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# Making sausages and law: the failure of animal welfare laws to protect both animals and fundamental tenets of Australia's legal system

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# Making sausages and law: the failure of animal welfare laws to protect both animals and fundamental tenets of Australia's legal system

## **Abstract**

Laws are like sausages. It is better not to see them being made.

The above aphorism, attributed to Bismarck, was quoted by Philip Ruddock when addressing lawyers in 2007 on the subject of law reform. Interestingly, Mr Ruddock also referred to the rule of law in the same speech. Apparently the juxtaposition of the rule of law with a preference for secret law-making did not strike the (then) federal Attorney-General as odd. Perhaps this is unsurprising: the rule of law is commonly invoked for effect and may be used for a multitude of purposes. For this, and other reasons, the idea is open to challenge in terms of both its value and meaning. Arguably, however, the 'minimum content' of the rule of law can serve as a useful framework for reflecting on the exercise of public power, notwithstanding its contested nature. This minimum content is generally understood by reference to various accepted attributes, including generality, openness, certainty, impartiality, access to the courts and so on. These characteristics overlap with, and complement, those of transparency, accountability and public participation which are central to an effective system of responsible and representative government. In this context, the rule of law may be viewed as a means of eschewing arbitrary rule and constraining the exercise of executive power.

## **Keywords**

animals, both, protect, laws, welfare, system, animal, legal, failure, law, sausages, making, australia, tenets, fundamental

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# **Making Sausages & Law: The Failure of Animal Welfare Laws to Protect both Animals and Fundamental Tenets of Australia's Legal System**

*By Elizabeth Ellis\**

*Laws are like sausages. It is better not to see them being made.*

The above aphorism, attributed to Bismarck, was quoted by Philip Ruddock when addressing lawyers in 2007 on the subject of law reform.<sup>1</sup> Interestingly, Mr Ruddock also referred to the rule of law in the same speech.<sup>2</sup> Apparently the juxtaposition of the rule of law with a preference for secret law-making did not strike the (then) federal Attorney-General as odd.<sup>3</sup> Perhaps this is unsurprising: the rule of law is commonly invoked for effect and may be used for a multitude of purposes. For this, and other reasons, the idea is open to challenge in terms of both its value and meaning.<sup>4</sup> Arguably, however, the 'minimum content' of the rule of law can serve as a useful framework for reflecting on the exercise of public power, notwithstanding its contested nature.<sup>5</sup> This minimum content is generally understood by

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\* Elizabeth Ellis is an honorary senior fellow, Faculty of Law, University of Wollongong. The author would like to thank Steven White, Luke McNamara and Ben Bramble for their helpful comments on a draft of this article and Amanda Paul, Division of Primary Industries, Industry & Investment NSW for assistance in relation to bobby calf standards.

<sup>1</sup> The Hon. Philip Ruddock, (Paper presented at 'Law and Government', 35th Australian Legal Convention, Sydney, 25 March 2007) [127].

<sup>2</sup> Ibid [8].

<sup>3</sup> Mr Ruddock appears to cite Bismarck as a rhetorical device to emphasise the difficulty of law reform and the messiness of the process but the reference nevertheless sits uncomfortably with the notion of the rule of law.

<sup>4</sup> For discussion and critique of the concept of the rule of law see, eg, Richard Bellamy (ed), *The Rule of Law and the Separation of Powers* (2005, Ashgate), Pietro Costa and Danilo Zolo (eds), *The Rule of Law: History, Theory and Criticism* (2007, Springer) and Cheryl Saunders and Katherine Le Roy (eds) *The Rule of Law* (2003, Federation Press).

<sup>5</sup> Simon Evans, 'The Rule of Law, Constitutionalism and the MV Tampa' (2002) 13 *Public Law Review* 94, 94-5.

reference to various accepted attributes,<sup>6</sup> including generality, openness, certainty, impartiality, access to the courts and so on. These characteristics overlap with, and complement, those of transparency, accountability and public participation which are central to an effective system of responsible and representative government. In this context, the rule of law may be viewed as a means of eschewing arbitrary rule and constraining the exercise of executive power.<sup>7</sup>

The importance of law as a constraint on power has been highlighted by those at the highest level. In the 2000 Boyer Lectures, for example, Murray Gleeson referred to the words of Thomas More in Robert Bolt's play *A Man for All Seasons* to describe law as a 'windbreak' that 'restrains and civilises power'.<sup>8</sup> In this general sense, the rule of law is a hallmark of civil society and an essential characteristic of good government. In other words, the legitimacy of law and government in the western legal tradition are inseparable from attributes associated with the rule of law and the idea of law as a restraint on power. The further one moves from these qualities with respect to a given object of legal regulation, the less confident one can be that the rule of law and associated democratic values are maintained. In the context of animal welfare, however, law's protection is at best ambivalent. Given the sentience of nonhuman animals and the apparent community interest in their welfare,<sup>9</sup> it is perhaps surprising that the legal regulation of animals in Australia falls significantly short of key attributes associated with good governance and the rule of law.

The problematic aspects of the law can be found at every level of animal welfare regulation: in the contradictory structure and language of the legislation, in the complex regulatory framework that relies heavily

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6 Ibid, 95-96.

7 Duncan Kerr and George Williams, 'Review of executive action and the rule of law under the Australian Constitution' (2003) 14 Public Law Review 219, 220.

8 Chief Justice Murray Gleeson, The Rule of Law (The Rule of Law Lecture Series), Lecture 1, 'A Country Planted Thick with Laws' (19 November 2000)

<<http://www.abc.net.au/rn/boyers/stories/s214400.htm>> at 12 October 2009.

9 Research for the federal Department of Agriculture, Fisheries and Forestry, as part of the Australian Animal Welfare Strategy, reveals a high level of interest in, and emotional engagement with, the topic of animal welfare, although this is coupled with superficial knowledge and the assumption that legislation protects animals from cruelty. See Angela Southwell, Amarylise Bessey and Barbara Barker, Attitudes to Animal Welfare, A Research Report (July 2006, TNS Social Research), 11-13.

on regulations and codes of practice, in the disproportionate influence in the making of these subordinate laws and guidelines by bodies whose interests are very different to those of animals, and in the enforcement of a penal statute by inadequately resourced charitable bodies. Using NSW as an example, this article seeks to examine each of these aspects of the legal regulation of animal welfare in Australia through the lens of attributes associated with good governance and the rule of law, in particular the idea that 'law restrains and civilises power'. Although there are jurisdictional differences, the shortcomings identified in relation to NSW are broadly typical of the legal regulation of animal welfare in Australia.

## **Legislative structure and language**

Each State and Territory has enacted legislation whose specific object is to prevent cruelty to animals and/or to promote their welfare. In NSW, the relevant statute is the *Prevention of Cruelty to Animals Act 1979*. Although by no means the only NSW legislation concerned with animals,<sup>10</sup> the *Prevention of Cruelty to Animals Act* ('the Act') is the State's principal animal welfare statute. Notably, the Act's express objects, set out in s3, are couched exclusively in terms of the prevention of cruelty to animals and the promotion of their welfare by persons in charge. Part I of the Act contains two general cruelty offences,<sup>11</sup> as well as various specific offences against animals.<sup>12</sup> Further offences are created by regulation. In conjunction with the fairly wide definition of 'animals' in s4, the legislation appears to provide animals with considerable protection.

Consideration of the whole of the Act's provisions, however, reveals two major shortcomings. First, the Act contains various exemptions and defences which, in effect, legalise considerable cruelty to animals in the context of certain uses. A prime example is the express exemption of 'stock animals' in s9 which deals with the confinement of animals. This exemption provides the framework in which millions of animals, such as pigs and chickens, are routinely tightly confined in a way that would otherwise constitute an offence under the Act. Another example is provided by s15, which creates an offence of administering poison

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10 Other NSW legislation includes the Animals Research Act 1985, the Exhibited Animals Protection Act 1986 and the Companion Animals Act 1998.

11 Section 5 cruelty to animals and s6 aggravated cruelty to animals.

12 Sections 7-23.

but limits its application to domestic animals. The defences set out in s24 also play a key role. For example, s24(1)(a)(ii) effectively allows the castration without anaesthetic of pigs less than two months old or of sheep or cattle less than six months of age. Other defences included in s24 relate to hunting, using animals in research and the destruction of animals used for food. Further exemptions and defences are contained in the regulations. These exemptions and defences run counter to the express objects of the Act and, taken together, mean that the legislation lacks application to the vast majority of animals. In other words, what the Act does – allow institutionalised cruelty to millions of animals – and what it purports to do – protect animals’ welfare – are in direct conflict. This inconsistency creates uncertainty in the interpretation of the legislation and is counter to good public policy. It is also at odds with the principle of legality when this is expressed to mean ‘that Parliament must squarely confront what it is doing and accept the political cost’.<sup>13</sup>

The problems created by the discrepancy between the objects clause and other statutory provisions are exacerbated by a second major shortcoming in the Act: the uncertain language in which key provisions are couched. First and foremost, the reference to an act of cruelty in s4 imports the words ‘unreasonably, unnecessarily or unjustifiably’. The obvious ambiguity of this phrase is compounded by similar references in other provisions. For example, the defences in s24 are only available where the accused satisfies the court that the specified act has been committed ‘in a manner that inflicted no unnecessary pain upon the animal’. The qualified application of the Act – to cruelty which is unreasonable, unnecessary or unjustifiable – is typical of animal welfare legislation in Australia and comparable jurisdictions overseas. Framed in this way, the construction of key words, such as ‘unnecessary’, is clearly critical to the Act’s scope and operation, yet its lack of enforcement in commercial contexts means there is an absence of Australian authority with respect to this. The result is a kind of circularity. If provisions such as s9 and s24 are assumed to support an interpretation of ‘unreasonably, unnecessarily or unjustifiably’ congruent with routine husbandry practices, this interpretation will rarely be subjected to scrutiny by the courts; in turn, the lack of judicial consideration reinforces the idea that the Act lacks application to commercial contexts. As a result, routine agricultural practices come to

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<sup>13</sup> R v Secretary of State for the Home Department; Ex parte Simms [2000] 2 AC 115, 131 (Lord Hoffmann) cited in K-Generation Pty Limited v Liquor Licensing Court (2009) 237 CLR 501, 520 (French CJ).

determine the content and scope of the law, with very little opportunity for parliament's intention to be tested in the courts. While the approach of British courts suggests that any gains for animals are likely to be limited where commercial considerations intrude, judicial exegesis of the idea of 'unnecessary suffering' would at least have the merit of exposing the limited reach of animal welfare legislation.<sup>14</sup> As it stands, the diminished role of the courts denies a key protection associated with the rule of law, while the problematic structure and language of the legislation make it uncertain whose interests are protected or what is required to ensure compliance with the legislation.

## **Regulatory framework**

The problematic structure and language of the Act are compounded by two other factors that also raise issues associated with the rule of law. First, there is a heavy reliance on delegated legislation and other instruments of uncertain status. Secondly, these legislative instruments are developed within a complex federal/State regulatory framework dominated by government agencies and industry bodies whose primary concerns and interests lie outside the sphere of animal welfare. These overlapping factors are considered below.

### *Heavy reliance on legislative instruments*

The Act's general regulation-making power is found in s35. Its detailed provisions include the power to exempt by regulation any person, or any specified class of persons, either absolutely or subject to conditions, from the operation of any provision of the Act.<sup>15</sup> In addition, s34A(1) allows the regulations to prescribe guidelines, or adopt a code of practice as guidelines, relating to the welfare of farm or companion animals. These guidelines are then admissible in proceedings as

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14 For an examination of relevant British case law, see Mike Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (2001, OUP). In *Department of Local Government and Regional Development v Emanuel Exports Pty Ltd* (Unreported, Magistrates Court of Western Australia, 8 February 2008, [97]-[98]) the magistrate referred to this case law in determining the issue of unnecessary suffering in relation to the export from WA of a class of live sheep.

15 Section 35(2)(d).

evidence of compliance, or failure to comply, with the Act or regulations.<sup>16</sup>

In NSW, codes of practice are incorporated into the Act through different provisions in the Prevention of Cruelty to Animals (General) Regulation 2006 ('the Regulation'). These incorporating provisions have a different operative effect. First, cll18-19 prescribe certain animal trades and corresponding Codes of Practice, as set out in Schedule 2 of the Regulation. Examples of prescribed animal trades are pet shops and animal breeding establishments. Proprietors and managers of a prescribed animal trade must, inter alia, comply with the provisions of the relevant Code and take all reasonable steps to ensure compliance by their employees or workers.<sup>17</sup> Failure to comply with this requirement is subject to a maximum penalty of 25 penalty units.<sup>18</sup> Note, however, that the Prevention of Cruelty to Animals Amendment Act 2009 (NSW) inserted s35(3) into POCTAA to enable the regulations to create offences with substantially increased penalties for offences relating to animal trades and laying fowl.

The other provision relevant to codes is c124 which adopts various Model Codes of Practice for the Welfare of Animals<sup>19</sup> for the purposes of s34A(1) of the Act. Accordingly, failure to comply with one of these codes is not an offence but may be given in evidence in proceedings for an offence under the Act or the Regulation. The Codes adopted by c124 deal with the commercial use of stock animals, are developed through a national process, and can be extremely detailed.<sup>20</sup> Although the national Model Codes only have legal effect if incorporated in State or Territory legislation they appear to have an informal status which influences the regulatory process.

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16 Section 34A(3). While other Australian jurisdictions incorporate codes of practice, most provide that compliance with these codes is an absolute defence.

17 Clauses 20(1) and 20(3)(i).

18 Clause 20 (1). See also Cl 23, Sch 3 which prescribes this clause as a penalty notice offence with a maximum penalty of \$200.

19 These Model Codes are gradually being rewritten as national standards. See below p 9.

20 For example, the Model Code of Practice for the Welfare of Animals: Domestic Poultry (4th ed, 2002). These codes are published by the CSIRO and are available at <<http://www.publish.csiro.au/nid/22/sid/11.htm>>. See also <[http://www.daff.gov.au/animal-plant-health/welfare/model\\_code\\_of\\_practice\\_for\\_the\\_welfare\\_of\\_animals](http://www.daff.gov.au/animal-plant-health/welfare/model_code_of_practice_for_the_welfare_of_animals)>.

The uncertainty of the status of these codes complicates the ambiguity of key provisions of the Act. For example, the Division of Primary Industries<sup>21</sup> which administers the Act notes on its website that unincorporated codes are ‘still regarded as the minimum standard by which livestock should be kept.’<sup>22</sup> The incorporation in NSW of the Domestic Poultry Code even though the Regulation deals in detail with laying fowl further increases the uncertainty.

While delegated legislation is an important and inevitable part of modern government, the dangers of extensive reliance on non-parliamentary lawmaking are well known. This has led to the development of various mechanisms to scrutinise subordinate laws and to keep delegated lawmakers in check. An important means of exercising parliamentary oversight is the requirement for publication/notification/tabling of delegated legislation and the opportunity for its disallowance by either house. In NSW, the relevant provisions are found in Part 6 of the Interpretation Act 1987. These require that statutory rules be published on the NSW legislation website and that notification of their making be tabled in parliament, with the rules subject to dis-allowance. In practice, however, the volume of delegated legislation detracts from the efficacy of this form of oversight; moreover, there is no requirement in NSW that an incorporated code be published with the statutory rule or otherwise drawn to the attention of parliament.<sup>23</sup> To some extent the limits of this form of parliamentary oversight are ameliorated by the work of committees charged with reviewing regulations. In NSW, this function is performed by the Legislation Review Committee, constituted by members drawn from both houses and from across the political spectrum. Although this Committee may draw parliament’s attention to regulations on any ground,<sup>24</sup> it is expressly constrained from engaging in consideration of Government policy, other than in specified circumstances.<sup>25</sup> Moreover, where specific grounds are included, they

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21 Previously a Department in its own right, Primary Industries is now a Division of Industry & Investment NSW. See below p 8.

22 <<http://www.dpi.nsw.gov.au/agriculture/livestock/animal-welfare/general/guidelines/national>> at 27 October 2009.

23 There may be jurisdictional differences, eg, s 7 of the Prevention of Cruelty to Animals Act 1986 (Vic).

24 Legislation Review Act 1987 (NSW) s 9(1)(b).

25 Legislation Review Act 1987 (NSW) s 9(3).

are not particularly helpful to the interests of animals and, in some cases, may be antithetical to them.<sup>26</sup>

Another measure to increase transparency and accountability is the requirement for a regulatory impact statement ('RIS') with respect to major delegated legislation. In NSW, an RIS is required in relation to a principal statutory rule, which is defined to exclude amendments,<sup>27</sup> even though an amending regulation may make substantial changes to a regulatory provision.<sup>28</sup> For example, the Prevention of Cruelty to Animals Regulation 1996 (NSW) and the Prevention of Cruelty (Animal Trades) Regulation 1996 (NSW) were repealed in 2006 in accordance with the sun-setting provisions of the Subordinate Legislation Act 1989 (NSW) and combined and remade as the current Regulation. Accordingly, the 2006 Regulation was subject to the requirement for an RIS. This was not the case, however, when the Regulation was amended in 2007 to insert more detailed provisions with respect to layer hens.<sup>29</sup> Although this amendment included a provision to give effect to the agreement by Australian ministers in 2001 for a small increase in cage size for some laying fowl, the lack of an RIS meant less opportunity for public debate in relation to the broader issue of battery hens.<sup>30</sup> There are other circumstances where an RIS is not required. For example, it is unnecessary to comply with the requirement for an RIS where, inter alia, the responsible Minister

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26 For example, s 9(1)(b)(i) and (ii) of the Legislation Review Act 1987 (NSW) respectively authorise the Committee to have regard to any undue trespass on personal rights and liberties and any adverse impact on the business community.

27 Subordinate Legislation Act 1989 (NSW) ss3 and 5.

28 Indeed, various codes of practice were originally incorporated into POCTAA for the purposes of s34A by an amending regulation: the Prevention of Cruelty to Animals (General) Amendment Regulation 2000.

29 Prevention of Cruelty to Animals (General) Amendment (Laying Fowl) Regulation 2007 (NSW).

30 The history with respect to this increase is instructive. Following lack of agreement to a Tasmanian proposal in 1992 to ban cage production of eggs, the States and Territories agreed in 1995 to legislate to give effect to the minimum cage sizes set out in the 3rd edn of the Model Code – Domestic Poultry. The agreement in 2001 to increase the minimum cage size per fowl from 450 sqcm to 550 sqcm took six years to be legislated in NSW.

See <[http://www.dpi.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0007/287098/](http://www.dpi.nsw.gov.au/__data/assets/pdf_file/0007/287098/)

Review-of-penalties-for-egg-producers-who-fail-to-comply-with-cage-standards.pdf> at 21 September 2009.

certifies that the proposed statutory rule comprises or relates to certain matters, including those involving the adoption of international or Australian standards or codes where a cost/benefit assessment has already been made.<sup>31</sup> The national code development process in relation to stock animals requires an RIS in accordance with the Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies endorsed by the Council of Australian Governments.<sup>32</sup> In relation to animal welfare, however, the national RIS process has been criticised.<sup>33</sup> Because heavy reliance on subordinate legislation derogates from the power of parliament it is essential that safeguards provide a meaningful check on delegated power, particularly where the impact of its exercise is potentially so adverse to the well-being and lives of millions of animals.

### *Development of codes of practice*

As the above suggests, mechanisms for scrutinising delegated legislation may be particularly unhelpful where the enabling Act allows the incorporation of a further layer of regulation, such as codes of practice. In the case of animal welfare there is a particular concern: many of the relevant codes are developed with significant input from bodies whose interests are essentially antagonistic to those of animals, including industry organisations which are not accountable politically for the result. Issues associated with impartiality, transparency and accountability in this code-development process are especially acute because the regulatory subjects are sentient creatures without any direct legal claims or capacity to articulate their own suffering.

It is significant that the impetus for Australian model codes in the early 1980s was a response from industry to challenges to methods of livestock management and animal experimentation from those concerned about animal welfare.<sup>34</sup> Most current national codes have been developed through a federal/State regulatory process under the auspices of the Primary Industries Ministerial Council ('PIMC'). The

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31 Subordinate Legislation Act 1989 (NSW) s 6(1)(a); Sch 3(5).

32 <[http://www.pc.gov.au/\\_data/assets/pdf\\_file/0020/65720/coag.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0020/65720/coag.pdf)> at 27 October 2009.

33 See, eg, Malcolm Caulfield, *Handbook of Australian Animal Cruelty Law* (2008, Animals Australia) 60 in relation to the revised pig code.

34 Geoff Neumann, *Review of the Australian Model Codes of Practice for the Welfare of Animals*, Final Report (9 February 2005, Geoff Neumann & Associates Pty Ltd) 3.

object of the PIMC is ‘to develop and promote sustainable, innovative, and profitable agriculture, fisheries/aquaculture, food and forestry industries’.<sup>35</sup> That this object runs counter to the interests of animals is illustrated by the failure of the PIMC in 2009 to oppose a practice of slaughtering some animals in Victorian abattoirs without pre-stunning, despite scientific evidence (if any were needed) of the risk to animal welfare.<sup>36</sup>

Notwithstanding the conflict of interest, it is within this regulatory framework that national model codes for livestock animal welfare have been developed. The Animal Welfare Working Group (‘AWWG’) of the Primary Industries Standing Committee has specific responsibility for this task. The AWWG comprises representatives of State and Territory governments, the federal Department of Agriculture, Fisheries and Forestry (‘DAFF’), Animal Health Australia (‘AHA’), the CSIRO and the Vertebrate Pests Committee.<sup>37</sup> Several aspects of the membership of the AWWG are worthy of mention. First, the government representatives are largely drawn from agencies whose primary goals are industry-related. For example, the NSW representatives are from the Animal Welfare Branch of the Department of Primary Industries (‘DPI’) which acts ‘in partnership with industry and other public sector organizations to foster profitable and sustainable development of primary industries in New South Wales.’<sup>38</sup> The focus on industry concerns is highlighted by the incorporation of the DPI, in July 2009, into a new government authority, the Department of Industry and Investment, trading as Industry & Investment NSW. The function of this body is ‘to build diversified industries and create jobs as well as provide better services to the people of the state through more integrated services and less red tape.’<sup>39</sup> Secondly, AHA is a non-profit public company established by governments and major livestock industry bodies, including Australian Pork Ltd, the Cattle Council of Australia

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35 Primary Industries Standing Committee, Model Code of Practice for the Welfare of Animals, Domestic Poultry, 4th edn, 2002, vii.

36 Lorna Edwards, ‘Ritual Slaughter Ruling Condemned’, Farmonline, 13 November 2009 <<http://fw.farmonline.com.au/news/nationalrural/livestock/news/ritual-slaughter-ruling-condemned/1676377.aspx>> at 15 November 2009; PIMC 16 Communique 6 November 2009 <[http://www.mincos.gov.au/data/assets/pdf\\_file/0004/1365511/pimc-16.pdf](http://www.mincos.gov.au/data/assets/pdf_file/0004/1365511/pimc-16.pdf)> at 15 November 2009.

37 <[www.daff.gov.au/animal-plant-health/animal/committees/ahc/awwg](http://www.daff.gov.au/animal-plant-health/animal/committees/ahc/awwg)> at 12 October 2009.

38 NSW Department of Primary Industries, Annual Report, 2007-08, 5.

39 <<http://www.dpi.nsw.gov.au/aboutus>> at 21 September 2009.

and the Australian Egg Corporation.<sup>40</sup> According to its Members' Charter, AHA 'is a dynamic partnership of governments and livestock industries that strengthens Australia's animal health status and reinforces confidence in the safety and quality of our livestock products in domestic and overseas markets'.<sup>41</sup> With respect to the other members of the AWWG, the CSIRO is a national statutory agency concerned with scientific and industrial research and the Vertebrate Pests Committee coordinates Australian policy and planning in relation to pest animal issues.<sup>42</sup>

Unsurprisingly perhaps, the codes developed by the AWWG tend to reflect industry practices even though there is some consultation with animal welfare organisations.<sup>43</sup> Where the process results in improvements to animal welfare, concessions are generally heavily qualified. For example, a revised *Model Code of Practice for the Welfare of Animals – Pigs*, was published in 2008. Pig farming in Australia is a highly intensive industry.<sup>44</sup> A major animal welfare issue is the common intensive farming practice of housing sows in stalls for most of their 16 week gestation. This practice is being phased out in Europe, with all sow stalls to be prohibited after 2013 except for the first four weeks of pregnancy.<sup>45</sup> By contrast, under the 2008 Australian pig code, the maximum time in stalls has been reduced to six weeks and pig producers have until 2017 before this change is operational. In

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40 The Australian Livestock Export Corporation is an Associate Member.

<<http://www.animalhealthaustralia.com.au/corporate/members.cfm>> at 12 October 2009.

41 <<http://www.animalhealthaustralia.com.au/corporate/members.cfm>> at 12 October 2009. Of the nine points listed under the heading Members' Charter, only point 6 makes specific reference to the interests of animals. Moreover, the wording of this point, that AHA is 'mindful of the inherent value of livestock as sentient animals in all considerations' is difficult to reconcile in any meaningful way with its broader objectives.

<<http://www.animalhealthaustralia.com.au/aahc/index.cfm?1D261FC4-DDE0-0F8B-F4B6-C8CAD9EDF7D7>> at 12 October 2009.

42 <<http://www.daff.gov.au/natural-resources/invasive/vertebrates>> at 20 April 2010.

43 See, for example, Primary Industries Standing Committee, above n 35, v and Primary Industries Ministerial Council, *Model Code of Practice for the Welfare of Animals - Pigs* (3rd edn, 2008).

44 Australian Bureau of Statistics, *Year Book Australia Livestock* (2008) Cat No 1301.1.

45 Peter Stevenson, 'European and International Legislation: A Way Forward for the Protection of Farm Animals?' in Peter Sankoff and Steven White *Animal Law in Australasia: A New Dialogue* (2009, Federation Press) 307, 311, 314.

addition, exemptions apply.<sup>46</sup> Moreover, the modest increase in the size of sow stalls in the 2008 Code only applies to new installations, with existing stalls merely required to meet vague outcomes-based criteria.<sup>47</sup> Even these minimal improvements had no formal legal status in NSW until 2010 when the relevant provisions were legislated by regulation.<sup>48</sup>

The code development process has now been brought under the umbrella of the Australian Animal Welfare Strategy ('AAWS') endorsed by the Australian government in 2005. A key aim of the AAWS is the development of nationally consistent animal welfare provisions to be adopted by each State and Territory government.<sup>49</sup> As with the development of previous model codes, this standards development process is dominated by government and livestock representatives whose primary interest is to support industry. The first set of standards to be developed as part of this process, the *Australian Standards and Guidelines for the Welfare of Animals: Land Transport of Livestock* ('LTL Standards'), illustrates the difficulty of addressing animal welfare concerns. The LTL Standards replace seven model codes, as well as provisions on livestock transport in another 13 documents.<sup>50</sup> Although the transport of animals is a notoriously problematic area in terms of animal welfare, the management of the standards development process was the responsibility of AHA. The first step in the process was the production of draft standards by a small writing group comprising representatives of government, industry and research bodies.<sup>51</sup> No animal advocates or animal welfare

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46 Primary Industries Ministerial Council, Model Code of Practice for the Welfare of Animals - Pigs (3rd ed, 2007) [4.1.5].

47 Ibid, Appendix III.

48 The Prevention of Cruelty to Animals (General) Amendment (Animal Trades) Regulation 2010 (NSW) prescribed a commercial pig establishment as an animal trade and the Animal Welfare Code of Practice – Commercial Pig Production (2009, Industry & Investment NSW) as the relevant code. Accordingly, a breach of the Code now constitutes an offence under the Regulation. Note, however, that the prescribed Code is inconsistent with POCTAA. While cl24 of the Code prohibits the surgical sterilisation of a male pig over the age of 21 days, unless performed by a vet and with anaesthetic, s24(1)(a)ii) of POCTAA provides a defence in relation to the same procedure where the pig is less than two months of age.

49 <<http://ww.daff.gov.au/animal-plant-health/welfare/aaws/online/goals>> at 12 October 2009.

50 Primary Industries Ministerial Council, Australian Standards and Guidelines for the Welfare of Animals: Land Transport of Livestock, Public Consultation Draft, 29 February 2008, vii-viii.

51 Ibid, vii.

representatives were included in the writing group for the LTL Standards but only in the Standards Reference Group that had input into the process after the initial drafting was completed. These draft standards were then subjected to a public consultation process and further revision.

The LTL Standards are detailed and complex and it is not easy to establish those changes made as a result of consultation, either with the Standards Reference Group or the broader public. Although the initial standards were subject to some amendment, there have been claims that the changes do little to benefit animal welfare, particularly in relation to bobby calves.<sup>52</sup> A by-product of the dairy industry which requires cows to be kept constantly pregnant, bobby calves are typically taken from their mothers in the first 24 hours and transported to slaughter when five days old. The practice of transporting bobby calves after five days was reflected in the public consultation draft LTL Standards B4 and supported by the dairy industry; by contrast, submissions from animal welfare and advocacy groups supported an older age threshold.<sup>53</sup> Following this public consultation process, no change to the age threshold was recommended.<sup>54</sup>

With respect to time off feed for bobby calves, the dairy industry submitted that 24 hours is the appropriate interval, while animal welfare and advocacy groups supported a maximum time off feed of 12 hours.<sup>55</sup> In the public consultation draft LTL Standards, a liquid feed for bobby calves every 12 hours was recommended by GB4.9 but this guideline was subsequently deleted in accordance with a proposal of the dairy industry.<sup>56</sup> Also deleted was that part of GB4.3 which recommended that bobby calves not be transported for a time exceeding 10 hours or a distance exceeding 500 kilometres.<sup>57</sup> Instead, standard SB4.5(iv), as

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52 See, eg, 'Proposed Animal Transport Standards Disappointing'

<<http://www.abc.net.au/news/stories/2009/03/18/2519543.htm?site=southwestwa>> at 12 October 2009.

53 Animal Health Australia (2008), Australian Animal Welfare Standards and Guidelines for the Land Transport of Livestock, Public Consultation Response Action Plan, 83-4.

54 Ibid, 84.

55 Ibid.

56 Ibid.

57 This proposed guideline was qualified where the calves are intended for slaughter and exceeding this time and distance is necessary to reach the nearest available, operating livestock-processing establishment.

included in the draft for endorsement published in December 2008, requires that bobby calves be prepared and transported to ensure delivery in less than 18 hours from last feed, with no more than 12 hours spent on transports. According to the Public Consultation Response Action Plan, this standard allows ‘the objective of reasonable calf welfare to be achieved *without major industry consequences*.’<sup>58</sup> In addition, guideline GB4.8 of the same version provides that bobby calves should be given a liquid feed as soon as possible after unloading, unless they are slaughtered within 18 hours of commencing transport. Apart from the recognised problems at abattoirs in relation to feeding calves,<sup>59</sup> this guideline in effect supports a maximum time off feed of 24 hours when read in conjunction with standards SB4.5(iii) and (iv).<sup>60</sup>

The point made by the Public Consultation Response Action Plan, that ‘POCTA provisions will still apply to any unsatisfactory outcomes’,<sup>61</sup> offers little reassurance given the major problems with animal welfare law enforcement discussed below. Moreover, further changes to the LTL Standards are pending. Although the PIMC endorsed the 2008 version in May 2009 it was noted that ‘further industry consultation will occur before the standards are given legislative effect.’<sup>62</sup> As a result, some changes to the 2008 edition are anticipated. In relation to bobby calves, the time-off-feed standard has been provisionally rewritten to require that calves between 5 and 30 days old travelling without their mothers must be slaughtered or fed within 30 hours from last feed.<sup>63</sup> The amended LTL Standards will be presented to the PIMC in November 2010 and, if endorsed, implemented by the States and Territories in 2011.<sup>64</sup>

With respect to the LTL Standards, AHA claims that the outcome followed ‘an extensive consultation process’, involved ‘careful consideration’ by the reference group of ‘the views and comments of all

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58 Animal Health Australia, above n 53, 85 (emphasis added).

59 Ibid.

60 Standard SB4.5(iii) of the 2008 draft requires that bobby calves be fed milk or milk replacer on the farm within 6 hours of transport.

61 Animal Health Australia, above n 53, 85.

62 PIMC 15, Communique 21 May 2009, p 3.

[http://www.animalwelfarestandards.net.au/aahc/australian-animal-welfare-standards-and-guidelines/land-transport/land-transport\\_home.cfm](http://www.animalwelfarestandards.net.au/aahc/australian-animal-welfare-standards-and-guidelines/land-transport/land-transport_home.cfm)> at 6 April 2010.

63 Email from Amanda Paul to Elizabeth Ellis, 8 April 2010.

64 Email from Amanda Paul to Elizabeth Ellis, 8 April 2010.

stakeholders' and generally reflects 'a high level of agreement about the welfare aspects of land transport'.<sup>65</sup> In further justification, AHA states that the 'decision-making process is conducted at the Reference Group level and is based on logic, values all opinions and is not set up to "out vote" any stakeholder or group.'<sup>66</sup> Yet, as also noted by AHA, there was less than full agreement for the LTL Standards as endorsed, particularly in relation to bobby calves,<sup>67</sup> as well as criticism of the standards development process by the RSPCA.<sup>68</sup> Moreover, the detail of the standards and guidelines, as well as the lengthy process, make it difficult to assess the extent to which animal welfare interests were taken into account. In addition, the complexity of the standards and guidelines, as well as the focus on technical and economic analysis in the 263-page RIS, do not facilitate participation by ordinary members of the public. Commenting on the public response, one of AHA's managerial staff stated:

There were 45 organisational written submissions and 72 personal submissions. This moderate response is thought to indicate a low level of concern with the development process and the standards and guidelines. This was supported by a lack of focus on a specific issue – there was a wide range of issues mentioned. It is also believed that the complexity of the Land Transport Standards and Guidelines and the RIS may have deterred those not truly motivated to respond.<sup>69</sup>

An alternative explanation is that individual members of the public who feel strongly about the issues nevertheless lacked the confidence to engage in the process in an informed way. Arguably of relevance here is a point that has been made in a different context - that 'an official discourse of inclusiveness and bureaucratic rationality' may 'shroud

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65 Animal Health Australia (2008), Australian Standards and Guidelines for the Welfare of Animals - Land Transport of Livestock, Draft for Endorsement, vii.

66 Animal Health Australia, above n 53, 11.

67 Animal Health Australia, above n 65, vii.

68 Animal Health Australia, above n 53, 11.

69 Kevin de Witte, 'Development of the Australian animal welfare standards and guidelines for the land transport of livestock' (Paper presented at the AAWS International Animal Welfare Conference, Gold Coast, Queensland, 31 August – 3 September 2008) 11.

<[http://www.daff.gov.au/\\_\\_data/assets/pdf\\_file/0009/1046394/22-kevin-de-witte.pdf](http://www.daff.gov.au/__data/assets/pdf_file/0009/1046394/22-kevin-de-witte.pdf)>.

substantial interest group influence from public scrutiny'.<sup>70</sup> As currently structured, the standards development process is vulnerable to the charge that it pays lip service not only to animal welfare but also to that degree of effective public engagement in subordinate lawmaking that the rule of law would seem to require.

## Enforcement

While the envisaged adoption of updated national codes as legally enforceable standards may go some way to decreasing uncertainty in relation to livestock, it will not ameliorate the major failings of animal welfare law. First, the disproportionate influence of industry interests suggests that animal welfare will continue to be a marginal rather than central consideration in the law's content. Secondly, only the standards, not the guidelines will be mandatory. Thirdly, standards are only of value if they are enforced. While law enforcement in any field typically yields issues about resources and the exercise of discretions, particular problems arise with respect to the regulation of animal welfare. In part this is a function of the inability of animals to articulate their own experience in terms acceptable to humans and the fact that the law denies them any direct legal claim. Also significant, however, is that the bulk of the enforcement function is carried out by private charities, principally the Royal Society for the Prevention of Cruelty to Animals ('RSPCA').

In NSW, the Act invests three agencies with an enforcement function: the police, officers authorised by the Minister, or the Director General or a Deputy Director-General of the Department of Primary Industries, and approved charitable organizations.<sup>71</sup> In practice, the police have a very limited role in relation to animal welfare, other than investigating the animal cruelty offences inserted into the *Crimes Act 1900* (NSW) in 2007.<sup>72</sup> Similarly, primary industries officers are not directly involved in enforcement of the Act,<sup>73</sup> although the department is responsible for its administration. This leaves the bulk of enforcement to the two charitable organisations approved in accordance with s34B of the Act:

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70 Mark Burton, 'Chaos, Rhetoric and the Legitimation of 'Democratic Government ': A Critical Review of Australia's Tax Legislative Process' (2007) 29 Sydney Law Review 613, 613.

71 Section 4(1); s24D.

72 Sections 530, 531.

73 Section 8(4) requires the advice of the Department with respect to the prosecution of a person for failing to provide food, water or shelter to stock animals on certain land.

RSPCA NSW and the Animal Welfare League NSW ('AWL'). The AWL's role is relatively minor, leaving the RSPCA as the major law enforcement body in NSW.<sup>74</sup> Even in jurisdictions where the department administering the relevant legislation has a more active role, the RSPCA usually retains a significant enforcement function. In Queensland, for example, the Department of Primary Industries and Fisheries and the RSPCA share the enforcement function by mutual agreement, with the former largely responsible for stock animals and the latter primarily for companion animals.<sup>75</sup>

Criminal law enforcement is the archetypal state function. The state traditionally prosecutes criminal offences because the interests of the whole community, not just individual victims, are considered to be at stake; by this process, the law recognises and reaffirms values and interests deemed worthy of protection. At the same time, the coercive power inherent in the criminal justice process demands safeguards for those affected by it. These are traditionally afforded not only by the requirements of transparency and accountability associated with our system of representative and responsible government but by comprehensive legal rules, embodying ideas of procedural fairness and restraint of power. As the High Court has noted,

'a criminal trial is an accusatorial process in which the power of the State is deployed against an individual accused of crime. Many of the rules that have been developed for the conduct of criminal trials therefore reflect two obvious propositions: that the power and resources of the State as prosecutor are much greater than those of the individual accused and that the consequences of conviction are very serious.'<sup>76</sup>

In the case of criminal proceedings for animal cruelty,<sup>77</sup> the con-

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74 The Prevention of Cruelty to Animals Amendment (Prosecutions) Act 2007 (NSW) removed the right to bring a private prosecution under the Act.

75 Steven White, 'Regulating Animal Welfare in Australia and the Emergent Commonwealth: Entrenching the Traditional Approach of the States and Territories or Laying the Ground for Reform?' (2005) 35 *Federal Law Review* 347, 351.

76 *R v Carroll* (2002) 213 CLR 635, 643 (Gleeson CJ and Hayne J).

77 For a consideration of the appropriateness of various regulatory responses to animal cruelty/welfare see, eg, Geoff Bloom, 'Regulating animal welfare to promote and protect improved animal welfare outcomes under the Australian Animal Welfare Strategy', (paper presented at AAWS International Animal Welfare Conference, Gold Coast, Queensland, 31 August – 3

sequences of conviction may be serious<sup>78</sup> but it is by no means 'obvious' that the resources of the prosecutor are much greater than the accused. Not only may private charities lack procedural expertise in relation to criminal investigations,<sup>79</sup> but successive governments have failed to resource the relevant bodies in a manner commensurate with the magnitude and complexity of the enforcement task. In 2008-2009, for example, RSPCA NSW received \$424,000 from the government for its inspectorial function.<sup>80</sup> Although this sum may be augmented by donations from members of the public and the assistance of pro bono lawyers, the resources available for enforcement reflect the charitable basis of the enterprise.

It is unsurprising then that the RSPCA undertakes very limited routine investigative activity;<sup>81</sup> where complaints are investigated, it is likely that prosecution is reserved for the most serious cases,<sup>82</sup> although it is difficult to establish the scope and detail of the enforcement process. First, the annual reports of the ACOs are limited in the information they contain. Since 2005, for example, written notices and penalty notices have been part of the armoury of enforcement options contained in the Act<sup>83</sup> yet data about their use is not included in the RSPCA's Annual Reports. Secondly, where information about enforcement activities is readily accessible, it may appear to be inconsistent with other publicly available data. For example, according to RSPCA NSW, there were

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September 2008). <[http://www.daff.gov.au/\\_\\_data/assets/pdf\\_file/0003/1041951/regulating-aw-geoff-bloom.pdf](http://www.daff.gov.au/__data/assets/pdf_file/0003/1041951/regulating-aw-geoff-bloom.pdf)>.

78 For discussion and critique of sentencing issues with respect to animal cruelty see, eg, Annabel Markham, 'Animal Cruelty Sentencing in Australia and New Zealand' in Peter Sankoff and Steven White (eds) *Animal Law in Australasia: A New Dialogue* (2009, Federation Press) 289 and Keely Boom and Elizabeth Ellis, 'Enforcing Animal Welfare Law: the NSW Experience' (2009) 3 *Australian Animal Protection Law Journal* 6.

79 For example, the Animal Cruelty Taskforce found no guarantee that a guilty person's fingerprints would be taken or a notation made on their criminal record where the investigation was carried out without police involvement. See NSW, *Parliamentary Debates, Legislative Assembly*, 9 November 2005, 19387 (Sandra Nori).

80 NSW RSPCA Annual Report 2008-2009, 46-47.

81 For example, only 55 routine inspections were carried out in 2008-2009 in NSW: RSPCA Australia, *National Statistics, 2008-2009*, Table 5.

82 White, above n5, 354.

83 Sections 24N, 33E inserted by the *Prevention of Cruelty to Animals Amendment Act 2005* (NSW).

704 charges approved to commence in 2006-2007 but the NSW Bureau of Crime Statistics and Research figures show 468 finalised charges for the same period.<sup>84</sup> While the Act requires ACOs to account in greater depth with respect to their enforcement activities,<sup>85</sup> the recipient is the Minister for Primary Industries, whose incongruous administration of animal welfare has already been noted. Moreover, in jurisdictions where government agencies are involved in enforcing the law in relation to farmed animals, little information about their activities is made publicly available.<sup>86</sup> Delegation of a penal function to a charitable body sits uncomfortably with the rule of law but it is too glib to assume that government assumption of all responsibility in this field would automatically lead to greater transparency or, indeed, different enforcement practices.

Without access to comprehensive information about enforcement it is difficult to evaluate the efficacy of law's protective role in relation to animals. It is clear, however, that the capacity of law to act as a windbreak is severely curtailed if adequate resources are not available to enforce the existing regime. Moreover, it is arguable that concerns other than animal welfare have motivated some penal provisions. In 2009, for example, POCTAA was amended by the insertion of s35(3) to allow the creation by regulation of offences with substantially increased maximum penalties in relation to animal trades and layer hens.<sup>87</sup> Although ostensibly 'aimed at improving the welfare of caged layer hens',<sup>88</sup> this amendment has been criticised as being less concerned with animal welfare than with giving large egg producers an advantage over their smaller competitors.<sup>89</sup> As already discussed, any disjunction between the actual aims of legislation and its purported objects creates uncertainty in its interpretation and is at odds with the principle of legality.

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84 See Boom and Ellis, above n 78.

85 Section 34B(3)-(4); reg 25.

86 White, above n75, 357.

87 Prevention of Cruelty to Animals Amendment Act 2009 (NSW).

88 New South Wales, Parliamentary Debates, Legislative Assembly, 25 September 2009, 18215 (David Harris).

89 New South Wales, Parliamentary Debates, Legislative Council, 10 November 2009, 19138 (Ian Cohen).

## Conclusion

Although the problems identified in this article are typical of a range of regulatory endeavours, the shortcomings are particularly serious in the case of animal welfare because animals are sentient beings yet exploited for human ends. Moreover, this occurs within a legal paradigm that treats animals as private property and in which they are powerless to assert their own interests. In these circumstances, it might be expected that governments would be fastidious in ensuring law's protective role; in fact, nearly every facet of this function is diminished. First, despite government rhetoric, the law accords only limited concessions to animals within a regulatory framework in which private industry, in collaboration with the executive arm, wields significant influence.<sup>90</sup> Secondly, the extent to which animal welfare is taken seriously is unclear because much of the law's development occurs at a subordinate level that lacks the transparency and exposure of the parliamentary process. Thirdly, the unique reliance on inadequately resourced private bodies to enforce a penal statute puts at risk those interests which the law purports to protect, as well as subverts the traditional relationship between the state and its citizens in relation to the criminal justice process. As noted at the outset, the idea of the rule of law is vulnerable to challenge<sup>91</sup> but greater attention to its minimum requirements, in conjunction with the overlapping democratic values of transparency, accountability and public participation, would have the merit of increasing public awareness of animal welfare and providing a more informed basis for debate.

According to a former Chief Justice, '[i]n a democracy, the rule of law is not achieved by raw power but by public acceptance of the law and by public confidence in the institutions which promulgate and

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<sup>90</sup> This influence is not confined to livestock. In relation to companion animals, for example, the relevant Codes of Practice are produced within the Division of Primary Industries, with industry routinely cited first among the stakeholders consulted in the process. See, eg, Animal Welfare Code of Practice – Animals in Pet Shops (2008) 2.

<sup>91</sup> Apart from the more usual criticisms, substantive versions of the rule of law embodying political philosophies based on human rights are inherently problematic for nonhuman animals who are regarded as a species of property. For a critique of the property status of animals see, eg, Gary Francione, "Animals – Property or Persons?" in Cass R. Sunstein and Martha C. Nussbaum, *Animal Rights: Current Debates and New Directions* (2004, Oxford University Press) 108.

administer it.’<sup>92</sup> This article has sought to demonstrate serious flaws in the regulation of animal welfare, both in the law and its administration. The inconsistent and uncertain nature of the language and structure of animal welfare legislation, the partiality and lack of accountability in its development, and the restricted access to the courts to enforce its breach all militate against public confidence in the current regulatory regime. To the extent that existing animal welfare law does command public support, this is arguably more a function of ignorance than acceptance.<sup>93</sup>

In the context of the current regime, it seems there is no escaping the irony of Murray Gleeson’s idea of law as a windbreak or shelter. Just as animal ‘shelters’ routinely destroy thousands of unwanted animals,<sup>94</sup> much of the legal protection afforded to animals is illusory. In relation to animal welfare then, it would seem that Philip Ruddock has little to fear – in important ways both the making of the sausages and the making of the law about the making of the sausages are hidden from the public gaze.

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92 Sir Gerard Brennan, ‘The Third Branch and the Fourth Estate’, Faculty of Law, University College, Dublin cited in President’s Report, Extra Judicial Notes, (1997) 16 Australian Bar Review 2, 2.

93 See above n9.

94 The RSPCA, for example, euthanased 72,309 dogs, cats and other animals in 2008-09. RSPCA Australia, National Statistics, 2008-2009, Table 2.