 2014, SAWA and the director were each charged with animal cruelty offences by Swift, an RSPCA inspector, mostly in relation to the dehorning of 'feral' cattle over the age of 12 months.[3] Some of the original charges were discontinued during trial and some were dismissed but the company and its director were each convicted of one charge of being cruel to an animal contrary to s 19(1) of the *Animal Welfare Act 2002* (WA). This was because the magistrate found that one animal was caused unnecessary harm contrary to s 19(3)(j) when it was dehorned closer to the skull than was necessary. On appeal, Martino J held that the magistrate had failed to identify the law he applied in concluding that the animal had suffered unnecessary harm; the magistrate's reasoning also failed to demonstrate how he decided that the defences under s 23 and s 25 had not been established. These sections provide that it is a defence to a charge under s 19(1) if the defendant proves that the act was done in accordance with a generally accepted animal husbandry practice and in a humane manner (s 23) or in accordance with a relevant code of practice (s 25). At that time, the relevant code of practice was the *Model Code of Practice for the Welfare of Animals – Cattle* (2004), which provided that the dehorning of domesticated cattle without analgesics should be confined to the first muster and preferably when cattle are under six months old [5.8.2]. In relation to feral cattle, the code provided that only under exceptional circumstances, for example range management of older, previously unmustered cattle in extensive operations, should dehorning be implemented without analgesics on animals older than six months [8.3].

Before exploring key features of the above case, there is another, important side to this story as two related cases reveal.[4] The events which led to the prosecution of SAWA and its director took place on private property in a remote part of Western Australia and only came

3 The use of the term 'feral' for some animals living in the wild illustrates the interaction of language and law in the construction of hierarchies of animal protection. See further Chapter 6 this volume.

4 *SAWA Pty Ltd v ABC* [2017] WASC 349; *ABC v SAWA Pty Ltd* [2018] WASCA 29.

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to the attention of the RSPCA because they were filmed by a company employee who was concerned about animal welfare.[5] This footage formed a key part of the prosecution case and was tendered in evidence at the trial. The ABC obtained a copy of the video recording pursuant to the *Magistrates Court Act 2004* (WA) with the aim of reporting on the proceedings and related issues, including proposed amendments to the *Animal Welfare Act*. SAWA then sought an injunction restraining publication of the footage while the ABC applied for an order allowing publication pursuant to the *Surveillance Devices Act 1998* (WA). Under s 31 of that Act, the court may make an order that a person may publish a record of a private activity that has come to their knowledge as a result of the use of an optical surveillance device if satisfied that publication should be made to protect or further the public interest. The ABC's application was dismissed by Chaney J on the basis that the broadcaster's purposes could be adequately achieved without using the video recordings and because it would be difficult, if not impossible, to enforce any limitation on their publication. An appeal by the ABC to the WA Court of Appeal was also unsuccessful.

Overview of the legal and regulatory framework

At one level, these cases provide some basic information about animal welfare law and regulation in Australia. First, they illustrate that animal welfare is principally the responsibility of state and territory governments, not the Commonwealth. The majority of jurisdictions include most animal welfare matters within one statute while others have a general animal welfare statute plus additional laws to cover some specific animal uses.[6] In New South Wales (NSW), for example, the *Prevention of Cruelty to Animals Act 1979* is supplemented by the *Animal Research Act 1985* and the *Exhibited Animals Protection Act 1986* but in Queensland only exhibited animals are the subject of separate legislation. Note, however, that some changes to existing legislative frameworks will occur as a result of current reviews in a number of

5 *SAWA v ABC*, [15].

6 Provisions related to animal welfare are also found in legislation governing other regulatory contexts, for example nature conservation legislation.

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jurisdictions, as outlined in Chapter 2. The NSW reforms, for example, propose to incorporate the regulation of animal research and exhibited animals into a single animal welfare statute.[7] The Commonwealth's limited legislative responsibility for animal welfare is mainly in relation to live exports and the trade in native wildlife. From time to time, however, the Commonwealth has played a broader role in policy development and national co-ordination, for example in relation to the development of the animal welfare standards referred to below.

Second, these cases demonstrate the key role of codes of practice/standards in the regulation of animal welfare and how they interact with the principal statutes in important ways. Similarly to the *Animal Welfare Act 2002* (WA), most jurisdictions provide that compliance with an industry code of practice is either a defence to a prosecution or exempts the conduct from the operation of cruelty laws.[8] In NSW, compliance with a code of practice does not operate as a complete defence but is admissible in evidence in proceedings under the *Prevention of Cruelty to Animals Act 1979*. The Model Codes of Practice – Animal Welfare are being systematically revised and converted into animal welfare standards and guidelines with the aim of creating enforceable national standards to replace the codes of practice, whose legal status was variable and largely voluntary. For example, the *Model Code of Practice for the Welfare of Animals – Cattle* (2004) referred to in *SAWA v Swift* has been replaced by the *Australian Animal Welfare Standards and Guidelines for Cattle* endorsed in 2016.

Third, these cases make it clear that causing an animal pain or suffering is only a crime if the act or omission is considered *unnecessary*. Words like 'unnecessary', 'unreasonable' and 'unjustifiable' are the standout characteristic of all animal welfare legislation, whatever its form. How these words are interpreted is a crucial element in defining the extent of suffering allowable by law but judicial authority in this regard is limited. This is due to various factors, including the numerous exemptions and defences in animal welfare statutes, the resources and culture of law enforcers, the number and type of prosecutions brought, and the fact that most offences are tried summarily, and result in few appeals.

7 Public exposure draft Animal Welfare Bill 2022.

8 Section 4 of the *Animal Welfare Act 1993* (Tas) only exempts compliance with a code of practice in relation to animal research.

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This brings us to the final point about the regulatory framework that the cases introduce: namely, that charitable organisations, principally the RSPCA, have an important role in enforcing the criminal law. In some jurisdictions, animal welfare legislation is also enforced by the relevant agriculture department, sometimes pursuant to a memorandum of understanding with the state government which sets out the scope of responsibility in each case. In Queensland, for example, a memorandum of understanding gives responsibility for commercial farming matters to Biosecurity Queensland (Department of Agriculture and Fisheries) while the RSPCA focuses on companion animals and hobby farms. In NSW, the RSPCA has responsibility for enforcing the *Prevention of Cruelty to Animals Act 1979*, along with the Animal Welfare League of NSW. The police also have a role in enforcing animal welfare laws but it tends to be limited to more serious matters, those connected to other criminal activity or where there is no other inspector available.

The above points will be dealt with at length throughout this book but for now they serve as an introduction to key elements of the law relating to animals as a basis for understanding some of its more complex characteristics. It is these less straightforward aspects of animal law, introduced below, that the two *SAWA* cases also illuminate.

Sentience, science and legal 'things'

Sentience may be defined as the capacity 'to consciously perceive by the senses; to consciously feel or experience subjectively'.[9] In *SAWA Pty Ltd v Swift*, Martino J referred at [24] to the magistrate's findings that the feral cattle were 'clearly distressed by the process however the handling of animals, in all such circumstances, will cause such an effect'. From this and other dicta, it is clear that the cattle suffered in the process of dehorning and are rightly considered sentient. While it might seem obvious that cattle are capable of suffering, and that this knowledge ought to guide human behaviour, a long tradition of Western philosophical thought denied moral standing to animals in the belief that they lacked certain

9 Mellor 2019, 440.

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Figure 1.1. The law classifies domestic animals as property. (iStockphoto)

qualities considered distinctively human. In the 12th century, St Thomas Aquinas married Aristotelian philosophy with Christian theology to propound a hierarchical order of nature with God at the apex and humans above animals, a superiority that justified an instrumental view of animals whom he believed lacked rationality and an immortal soul.[10] In the 17th century, René Descartes viewed animals as mere automata which could be used for scientific experimentation without regard to analgesia or anaesthetic.[11] Writing in the early 18th century, Immanuel Kant believed that no direct duties were owed to animals because they lacked self-consciousness and the capacity for rational thought. Although he rejected animal cruelty, this was because of its tendency to harden its perpetrators in relation to other humans, not because any moral significance was attached to animals in their own right.[12]

10 Bruce 2018, 13–15.
11 Francione 2004, 110–11.
12 White 2013a, 38.

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By the 18th century, however, some philosophers had begun to focus on the capacity of animals to experience affective states and the implications of this for human behaviour. Foremost among these was Jeremy Bentham, a lawyer and social reformer, whose name is synonymous with the development of utilitarian philosophy. In determining right action, utilitarianism considers the consequences of conduct and whether it produces the greatest good for the greatest number but in relation to animals the question remained: how did they fit into this moral calculus? Bentham's answer came in 1789 with the publication of his *Introduction to the Principles of Morals and Legislation*. After noting the neglect of animals' interests by ancient jurists and their consequent degradation into the class of 'things', Bentham argued in a footnote that:

> 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*?[13]

Embodying a shift in focus from rationality to sentience, these oft-quoted words were to have a profound and lasting effect on the place of animals in the moral calculus. Even so, Bentham's position was not without constraint. Notwithstanding his reference to 'rights'[14] and the

13 Bentham 1823, 235–6.

14 Bentham used the word 'rights' not in the popular contemporary sense but as 'a law or rule backed by sanctions': Garrett 2011, 79.

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categorisation of animals as 'things', the preceding part of the same footnote makes clear that Bentham was untroubled by the human use of animals:

> If the being eaten were all, there is very good reason why we should be suffered to eat such of them as we like to eat: we are the better for it, and they are never the worse. They have none of those long-protracted anticipations of future misery which we have. The death they suffer in our hands commonly is, and always may be, a speedier, and by that means a less painful one, than that which would await them in the inevitable course of nature. If the being killed were all, there is very good reason why we should be suffered to kill such as molest us: we should be the worse for their living, and they are never the worse for being dead. 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.[15]

For Bentham, the capacity of animals to suffer makes them worthy of moral consideration, but lacking any interest in their own life ('they are never the worse for being dead') their use by humans is uncontested. Indeed, this use is characterised as beneficial for animals on the basis that their death at human hands 'commonly is, and always may be', a speedier and less painful one than awaits them in nature. Bentham's confidence in the potential for humane treatment may have been misplaced but the idea that animals are owed direct duties due to their sentience was a considerable advance. Nevertheless, a crucial question remained: how should the interests of animals in not suffering be balanced against human interests in using them?

The 19th-century response to this question is illustrated by the parliamentary debates during early attempts to legislate against animal cruelty in Britain. With concern about the potential impact of these reforms on human interests, reassurance was found in the ready distinction between animal use and abuse within the prevailing paradigm of the human–animal relationship. On introducing his Cruelty to Animals Bill 1809, Lord Erskine anticipated the following objections:

15 Bentham 1823, 235.

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> How, it may be first asked, are magistrates to distinguish between the justifiable labours of the animal, which from man's necessities is often most fatiguing, and apparently excessive, and that real excess which the Bill seeks to punish as wilful and wanton cruelty? How are they to distinguish between the blows which are necessary, when beasts of labour are lazy or refractory, or even blows of sudden passion and temper, from deliberate, cold-blooded, ferocious cruelty, which we see practised every day we live, and which have a tendency, as the preamble recites, to harden the heart against all the impulses of humanity?[16]

In answer to his rhetorical questions, Lord Erskine averred:

> This bill makes no act whatever a misdemeanor that does not plainly indicate to the court or magistrate a malicious and wicked intent; but this generality is so far from generating uncertainty, that I appeal to every member in our great profession, whether, on the contrary, it is not in favour of the accused, and analogous to our most merciful principles of criminal justice? So far from involving the magistrate in doubtful discriminations, he must be himself shocked and disgusted before he begins to exercise his authority over another. He must find malicious cruelty; and what that is can never be a matter of uncertainty or doubt, because nature has erected a standard in the human heart, by which it may be surely ascertained.—This consideration surely removes every difficulty from the last clause, which protects from wilful, malicious, and wanton cruelty, all reclaimed animals. Whatever may be the creatures which, by your own voluntary act, you choose to take from the wilds which nature has allotted to them, you must be supposed to exercise this admitted dominion, for use, or for pleasure, or from curiosity. If for use, enjoy that use in its plenitude; if the animal be fit for food, enjoy it decently for food; if for pleasure, enjoy that pleasure, by taxing all its faculties for your comfort; if for curiosity, indulge it to the full. The more we mix ourselves with all created matter, animate or inanimate,

16 United Kingdom, *House of Lords Debates*, 15 May 1809, 565–6 (Lord Thomas Erskine).

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> the more we shall be lifted up to the contemplation of God. But never let it be said, that the law should indulge us in the most atrocious of all propensities, which, when habitually indulged in, on beings beneath us, destroys every security of human life, by hardening the heart for the perpetration of all crimes.[17]

As with earlier attempts to legislate to ban bull-baiting, Lord Erskine's Bill failed and it was not until 1822 that a Bill introduced by social reformer Richard Martin was successfully enacted.[18] Even then, parliamentary support was not unanimous, with one member declaring his opposition:

> … not because he did not concur with the hon. mover, in disapproving of the ill-treatment of animals, but because the offences proposed to be punished by this bill were of too vague and indefinite a nature. Indeed, if the principle were adopted he could not see where the line was to be drawn, or why there should not be a punishment affixed to the boiling of lobsters, or the eating of oysters alive.[19]

Martin's Act was the forerunner of more comprehensive 19th-century reforms which were consolidated in the *Protection of Animals Act 1911* (UK). While the motivation for reform was diverse, 'there seems little doubt that change in the understanding of the moral significance of animals, and of their vulnerability to pain, was important'.[20] These early laws established the framework for modern animal welfare legislation in that nation and served as a broad prototype for Australian legislation, with the first anti-cruelty law introduced in Van Diemen's Land in 1837.[21] As we will see in Chapter 2, the law has evolved considerably since then, extending the level and scope of protection afforded animals and incorporating positive duties to act in relation to their welfare.

17 Ibid, 569–70.
18 The *Cruel Treatment of Cattle Act* 3 Geo IV, c 71 extended to horses, sheep and other livestock. For further historical detail of British law, see Radford 2001.
19 United Kingdom, *House of Commons Debates*, 7 June 1822, 873 (Sir James Scarlett).
20 White 2016b, 114.
21 Jamieson 1991, 239.

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Yet the underlying ethos of animal welfare legislation in Australia and other western nations remains broadly unchanged and contemporary law continues to reflect the fundamental dilemma that characterised its earliest incarnations. With an implicit acceptance of some animal suffering in the course of their use for human purposes, the animal welfare ethic seeks to regulate the extent and degree of suffering, with conduct only criminalised where the harm is considered unnecessary.

While the concept of necessity is subject to change, ultimately the interests of animals in not suffering must be weighed against human interests in making use of them, a calculus determined by humans. In balancing these interests, science is increasingly called upon to guide our understanding of animals' affective states and the implications of this knowledge for their wellbeing. Yet scientific understanding cannot be divorced from ethical considerations or the broader social and political context, as both historical and contemporary issues demonstrate. In the 19th century, Darwin's ground-breaking work demonstrated that human and non-human animals were part of a continuum rather than fundamentally different, thereby suggesting a non-instrumental basis for valuing animals' lives.[22] At the same time, this approach retained the anthropocentric categorisation of animals according to their similarity to humans,[23] thus reflecting the long tradition of superiority based on human characteristics. More recent times have seen scientific attention to animal welfare increase significantly yet aspects of animal welfare science remain highly contested, as we will see in Chapter 4 in the context of the development of new animal welfare standards for poultry.

In any case, scientific recognition of animal sentience has not altered the fact that, for legal purposes, animals are classed as things. In 1871, Charles Darwin acknowledged 'that the lower animals are excited by the same emotions as ourselves', a fact he considered 'so well established that it will not be necessary to weary the reader by many details'.[24] At common law, however, domestic animals were treated as absolute property and 150 years after Darwin's words, both common law and

22 Chen 2016, 30.
23 Ibid.
24 Darwin 1871 quoted in Dawkins 2006, 4.

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statute continue to define animals in terms of goods.[25] The significance of this status is the subject of extensive discussion in the animal law literature. Some lawyers and theorists believe that it is human attitudes and practices that require change rather than animals' property status;[26] others believe that ownership can actually benefit animals by creating a proprietorial interest;[27] others still, argue strongly that meaningful improvement to the lives of animals is impossible without removing their property status.[28] Of those who do favour change, some believe that animals require recognition as legal persons while others support a new category in which humans are the guardians, not owners, of animals.[29] Yet another view is that animals' property classification needs to be replaced 'with a new, transformative legal status or subjectivity' which respects animals 'for what they are – rather than their proximity to idealized versions of humanness'.[30]

As this book unfolds, we will return to the issue of animals' property status and its significance in legal terms. We will also consider some alternative views about the moral significance of animals and their relationship to humans. While comprehensive philosophical inquiry is beyond the scope of this book, it is impossible to evaluate the existing law without some understanding of the assumptions that underpin it. In any case, even acceptance of the current paradigm by no means avoids difficult questions about the moral significance of animals and the adequacy of the law when judged against its own criteria. By returning to *SAWA v Swift* we can start to see these difficulties in the context of contemporary animal welfare issues.

25 See, for example, s 2(1) of the *Australian Consumer Law*. For the difference in property status between wild and domestic animals, see Chapter 6 this volume.
26 See, for example, Caulfield 2018, 22–4.
27 See, for example, the chapter by Epstein in Sunstein and Nussbaum 2004.
28 See, for example, the chapter by Francione in Sunstein and Nussbaum 2004.
29 See further Chapter 3 this volume.
30 Deckha 2021, 6.

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Unnecessary suffering

You will recall that the relevant law in this case is the *Animal Welfare Act 2002* (WA) (the WA Act). As we have seen, the philosophical justification for animal welfare legislation is the capacity of animals to feel pleasure and pain yet the WA Act makes no reference to animals as sentient. As of 2021, this omission is consistent with all Australian jurisdictions, other than the Australian Capital Territory (ACT), although some changes are pending.[31] Nevertheless, animal sentience is implied in the WA Act's objects as set out in s 3(2) to:

> (a) promote and protect the welfare, safety and health of animals; and
>
> (b) ensure the proper and humane care and management of all animals in accordance with generally accepted standards; and
>
> (c) reflect the community's expectation that people who are in charge of animals will ensure that they are properly treated and cared for.

While these objects apply to all animals, as defined in s 5,[32] the effect of the WA Act as a whole, as with other Australian statutes, is that very different levels of protection apply depending upon the setting in which an animal is used. In other words, it is the function of the animal and the context of their use that determine the extent of legal protection. In *SAWA v Swift*, the setting was a cattle station and the context was the dehorning of cattle over 12 months of age, with deficiencies in the magistrate's reasons being determinative of the appeal. The underlying

31 The *Animal Welfare Act 1992* (ACT) was amended in 2019 to recognise that animals are sentient and have intrinsic value. As part of its Animal Welfare Action Plan, December 2017, the Victorian government committed to introducing new principal animal welfare legislation that includes acknowledgement of animal sentience. In Western Australia, the government response to the recommendations of an independent review supports the express recognition of animals as 'living beings, able to perceive, feel, and have positive and negative experiences'. For further information about current reviews of the animal welfare Acts, see Chapters 2 and 8 this volume.

32 For jurisdictional differences in the definition of the term 'animal', see Chapter 2 this volume.

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substantive issue, however, was whether the distress caused to the cattle amounted to cruelty in a legal sense, insofar as it was unnecessary and not justified by the available defences. For our purposes, then, let's suppose that the magistrate had set out his reasons more fully: to what legal authorities might he have adverted with respect to the issue of necessity, once the infliction of pain had been established?

The starting point is an old English case, *Ford v Wiley*.[33] This case concerned a successful appeal against a magistrate's decision to acquit the accused of cruelty for, as it happens, dehorning cattle, in that case with a saw. Having found that considerable pain was inflicted, Lord Coleridge CJ held at [209–10] that it is lawful:

> … if it is reasonably necessary; a phrase vague, no doubt, but with which in many branches of the law every lawyer is familiar. This involves the consideration of what "necessary," and "necessity" mean in this regard. It is difficult to define these words from the positive side, but we may perhaps approach a definition from the negative. There is no necessity and it is not necessary to sell beasts for 40s. more than could otherwise be obtained for them; nor to pack away a few more beasts in a farm yard, or a railway truck, than could otherwise be packed; nor to prevent a rare and occasional accident from one unruly or mischievous beast injuring others. These things may be convenient or profitable to the owners of cattle, but they cannot with any show of reason be called necessary. That without which an animal cannot attain its full development or be fitted for its ordinary use may fairly come within the term "necessary," and if it is something to be done to the animal it may fairly and properly be done. What is necessary therefore within these limits, I should be of opinion may be done even though it causes pain; but only such pain as is reasonably necessary to effect the result.

In his judgment, Lord Coleridge CJ emphasised the need for proportionality between the object and the means, as did Hawkins J at [220]:

33 (1889) 23 QBD 203.

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> … even where a desirable and legitimate object is sought to be attained, the magnitude of the operation and the pain caused thereby must not so far outbalance the importance of the end as to make it clear to any reasonable person that it is preferable the object should be abandoned rather than that disproportionate suffering should be inflicted.

Notwithstanding the passage of time, *Ford v Wiley* was considered by the magistrate in an Australian decision, *Department of Local Government and Regional Development v Emanuel Exports* (2008) (the *Al Kuwait* case).[34] Coincidentally, this case takes us back to the Magistrates Court of Western Australia and the *Animal Welfare Act 2002* (WA), although the context was not the dehorning of cattle but the live export of sheep, a subject to which we will return in Chapter 4. The magistrate cited from the above passage by Lord Coleridge CJ and emphasised the need for proportion between object and means. Applying this reasoning to the facts, she found that a particular class of sheep had been transported in a way that causes, or is likely to cause, unnecessary harm in breach of s 19(1). The defendants were acquitted, however, because the magistrate found an 'operational inconsistency' between the Act and the Commonwealth law regulating live exports, with the relevant provisions of the Act rendered invalid by the operation of s 109 of the *Constitution*.[35]

With a lack of Australian authority on the meaning of unnecessary suffering, this case illustrates the continuing relevance of the principle in *Ford v Wiley*: harming animals is only lawful if it occurs in pursuit of a legitimate end and is proportionate to that purpose. The implications of this approach and the judicial scope it affords attract different

34 Unreported, Magistrates Court of Western Australia (Criminal Jurisdiction), Crawford M, 8 February 2008.

35 The magistrate's finding on the s 109 issue has been questioned: Morfuni 2011; McEwen 2008. Note also that in a preliminary hearing in another prosecution of the same company in 2021, a different magistrate ruled that s 19(1) and s 19(3) of the *Animal Welfare Act 2002* (WA) are not inconsistent with Commonwealth laws governing live exports: *Department of Primary Industries and Regional Development v Emanuel Exports*, unreported, Magistrates Court of Western Australia (Criminal Jurisdiction), Shackleton M, 3 June 2021. See further Chapter 4 this volume.

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views among animal law scholars. Citing extensively from a Canadian case,[36] Sankoff argues strongly that there is virtually no end to those purposes considered legitimate within a paradigm that privileges human interests.[37] While the means adopted must be proportionate to the legitimate end, suffering is only unnecessary if it may reasonably be avoided after taking into account human interests, including economic efficiency, social costs and even mere convenience.[38] By contrast, some scholars take a less pessimistic view. For Radford, the flexibility of the concept of unnecessary suffering allows its application to a wide variety of factual circumstances and its reinterpretation by the courts in the light of changing attitudes to animals.[39] In the context of animal welfare politics, Garner argues that the imprecision at the heart of the concept is also its strength because what is considered unnecessary 'can be altered by subjective political debate'.[40]

It is true that the decision in *Ford v Wiley* expressly rejected 'the notion that economic expediency of itself can justify a harm-causing practice and protect it from scrutiny'.[41] Moreover, the potential for a broader application of his reasoning was recognised by Lord Coleridge CJ at [215] when deciding the case:

> I am not afraid of the possible application of the principle to other practices which have not yet been attacked, but which may hereafter turn out to be prohibited by law.

In fact, as we have seen, this potential was realised in the magistrate's reasoning in the *Al Kuwait* case, notwithstanding the outcome on the s 109 issue. Accordingly, *Ford v Wiley* arguably 'provides a robust analytical framework for enabling stringent review of painful animal husbandry practices'[42] but its utility is subject to qualification. As identified by Lord Coleridge CJ at [210], the practice under consideration was no longer in general use when *Ford v Wiley* was decided:

36 *R v Menard* (1978) 43 CCC (2d) 458.
37 Sankoff 2013, 18.
38 Ibid, 20.
39 Radford 2001, 258.
40 Garner 2006, 166.
41 Goodfellow 2015, 110.
42 Ibid, 111.

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> … as to necessity, it is found in the case that for twenty years the practice of dishorning has been entirely disused throughout England and Wales. It has not been thought necessary in all that time to perform it on any of the millions of cattle which during that time the farmers of England of all sorts have reared, and sold, and eaten. We learn further … that except in three counties, Fife, Forfar, and Kincardine, it is unknown in Scotland … It is incredible to me, at least, that an operation for many years discontinued in England and Wales, and, with the above exception, in Scotland also, should suddenly have become "necessary" so as to except it, if it be cruel, from the mischiefs against which the statute is directed. It was not unknown, but it has been discontinued.

In other words, the disuse of the practice in most of Britain at that time appears to have been an influential factor in determining the issue of necessity and the application of the proportionality test may well be different where husbandry practices enjoy widespread industry support. In White's view, 'it is perhaps doubtful that a court would regard a *usual* animal husbandry practice as being unnecessary, if the legitimacy of the practice was otherwise accepted'.[43] Dehorning in Australia today is just one example of a common farming practice whose legitimacy is widely accepted, with 'an estimated 122,294 calves dehorned every year without the use of pain relief'.[44] According to the NSW Department of Primary Industries (DPI), dehorning has 'been an accepted part of cattle management for generations'. While noting that 'past methods can no longer be accepted without question', the DPI states that the 'temporary discomfort caused by the operation is completely outweighed by the

43 White 2016a, 195. In relation to the application of the proportionality test in the Al Kuwait case, several factors should be noted. First, a separate charge, that the sheep were confined in a manner likely to cause unnecessary harm, was dismissed by the magistrate. Second, the prosecution case was confined to a class of fat adult sheep constituting 13,163 sheep out of a total of 103,232 sheep loaded. The confinement of the argument in this way allowed the case to be framed as a problem with a specific aspect of the voyage rather than with the live export trade more generally: see Caulfield 2008, 203–4.

44 Animal Health Australia 2013, 28.

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long-term benefits'.[45] These benefits, as listed by the DPI,[46] are that horned cattle:

- can cause more severe injury to other cattle, especially in yards, feedlots and transport;
- can damage hides and cause bruising which reduces the value of carcases;
- are harder to handle in yards and crushes;
- can be potentially more dangerous to handlers;
- require more space at a feed trough and on cattle trucks;
- are not as tractable and quiet to handle;
- may suffer discounts at sale especially if they are destined for feedlots.

Notably, only one of the listed benefits relates to animal welfare, while the impact of dehorning is described as 'temporary discomfort'. Yet, according to the European Scientific Committee on Animal Health and Animal Welfare, painful husbandry procedures, including dehorning, present one of the main risks to cattle welfare.[47] Similarly, a discussion paper prepared for the Australian cattle standards and guidelines development process, notes that dehorning appears to be 'one of the most aversive procedures used on cattle, based on the magnitude of acute stress responses'.[48] The same discussion paper concludes, however, that 'the procedure is necessary for cattle husbandry'.[49] In other words, within specified age limits, dehorning cattle without pain relief is considered an acceptable practice, carried out for a legitimate purpose, notwithstanding the suffering involved.

45 NSW Department of Primary Industries, n.d. The DPI notes that '[d]ehorning by veterinarians using sedation and local anaesthesia is accepted practice in Europe and should be encouraged in this country where practical, such as in small intensively managed situations'.
46 Ibid.
47 Scientific Committee on Animal Health and Welfare 2001 cited in Animal Health Australia 2013, 23.
48 Cattle Standards and Guidelines Writing Group 2013, 7.
49 Ibid, 2.

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Exemptions and defences

In any case, the question of whether a common farming practice might fall foul of the concept of necessity is largely moot given the exemptions and defences included in animal welfare statutes. These provisions have a long history. In response to rural agitation and concern about the fining of Victorian farmers, dehorning was exempted from cruelty legislation in 1908 in South Australia when 'performed with a minimum of suffering to the animal'.[50] This exemption was adopted by other Australian jurisdictions over the next 20 years, with further farming exemptions to follow.[51] While there are jurisdictional differences, *SAWA v Swift* provides a contemporary example of the effect of these kinds of provisions, as well as illustrating the ambiguity of animal welfare legislation. Remember, s 23 of the WA Act provides a defence to a cruelty charge if the relevant act was done in accordance with a generally accepted husbandry practice, other than a prescribed practice, *and* in a humane manner. Dictionaries define 'humane' in terms of showing kindness, sympathy and compassion and its opposite as 'inhumane' and synonymous with cruel. Accordingly, if a generally accepted husbandry practice *is* humane within the ordinary meaning of the word it would be unlikely to fall within the definition of cruelty in s 19 and therefore would not be subject to prosecution. However, with regard to the purpose of the WA Act and the whole of its provisions, a cruel husbandry practice might be construed as 'humane' for the purposes of s 23 provided that reasonable care is taken to avoid suffering. As Radford notes in relation to Britain, a practice expressly or impliedly permitted by legislation will be considered legitimate by the courts, 'provided it is carried out in a reasonable manner … even though there may be an alternative means of achieving the same end which causes less suffering'.[52]

But there was another relevant defence in *SAWA v Swift*, and one not qualified by reference to humane practice. Section 25 of the WA Act provides a defence to a charge under s 19(1) where the defendant can prove that the impugned act was in accordance with a code of practice, as prescribed by the regulations in accordance with s 5(1). To put this

50 Jamieson 1989 quoted in White 2016b, 120.
51 Ibid.
52 Radford 2001, 249.

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into context, the prosecution case on the dehorning charges involved four feral animals, three of whom were dehorned at the base of the skull and returned to the paddock to put on weight prior to their sale. By contrast with tipping the horns, this practice causes considerable suffering, but was undertaken to avoid repeating the process before the animals were ready to be sold. The fourth animal was being shipped. While this journey required cutting the animal's horn to within 12 cm of its skull, it was cut to within about 7 cm instead. During the trial, the magistrate accepted that the relevant code of practice permitted dehorning of previously unmustered older cattle when being returned to the paddock but concluded that the act of aggressively cutting the horn of the animal being shipped caused unnecessary harm.[53] On appeal, however, Martino J held that the magistrate's reasons failed to demonstrate how he had concluded that the defences under both s 23 and s 25 had not been established, leaving open the possibility of establishing these defences in relation to the matter on appeal.[54] Either way, the company and its director had already been able to rely on the code of practice to justify the dehorning of the other animals. As Goodfellow maintains, the risk that many farming practices might be challenged under the general legislative standard 'is precisely why State governments have sought to exempt the practices prescribed in the codes of practice from the application of animal welfare law'.[55] In relation to Western Australia, the independent panel commissioned to review the operation and effectiveness of the *Animal Welfare Act 2002* concluded that:

> Many of the codes adopted under the AW Act have not been updated for many years, and the recommendations in many codes do not reflect advances in animal welfare science or community expectations. The use of outdated provisions as a defence against a charge of cruelty may provide a defence for the use of practices

53 *Western Australia Police v Nicolaas Francois Botha*, unreported, Magistrates Court of Western Australia (Criminal Jurisdiction), Tavener M, 30 March 2016, [102], [104].

54 As noted in *Sawa v Swift* [35] the prosecution decided not to seek a retrial.

55 Goodfellow 2016, 204.

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> that are less humane than practically available options, which is inconsistent with the objectives of the AW Act.[56]

The independent panel also found that '[g]iven the move towards national endorsed animal welfare standards, the need to retain a broad, undefined defence for "normal animal husbandry" is questionable and not supportive of contemporaneous and progressive animal welfare legislation'.[57]

Conflicting interests

Chapters 2 and 4 will consider codes of practice and their conversion into national standards and guidelines in detail. They will also examine the different ways in which states and territories incorporate exemptions and defences into the principal statute. For now, some background material serves further to illustrate how codes of practice and animal welfare standards interact with other characteristics of the regulatory framework to exempt the majority of animals affected by human activities from the operation of cruelty laws in substantial ways.

Codes of practice originated in the context of increasing community concern about animal welfare in the second half of the 20th century. In Britain, technological and scientific advances, combined with the reduction of government farming subsidies in the 1950s, fuelled the expansion of intensive farming to contain costs and increase productive efficiency.[58] Similar developments occurred in Australia from the 1960s.[59] In 1964, Ruth Harrison's account of intensive farming in Britain[60] alerted the public to practices such as housing chickens, calves and pigs in tiny cages, crates and stalls, thus exploding 'the pervasive myth that farm animals were well-treated and enjoyed a bucolic, pastoral life'.[61] In response to community concern,

56 Western Australia, Department of Primary Industries and Regional Development 2020, 86.
57 Ibid, 84.
58 Woods 2012, 16. See also Goodfellow 2015, 31–2.
59 Senate Select Committee on Animal Welfare, Parliament of Australia 1990, 21.
60 Harrison 1964.
61 Rollin 2019, 155.

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the Brambell Committee was established by the British government to inquire into intensive livestock systems,[62] following which the first comprehensive standards for regulating farmed animals were written. In 1975, the publication of Peter Singer's seminal work, *Animal Liberation*, drew further attention to the treatment of animals in large commercial systems and laboratories. In this environment, the impetus to develop codes of practice in Australia came from industries fearful of challenges to methods of livestock management and animal experimentation.[63] By documenting minimum accepted standards of animal treatment, the codes aimed to facilitate national consistency and provide guidance to industry on acceptable practices, while reassuring the public that animal welfare was being managed.[64] In this way, they acted as a shield against criticism of animal industries even though the codes' provisions generally reflected existing husbandry and management practices.[65] Further, while compliance with the codes was voluntary in most jurisdictions, legal protection for industry was obtained through the effective exemption of otherwise cruel practices from the operation of animal welfare legislation, as *SAWA v Swift* illustrates.

Between 1983 and 2006, 22 model codes of practice were endorsed by the (then) Primary Industries Ministerial Council (PIMC).[66] The early 2000s, however, saw two developments in animal welfare regulation. First, a review of the model codes was commissioned amidst concern that Australia's position as a major livestock producer and exporter was facing 'international scrutiny and rising community expectations'.[67] The Neumann Review identified major shortcomings with the code process, including inconsistent application and enforcement of codes, lack of transparency and public consultation, and inconsistent use of animal welfare science.[68] Second, the Commonwealth took a leadership role in the creation of the Australian Animal Welfare Strategy (AAWS).

62 Brambell 1965.
63 Geoff Neumann & Associates Pty Ltd 2005, ii, 3, 10.
64 Ibid, 5.
65 Ibid, ii, 10.
66 Australian Animal Welfare Strategy 2009, 3.
67 Geoff Neumann & Associates Pty Ltd 2005, 10.
68 Ibid, 11.

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Endorsed by the PIMC in 2004, the AAWS aimed 'to provide the national and international communities with an appreciation of animal welfare arrangements in Australia and to outline directions for future improvements in the welfare of animals'.[69] The National Implementation Plan developed by the AAWS included converting the existing codes of practice to mandatory national standards and guidelines, with Animal Health Australia (AHA) commissioned to facilitate the standards development process. Following the election of the Abbott government in 2013, however, the Commonwealth withdrew from any leadership role in national animal welfare initiatives, with the result that 'the AAWS is now simply a document with no governance or administrative structure, or sustained funding source to ensure its implementation'.[70]

With the termination of the AAWS, an Animal Welfare Task Group (AWTG) comprised of deputy secretaries of state and territory departments with responsibility for agriculture/primary industries was formed to oversee the standards development process under the auspices of the Agriculture Ministers' Forum. AHA was retained as the overall project manager, with the contract management of developing individual standards the responsibility of a nominated state. It had originally been envisaged that all existing model codes of practice would be reviewed by 31 December 2010[71] but as of March 2022 only four sets of standards for farmed animals have been finalised: the land transport of livestock in 2013, sheep standards in 2016, cattle standards in 2016, and standards for livestock at saleyards and depots in 2018.[72] As we discuss in Chapter 4, development of standards to replace the 2002 poultry code of practice commenced in June 2015 but nearly seven years later the development process remains unfinished.

Lengthy delays are not the only problem with the standard-setting process. Although badged as animal welfare standards and guidelines, the dominant players in the process are government agriculture/primary industries departments and industry stakeholders. This can be illustrated by reference to the cattle standards and guidelines, endorsed

69 Australia, Department of Agriculture, Fisheries and Forestry 2005, 5.
70 Goodfellow 2015, 101.
71 Australian Animal Welfare Strategy 2009, 8.
72 Standards for exhibited animals were endorsed in 2019. See further Chapter 5 this volume.

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in 2016 and referred to in *SAWA v Swift*. The writing group responsible for drafting the cattle standards and guidelines was comprised of representatives from the Animal Welfare Committee (AWC), Cattle Council of Australia, Australian Lot Feeders' Association Inc, Dairy Australia, CSIRO, the Department of Agriculture and an independent chair, and was supported by AHA.[73] At that time, the AWC comprised representatives from each of the state and territory departments with responsibility for animal welfare (typically primary industries/agriculture departments), the CSIRO, and the Commonwealth Department of Agriculture, Fisheries and Forestry.[74] AHA is a not-for-profit public company whose vision is a 'national biosecurity system that provides every opportunity for Australian agriculture to succeed at home and overseas'.[75] Support and comment was provided by a standards reference group (now the stakeholder advisory group) which comprised representatives from the same federal, state and territory departments, 12 industry stakeholders, two animal welfare organisations and the Australian Veterinary Association.[76] It is unsurprising then that animal welfare organisations are much more critical of the standards that result from this process than the industry bodies directly affected by them.[77]

The extent of industry influence in the standards-setting process has been the subject of considerable criticism by academics and lawyers, as well as animal welfare groups. So too the fact that the government departments responsible for animal welfare are principally concerned with the promotion of efficient and profitable agricultural industries.[78] In NSW, for example, the *Prevention of Cruelty to Animals Act* is administered by the Department of Primary Industries, whose ultimate goal is 'increasing the economic contribution of primary industries to the state'.[79] The interplay of competing interests can be illustrated by the NSW DPI's views on the practice of dehorning, referred to earlier

73 Australian Animal Welfare Standards and Guidelines 2020c.
74 Tim Harding & Associates in association with Rivers Economic Consulting 2013, 13.
75 Animal Health Australia 2020.
76 Tim Harding & Associates in association with Rivers Economic Consulting 2013, 14–16.
77 See, for example, Oogjes 2011.
78 See Chapter 4 this volume for further discussion and references.
79 NSW Department of Primary Industries 2017, 5.

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in this chapter, and in the Western Australian context, by the minister's instruction to withdraw the appeal already commenced by the State Solicitor's office in the *Al Kuwait* case.[80] That government agencies might favour productivity gains over animal welfare is unsurprising. As the Productivity Commission notes, the welfare of animals 'is likely to be of secondary importance when the primary objective of the agency responsible for livestock welfare is to promote a productive and profitable agricultural sector'.[81] The extent to which these interests conflict turns, in part, on how animal welfare is conceptualised. Industry bodies tend to equate welfare with productivity, a very narrow view rejected by animal welfare organisations and by contemporary science.[82] In a comprehensive study of farmed animal regulation in Australia, Goodfellow found that while many government regulators reject the notion that productivity and animal welfare are synonymous, 'their perspective of the overall role of animal welfare within the agricultural sector is not inconsistent with that of the livestock industries'.[83]

Apart from problems with delay and conflicting interests, the key aims of creating national consistency and mandatory regulation have not been achieved. In NSW, the sheep and cattle standards have not been regulated but only prescribed as guidelines under s 34A of the *Prevention of Cruelty to Animals Act*. This means that compliance or noncompliance with the standards is admissible in evidence in cruelty proceedings but industry compliance with the standards is not mandatory. This approach gives effect to a 2015 memorandum of understanding between the NSW Liberals and Nationals and the NSW Farmers Association which incorporated a commitment to non-mandatory animal welfare standards in order to drive agricultural growth within the NSW economy.[84] Even where standards are being regulated into law, there are different legislative routes to enforceability

80 Western Australia, *Parliamentary Debates*, Legislative Council, 19 March 2008, 1147b (Ljiljanna Ravlich).
81 Productivity Commission 2016, 224.
82 Goodfellow 2016, 214.
83 Goodfellow 2015, 200.
84 The MOU, *NSW Farming: Investing Locally, Connecting Globally*, was signed on 25 March 2015 by Troy Grant on behalf of the NSW Liberals and Nationals and the President of the NSW Farmers Association, Fiona Simson.

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and the process of implementation is very slow.[85] As a result, jurisdictional differences continue even though the ongoing support of some industries for the standards is contingent upon the 'successful harmonisation of state and territory welfare legislation'.[86] Any failure to regulate new standards through legislation also means that some animals are denied even the relatively weak welfare protections they contain. Further, where the standards are mandatory, enforcement remains a major issue. First, in many cases, the same government agencies involved in setting the standards are responsible for their enforcement, with the attendant problem of conflicting interests this entails. Second, resourcing of animal welfare within government agencies is limited.[87] Where the RSPCA is responsible for livestock welfare, resources are simply inadequate to the task of monitoring and enforcing the law across a wide range of industries, over large distances and involving millions of animals.

These and other concerns about the national standards process were recognised by the Productivity Commission in its 2016 report, *Regulation of Australian Agriculture*. The report identified three areas where the regulation of farm animal welfare could be improved, including greater independence and transparency in the standards development process and the application of rigorous scientific principles.[88] To this end, the Productivity Commission recommended the establishment of an independent body, the Australian Commission for Animal Welfare, to assume responsibility for developing national standards and guidelines.[89]

Inconsistent laws, fragmented administration

It is instructive to contrast the legal protection of farmed animals with the laws regulating companion animal welfare. The latter topic will

85 See, for example, the progress report on the cattle standards endorsed in 2016: Australian Animal Welfare Standards and Guidelines, 2020a.
86 Animal Health Australia 2014, 15.
87 Productivity Commission 2016, 242.
88 Ibid, 228.
89 Ibid, 236.

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be examined in detail in Chapter 3 but a few examples here serve to highlight the distinction. With a qualified definition of cruelty and various exemptions and defences, animal welfare legislation typically allows castration of young farmed animals without pain relief although performance of the same procedure in the same way on a dog or cat would incur criminal liability. Similarly, to confine a companion animal to a small cage without any opportunity for exercise is a criminal offence but to confine millions of hens in a similar way is perfectly legal. In NSW, this is achieved by exempting stock animals (other than horses) from the requirement in s 9(1) of the *Prevention of Cruelty to Animals Act* to exercise confined animals, in conjunction with the *Prevention of Cruelty to Animals Regulation 2012* which adopts the stocking densities for laying fowl set out in the poultry code of practice. With limited exceptions, other jurisdictions use a variety of legislative approaches to achieve the same result.[90]

Even the same species of animal attracts a different level of legal protection depending upon the setting. A rabbit, for example, kept as a pet receives a higher level of protection than one considered feral or one used in laboratory research. Again, these differences may be illustrated by reference to NSW. Section 15 of the *Prevention of Cruelty to Animals Act* confines the prohibition on the administration of poison to domestic animals, while s 24(1)(b) provides a defence to a cruelty charge if the act or omission occurred, *inter alia*, in the course of, and for the purpose of, hunting an animal, subject to the ambiguous proviso of no unnecessary pain. Another defence is provided by s 24(1)(e)(i) where the animal is harmed in the course of, and for the purpose of, carrying out animal research in accordance with the provisions of the *Animal Research Act 1985* (NSW). While a rabbit kept for laboratory research is accorded some protections under the *Australian Code for the Care and Use of Animals for Scientific Purposes*, the s 24 defence is acknowledgement that a rabbit

90 Battery cages were banned in the ACT by legislation passed in 2014. Under the *Animal Welfare (Domestic Poultry) Regulations 2013* (Tas), keeping layer hens in cages is not permitted in Tasmania unless a person is an existing cage producer or the purchaser of all or part of an existing egg operation: Tasmania, Department Primary Industries, Parks, Water and Environment, Biosecurity Tasmania 2021.

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or other animal can legally be subjected to great cruelty in certain circumstances.

To sanction the differential treatment of non-human animals for reasons other than their sentience is to sever animal welfare legislation from its philosophical base. In turn, this begs the questions: what determines the level of protection an animal receives and what justifies the difference? Significantly, Goodfellow's study of farmed animal regulation in Australia found that 'none of the regulators associated the role of animal welfare regulation with any kind of ethical foundation', with animal welfare framed not by reference to sentience but solely in terms of instrumental benefits.[91] This inconsistent protection of animals depending upon their context and use is in marked contrast to much government rhetoric about animal welfare and raises issues of regulatory legitimacy which will be considered throughout this book. In addition, because there is no overarching philosophical and policy framework within which animal welfare laws are developed, their administration and enforcement are spread across diverse agencies, both within and between jurisdictions. The result is fragmented regulatory responsibility, including in contexts inherently risky to animal welfare, such as slaughter, which is largely regulated through food safety laws. As we will see when we consider enforcement in detail, this kind of fragmented responsibility can lead to communication problems, divided resourcing, and a lack of accountability and transparency. With no overarching framework, animals are also very vulnerable in regulatory contexts less obviously associated with their welfare. For example, land clearing and the consequent habitat loss are a major cause of injury, starvation and death for wildlife, including threatened native species.[92]

Hidden animals, opaque law

Animal welfare is a unique regulatory field because it governs the use of sentient beings who are also recognised by the law as a human resource. In these circumstances, it might be expected that animal use

91 Goodfellow 2015, 198.
92 Taylor et al. 2017.

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and its regulation by law would be highly transparent. In fact, animal use is largely hidden, particularly in commercial contexts, and detailed information about its regulation is not readily available. Again, the *SAWA* litigation is instructive. The events in question took place on a remote private property where cameras were prohibited and thus would have escaped public attention without the footage obtained by the employee. The restriction on cameras was said to be due to occupational and health considerations but also because 'standard practices conducted in the cattle industry are confronting to the general public' and are capable of bringing the company 'into disrepute if publicly broadcast'.[93]

In conjunction with the failure of the ABC's application to broadcast the footage, this statement illustrates the invisibility of much animal use, as well as the problematic nature of the surrounding secrecy. That standard industry practices are too confronting to reveal might suggest problems with the practices or, at the very least, a need to subject them to closer scrutiny. Further, the reasoning that denies access to this knowledge is circular: the public must be protected from practices they don't understand but they don't understand the need for the practices because they lack industry knowledge. This reasoning also reflects a view that only those with industry experience are sufficiently informed to speak with authority about animal welfare. This belief was clearly evident in a Senate inquiry into a private senator's Bill to establish an independent office of animal welfare.[94] It is also hinted at in a report to the NSW DPI as part of the poultry standards consultation process which notes that 'many community and animal welfare representatives had little understanding of the poultry industry and practices'.[95] This bifurcation of the public response to animal welfare reinforces another divide which itself has a long history – that between urban and rural Australians. In relation to early Australian animal welfare laws, Jamieson notes that the 'historical concentration of animal protection legislation

93 Nicolaas Botha's affidavit evidence cited in *SAWA v ABC*, [26].

94 The Voice for Animals (Independent Office of Animal Welfare) Bill 2015 was introduced by Senator Lee Rhiannon for the Greens. The proceedings of the Senate Rural and Regional Affairs and Transport Legislation Committee, 14 September 2015, may be viewed at http://parlview.aph.gov.au/mediaPlayer.php?videoID=275719.

95 Roth 2018, 10.

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on domesticated animals had early fostered its perception by the rural community as mere urban meddling'.[96] The framing of concern about animal welfare as uninformed, urban meddling is commonly found in contemporary debates, as the 2015 Senate inquiry also illustrates.

The hidden nature of much animal use is reinforced by a lack of transparency about regulatory activities.[97] With respect to the enforcement activities of charitable bodies, information is generally available but lacks detail. For example, basic data about cruelty complaints, prosecutions and routine inspections are included in RSPCA Australia's national statistics but more comprehensive data, such as the number of penalty notices issued, is not and the information in state and territory RSPCA annual reports is typically limited.[98] In relation to government activities, not all agencies publish animal welfare compliance and enforcement data and, where it is available, detail is usually lacking. This applies generally, not just to farmed animal welfare. The NSW DPI, for example, is responsible for enforcing the *Exhibited Animals Protection Act 1986* (NSW) but provides no information in departmental annual reports or on its website about compliance and enforcement, other than a general guide to licensees in relation to the audit process. Available data about animals used in research varies by jurisdiction, and key information, such as details of site inspections, is strictly limited.[99]

Even when the exposure of major animal welfare issues compels greater disclosure, significant knowledge gaps remain, as recent events in relation to live exports illustrate. As part of its response to the footage of the suffering of live sheep, broadcast in 2018[100] and generally regarded as shocking, the federal government placed 'independent observers' on live export voyages. The Department of Agriculture, Water and the Environment, however, only publishes brief summaries of its reports,

96 Jamieson 1989 quoted in White 2016b, 120.
97 White 2007, 359.
98 The RSPCA is a federated organisation whose state and territory member societies are independently responsible for investigating and prosecuting cruelty complaints.
99 See further Chapter 7 this volume.
100 Bartlett 2018.

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often after substantial delay.[101] Even after lodging an FOI application at considerable cost, RSPCA Australia only gained access to heavily redacted observer reports and photographs six months later, with the department still refusing to release the video footage.[102] In July 2019, the Senate passed a motion noting that less than half the independent observer summary reports from 2018 had been finalised and no 2019 reports had been released.[103] More generally, all of the above problems in accessing information are exacerbated by the fragmentation of responsibility for animal welfare. Without a national agency, or even state and territory agencies, which bring together data on all animal welfare matters, locating the required information is difficult and time-consuming even where it is available.

The use of animals in private contexts, the conflicting interests of regulatory agencies, the lack of transparency, and the cultural and resource problems associated with enforcement mean that serious animal cruelty often comes to light only when exposed by whistle-blowers or activists, with the help of the media. Cruelty in the live export industry is the prime example but others include the non-livestock sector, such as the 'horrific practice'[104] of live baiting in the greyhound racing industry exposed in 2015.[105] In the subsequent NSW inquiry into the industry, it was discovered that Greyhound Racing NSW had deliberately misreported the extent of racetrack injuries and failed to make publicly available information about deaths of greyhounds both during and after racing.[106] While these kinds of exposés have led to some beneficial regulatory change, governments have also responded by seeking to introduce harsher penalties for those who engage in undercover activities.

101 See, for example, *Independent Observer Summary Report on MV Al Shuwaikh Sheep and Cattle Exported to Kuwait, Qatar and United Arab Emirates in June 2018*, Report 7, May 2019.
102 RSPCA Australia 2019c.
103 Commonwealth, *Parliamentary Debates*, Senate, 24 July 2019, 63–4 (Mehreen Faruqi).
104 McHugh 2016, vii.
105 Meldrum-Hanna 2015b.
106 McHugh 2016, 9.

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The story so far

By using the cases arising from one incident, in one jurisdiction, this chapter has sought to chronicle the law governing all animals in all parts of the nation. This account reveals not only the mechanics of the law but also a more complex story about the law's role in reflecting and constructing the human and non-human animal relationship. A careful reading of the statutes regulating this relationship reveals that the protection they afford animals is considerably more limited than their titles and objects suggest. In turn, the restrictive nature of these legislative provisions is reinforced by other regulatory features which further limit the law's protective reach.

Animal law then is defined by the following key characteristics:

- law regulates the extent and degree of animal suffering in connection with human conduct but harming animals is only criminalised where it is considered unnecessary;
- the level of legal protection is based on the animal's setting and function not on the animal's sentience;
- the result is inconsistent laws governing different species and even the same species in different settings;
- inconsistent laws go hand in hand with fragmented administration and enforcement;
- inconsistencies within jurisdictions are amplified by inconsistencies between jurisdictions;
- there is a heavy reliance on codes of practice and animal welfare standards developed through non-parliamentary processes, with disproportionate input from industry;
- the law is typically administered by government departments whose principal purpose is the promotion of productive and profitable agricultural and other industries;
- the law is enforced by these same departments and/or by charitable organisations;
- animals have the legal status of property, with their use in commercial contexts hidden from public scrutiny; and
- comprehensive information about the operation of laws that regulate animal use is not readily available to the public.

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While this chapter has focused on farmed animals for illustrative purposes, these characteristics apply to all animal settings, to varying degrees, including those that attract the greatest legal protection. The breeding and sale of companion animals, for example, are also regulated by codes of practice typically developed under the auspices of primary industries departments with significant input from the pet industry. Similarly, regulation related to their welfare is fragmented and inconsistent, both within and between jurisdictions, while government action to address the problem of companion animal overpopulation has been piecemeal and inadequate.

In the following chapters, we will explore in detail the characteristics listed above in relation to major animal settings: companion animals, farmed animals, animals used for entertainment, sport and recreation, animals in the wild, and animals used in research and teaching. We will map the pervasiveness of these characteristics across the different regulatory settings and the way they contribute to an animal law narrative which is widely promoted but factually inaccurate. First, however, we need to examine the overall legal and regulatory framework and the breadth of the boundaries it sets for lawful animal use in Australia.

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