

University of Wollongong

Research Online

Faculty of Law, Humanities and the Arts -
Papers (Archive)

Faculty of Arts, Social Sciences & Humanities

1-1-2013

Bearing the burden: shifting responsibility for the welfare of the beast

Elizabeth Ellis

University of Wollongong, eellis@uow.edu.au

Follow this and additional works at: <https://ro.uow.edu.au/lhapapers>



Part of the [Arts and Humanities Commons](#), and the [Law Commons](#)

Research Online is the open access institutional repository for the University of Wollongong. For further information contact the UOW Library: research-pubs@uow.edu.au

Bearing the burden: shifting responsibility for the welfare of the beast

Abstract

The contemporary focus on accuracy in food labelling in part reflects increasing community concern about animal protection. Yet the problematic nature of current animal welfare regulation suggests the failure of governments to respond in a commensurate manner. Regulatory problems are multiple and diverse: conflicts of interest, legislative incoherence, inconsistent policy and practice, lack of transparency and inadequate enforcement of the law. These regulatory deficiencies reflect modes of thinking that privilege individual over community responsibility and frame animal protection as a charitable concern. The result is a flawed animal welfare regime, at odds with official rhetoric and with the principle of legality that requires governments to be open and honest with the electorate. To start shifting the burden from animals to those with a greater capacity and the moral responsibility to bear it requires significant reform. Arguably, this includes consistent legislative provisions, independent and coherent mechanisms for standard-setting, administration and enforcement, and publicly available information about all aspects of animal use as a basis for informed community debate.

Keywords

shifting, beast, burden, welfare, bearing, responsibility

Disciplines

Arts and Humanities | Law

Publication Details

Ellis, E. (2013). Bearing the burden: shifting responsibility for the welfare of the beast. *Macquarie Law Journal*, 11 (4), 39-49.

BEARING THE BURDEN: SHIFTING RESPONSIBILITY FOR THE WELFARE OF THE BEAST[†]

ELIZABETH ELLIS*

The contemporary focus on accuracy in food labelling in part reflects increasing community concern about animal protection. Yet the problematic nature of current animal welfare regulation suggests the failure of governments to respond in a commensurate manner. Regulatory problems are multiple and diverse: conflicts of interest, legislative incoherence, inconsistent policy and practice, lack of transparency and inadequate enforcement of the law. These regulatory deficiencies reflect modes of thinking that privilege individual over community responsibility and frame animal protection as a charitable concern. The result is a flawed animal welfare regime, at odds with official rhetoric and with the principle of legality that requires governments to be open and honest with the electorate. To start shifting the burden from animals to those with a greater capacity and the moral responsibility to bear it requires significant reform. Arguably, this includes consistent legislative provisions, independent and coherent mechanisms for standard-setting, administration and enforcement, and publicly available information about all aspects of animal use as a basis for informed community debate.

I INTRODUCTION

In 2012, a NSW egg producer was fined for mislabelling 38,000 dozen barn laid eggs as free range. The details were released in October of that year by the NSW Minister for Primary Industries as part of her responsibility for food safety legislation, under which the offences arose.¹ Although more informed food choices might ultimately benefit animals, the focus of

[†] A version of this paper was presented at Tomorrow's Law: The Future of Animal Law Conference, Sydney, 18 October 2012. Some of the ideas are also explored in "The Animal Welfare Trade-off or Trading Off Animal Welfare?" in Peter Sankoff, Steven White and Celeste Black (eds) *Animal Law In Australasia* (Federation Press, 2nd ed, 2013, forthcoming). The author would like to thank an anonymous reviewer for comments on a draft of this article.

* Elizabeth Ellis is an honorary senior fellow with the Faculty of Law at the University of Wollongong where she has taught Animal Law since 2008. Her animal law publications include book chapters, journal articles and an animal law edition of *Hot Topics* for the Legal Information Access Centre. With a focus on public law and an interest in legal education, Elizabeth also uses animal law to illustrate broader issues in her general text, *Principles and Practice of Australian Law* (3rd ed, 2013).

¹ Katrina Hodgkinson, Minister for Primary Industries, "Producer Fined for Mislabelling Eggs" (Media Release, 7 October 2012) <<http://www.foodauthority.nsw.gov.au/news/media-releases/mr-07-Oct-12-producer-fined-mislabelling-eggs/>>.

ministerial concern was clearly consumer protection not animal welfare. There is a certain irony here as the Minister for Primary Industries is also responsible for the administration of the *Prevention of Cruelty to Animals Act 1979* (NSW) and other State animal welfare legislation. In relation to both her animal welfare and food labelling responsibilities, the Minister appeared on ABC television in June 2012 in the context of a story about layer hens. In response to the claim by Animal Liberation that buying cage eggs is contributing to cruelty, the Minister volunteered that she purchases cage eggs, noting that “everybody is a little bit different” and she is “perfectly comfortable” with her choice. Asked whether there is a place for ethics in people’s food choices, the Minister’s response was brief: consumers should have the information necessary to make informed choices, with appropriate labelling of egg cartons a “really good step”.²

These ministerial statements are relevant to a discussion of animal protection in several ways over and above the immediate welfare issues associated with intensive farming. First, they illustrate the reliance on moral pluralism to frame animal welfare as a matter of individual preference or conscience rather than as a political issue requiring intervention by the state. The impact of this approach on the well-being of animals is considerable.³ Secondly, the focus on consumers’ right to know is relevant insofar as it reflects the value underlying the principle of legality frequently invoked by the courts. While the specific context is that of statutory interpretation and the judicial presumption that parliament does not intend to trample on commonly accepted rights, the principle of legality reflects a broader value: that governments should be open with, and accountable to, the people whom they represent.⁴ In other words, subject to Australia’s limited constitutional protections, governments may legislate in a way that intrudes on individual rights but must make it plain that they are doing so. These principles of openness and honesty underpin the capacity for informed community debate that is integral to the legitimacy of representative government.

While nonhuman animals lack rights in any formal legal sense, the focus on consumer protection reflects increasing community concern about animal welfare. Accordingly, consistent with the principle of open and accountable government, public administrations should be honest about the extent to which animal protection is secured by law. By reference to a selection of topical issues across a range of settings, this article identifies key characteristics of animal welfare regulation that impact on the level of protection afforded to animals, while also obscuring important policy issues and reducing public awareness of problematic aspects of the law. The article concludes that these characteristics diminish the capacity of the public to engage in informed debate and are inconsistent with the values of openness and accountability that underlie the principle of legality. In these circumstances, nonhuman animals bear the burden of suffering in terms of their use as a human resource, with significant change required to shift responsibility to those with a greater capacity and the moral responsibility to bear it.

² ABC Television, “Rotten Eggs”, 7.30 NSW, 8 June 2012 (Katrina Hodgkinson).

³ Gary Francione and Robert Garner, *Animal Rights Debate: Abolition or Regulation?* (Columbia University Press, 2010) 146-154. See also Robert Garner, *Theory of Justice for Animals: Animal Rights in a Nonideal World* (Oxford University Press, 2013, forthcoming).

⁴ See, eg, *Momcilovic v The Queen* (2011) 245 CLR 1, 46-7 (French CJ).

II CONFLICTS OF INTEREST

A return to the NSW Minister's stated preference for purchasing eggs from caged hens provides a useful starting point. On the same television program, RSPCA Australia's chief scientific officer, Bidda Jones, affirmed the opposition of the RSPCA to keeping hens in cages yet the Minister did not advert in any way to the significant animal welfare issues involved in intensive farming systems.⁵ A similar lack of sensitivity to animal welfare issues was evident in the same Minister's response to a Question without Notice in Parliament in May 2012 with respect to the keeping of sows in stalls. That the Minister's overwhelming concern was primary production is clear from her short answer that included the following remarks:

All sorts of things could be done to try to appease those who do not really understand farming, but would that be productive for our food sector? As someone who comes from a rural background, I understand primary production and the need for a farmer to be able to make money and continue with production.⁶

The Minister's apparently anomalous response to a question about animal welfare is symptomatic of a regulatory system characterised by conflicts of interest. In all Australian jurisdictions, animal welfare statutes are administered by government agencies whose core responsibilities lie elsewhere. It is not simply that animal welfare is peripheral to the main function of these agencies but that their core responsibilities and the requirements of animal welfare often conflict. Likewise, Ministers may be ill-informed and/or liable to privilege agricultural and industry interests over animal welfare. This privileging is most notable with respect to standard-setting, where industry interests dominate. The commitment under the Australian Animal Welfare Strategy (AAWS) to convert the Model Codes of Practice for the Welfare of Animals into national, enforceable Animal Welfare Standards and Guidelines was an opportunity to update the provisions to reflect changing community attitudes. One way of achieving this would have been to involve animal protection stakeholders in the process in a more meaningful way than had been the practice in relation to the Model Codes. To date, however, the development of these Standards and Guidelines has simply demonstrated industry's continuing dominance. Significantly, the process is managed by Animal Health Australia (AHA) which comprises peak industry bodies and government primary industries and agricultural departments. Of the eight priorities listed in AHA's strategic plan the only mention of animal welfare is in the context of maintaining and increasing livestock market access.⁷ The writing group that produced the initial draft for the major Land Transport of Livestock Standards, endorsed by the Primary Industries Ministerial Council (now the Standing Council on Primary Industries (SCoPI)) in 2009, did not include any animal welfare representation, an approach that has been maintained for the Cattle and Sheep Standards currently in development.⁸ Unsurprisingly, then, the standards development process favours the industry position in relation to contentious animal welfare issues, such as the proposed 30

⁵ ABC Television, above n 2.

⁶ NSW, *Parliamentary Debates*, Legislative Assembly, 31 May 2012, 12467 (Katrina Hodgkinson).

⁷ Animal Health Australia, *Strategic Plan 2010-2015*, <<http://www.animalhealthaustralia.com.au/wp-content/uploads/2011/05/AHA-Strategic-Plan-2010-2015.pdf>>.

⁸ Animal Health Australia, *Development of Australian Standards and Guidelines for the Welfare of Livestock* (February 2009) Australian Animal Welfare Standards and Guidelines, 9-10 <<http://www.animalwelfarestandards.net.au/files/2011/01/Animal-Welfare-Standards-and-Guidelines-Development-Business-Plan.pdf>>.

hour time off feed standard for bobby calves.⁹ Against this background, to badge the standards and guidelines as “animal welfare” is arguably to engage in a calculated deceit.

Conflicts of interest also occur with respect to compliance activity, although governments consistently fail to acknowledge the issue in these terms. In response to the Farmer Review of the live export trade which followed the broadcast of shocking cruelty to cattle in Indonesian abattoirs by ABC television in 2011¹⁰ the federal government introduced a new regulatory scheme, the Exporter Supply Chain Assurance System (ESCAS), to govern live exports. A key requirement of this scheme is the independent auditing of the supply chain. According to the federal Department of Agriculture, Fisheries and Forestry (DAFF), however, “payment to an auditor for carrying out the functions of an auditor does not constitute a conflict of interest and is generally the responsibility of the establishment being audited”.¹¹ That major breaches of ESCAS with respect to animal welfare have since been identified by animal advocates not exporter employed auditors¹² reinforces concern that the latter lack the requisite independence to sustain community confidence in the new regulatory arrangements. Moreover, investigation of alleged non-compliance is the responsibility of DAFF whose stated aim is “to enhance the sustainability, profitability and competitiveness of Australia’s agriculture, food, fisheries and forestry industries”.¹³ The same Department also determines what action to take, if any, where non-compliance is found to have occurred.¹⁴

But conflicts of interest are not confined to livestock welfare. At State level, primary industries departments are also responsible for animal welfare across a wide range of other settings, including companion animals, exhibited animals and feral animal control. As with livestock, there is also significant input from industry stakeholders and from government administrators whose primary interests are not animal welfare. An example is the establishment in 2011 of a Companion Animals Taskforce to provide advice to the NSW government on key welfare issues, particularly in relation to the very high rate of euthanasia of cats and dogs.¹⁵ Representatives of animal welfare organisations comprised three of the 10-member Taskforce.¹⁶ The resulting Discussion Paper, released for public comment in May 2012, dealt only cursorily with the most complex issues, such as mandatory desexing and the commercial sale of cats and dogs,¹⁷ while the public consultation process encouraged the confinement of submissions to the issues thus narrowly defined. Meanwhile, despite assurances by the Minister for Local Government that the Taskforce would hold community

⁹ Animal Health Australia, ‘Australian Animal Welfare Standards and Guidelines – Land Transport of Livestock: Proposed Amendment to the Land Transport of Livestock Standards (SB4.5) Bobby Calves Time Off Feed Standard’ (Post-Public Consultation Decision RIS, Primary Industries Ministerial Council, 6/7/2011) 90-93 <http://www.animalwelfarestandards.net.au/files/2011/05/Bobby-Calf-ToF-Discussion-RIS-OBPR-endorsed-Final-_AHA6.7.11.pdf>.

¹⁰ Bill Farmer, ‘Independent Review of Australia’s Livestock Export Trade’ (Report, 2011).

¹¹ Department of Agriculture, Fisheries and Forestry, Australian Government, *Approved Auditor Information* (7 December 2011) <<http://www.daff.gov.au/aqis/export/ecri/approved-auditor-information>>.

¹² Department of Agriculture, Fisheries and Forestry, Australian Government, *Independent Audit Summary Reports of an Exporter Supply Chain Assurance System (ESCAS)* (23 May 2013) <<http://www.daff.gov.au/aqis/export/live-animals/livestock/escas/audit-reports#sect7>>.

¹³ Department of Agriculture, Fisheries and Forestry, Australian Government, *What we do* (28 April 2011) <<http://www.daff.gov.au/about/what-we-do>>.

¹⁴ Department of Agriculture, Fisheries and Forestry, Australian Government, *Guideline – Management of Non-Compliance* (17 May 2013) <<http://www.daff.gov.au/aqis/export/live-animals/livestock/escas/non-compliance>>.

¹⁵ NSW Companion Animals Taskforce, ‘NSW Companion Animals Taskforce Discussion Paper’ (Discussion Paper, Division of Local Government, Government of NSW, May 2012) 1.

¹⁶ Ibid.

¹⁷ Ibid, 11.

consultations around NSW this has not occurred.¹⁸ In all these circumstances, and with no public minutes of Taskforce meetings, there can be little confidence that the difficult and complex issues in relation to the high rates of companion animal euthanasia have received priority over commercial or other considerations. The Taskforce Report, released publicly in March 2013, contains some worthwhile recommendations, in particular the establishment of a breeder licensing system. Even if adopted, however, the impact of the recommended initiatives is likely to be limited without more stringent measures to address the underlying problem of the oversupply of cats and dogs.

III CONFLICTS AND INCOHERENCE

Community concern about government action sometimes shines a light on regulatory conflicts. In NSW, for example, wide opposition to the State government's decision to allow hunting in some national parks has highlighted the conflicting roles of the NSW Game Council in both regulating and promoting hunting. Citing the NSW Independent Commission Against Corruption, the *Sydney Morning Herald* editorialised "that 'the perception of a conflict of interests' within regulatory bodies 'can be as damaging as an actual conflict, because it undermines public confidence in the integrity of the organisation'".¹⁹ Under s 9 of the *Game and Feral Animal Control Act 2002* (NSW), the functions of the Game Council include representing the interests of licensed hunters, administering the licensing system the Act creates, providing advice to the Minister for Primary Industries and enforcing the legislation. The latter includes mandatory animal welfare provisions in a Code of Practice and compliance with mandatory provisions is a condition of game hunting licences.²⁰ It might be argued that any conflict of interest in reposing the enforcement of these provisions in the Game Council is balanced by s 6(b) of the *Game and Feral Animal Control Act* which provides that nothing in the Act affects the operation of the *Prevention of Cruelty to Animals Act 1979* (NSW) (POCTAA). At the same time, however, s 24(1)(b)(i) of the latter Act provides a defence against a cruelty prosecution where the relevant act or omission occurred in the course of, and for the purpose of hunting, shooting, snaring, trapping, catching or capturing the animal in a manner that inflicted no unnecessary pain.

The uncertainty created by the language of this defence and the co-existence of separate but overlapping regulatory regimes are symptomatic of a broader conceptual incoherence underlying the regulation of animal welfare. While recognition of sentience is supposedly the basis of animal welfare policy, in practice regulatory measures are informed by the human utility of animals and the degree of influence of those who benefit most. As a result, inconsistency infects every level of animal welfare regulation, with very different legislative regimes governing animals according to context and function. The oft-cited example is the

¹⁸ Donald Page, Minister for Local Government, "Pet Taskforce Set to Deliver Discussion Paper" (Media Release, 4 April 2012). According to the Taskforce Report, four targeted consultation sessions on the Discussion Paper were held during the submission period. These sessions were attended primarily by representatives of stakeholders who also had institutional representation on the Taskforce itself. Companion Animals Taskforce, *Report to the Minister for Local Government and the Minister for Primary Industries* (Report, Division of Local Government, October 2012), 5.

¹⁹ Editorial, "Allowing the Game Council's dual role poses too great a risk", *Sydney Morning Herald* (online), 8 March 2013 <<http://www.smh.com.au/opinion/editorial/allowing-the-game-councils-dual-role-poses-too-great-a-risk-20130307-2fo3b.html>>.

²⁰ *Game and Feral Animal Control Act 2002* (NSW) s 24; *Game and Feral Animal Control Regulation 2012* (NSW) sch 2. Note that not all game hunting requires a licence under the *Game and Feral Animal Control Act 2002* (NSW): see s 17.

exemption of stock animals from some or all of the provisions of State animal welfare statutes and/or the inclusion of a defence where the harm occurs in certain circumstances and causes no “unnecessary pain”. Prime examples in relation to POCTAA are s 9 which excludes stock animals from requirements governing exercise and s 24(1)(a) which effectively sanctions husbandry practices otherwise likely to be considered cruel. As the example of game hunting suggests, the leeway these provisions afford both reflects and complicates the enforcement of general cruelty provisions, already drafted to confine offences to “unnecessary” conduct.

Conceptual confusion also results in inconsistency at the subordinate level. For example, the *Game and Feral Animal Control Regulation 2012* (NSW) as originally drafted by the NSW Department of Primary Industries (DPI) included a clause that would have allowed the grant of a licence for unsupervised hunting by children between the ages of 12 and 17, including on declared public land.²¹ While strong opposition to this provision saw its removal from the final Regulation,²² the draft proposal provided a stark contrast with mandatory provisions governing companion animals. In NSW, both the *Animal Welfare Code of Practice – Breeding Dogs and Cats* and the *Animal Welfare Code of Practice – Animals in Pet Shops* prohibit the sale of cats and dogs to those under 18 years of age. These provisions, given legal force through their incorporation into the *Prevention of Cruelty to Animals Regulation 2012* (NSW) by reg 26, sch 1, suggest that children lack the maturity to care for and/or make responsible decisions with respect to companion animals. Yet these Codes are produced within the NSW DPI, the same government agency that was prepared to entrust the welfare of wild animals to unsupervised children as young as 12 and in circumstances that afford animals minimal, if any, protection.

A regulatory system fraught with inconsistency is in particular need of strong enforcement. Instead, successive governments have abdicated responsibility for enforcing animal welfare by largely outsourcing this quintessentially state function to private charities. The abdication of responsibility for a task that demands strong public accountability is in itself problematic but it also has significant consequences for animals, most obviously in terms of resourcing. With an annual NSW government grant of \$424,000 for the work of the RSPCA NSW inspectorate,²³ enforcement is inevitably complaint-driven²⁴ and leaves little scope for routine monitoring of compliance with regulatory provisions across a wide range of animal settings.²⁵ Beyond the immediate consequence that much animal welfare law stands unenforced is a broader issue: the mismatch between government rhetoric and practice. With regulatory standards commonly held up as evidence of a strong commitment to animal welfare, a failure to resource their enforcement leaves governments vulnerable to a charge of window dressing.

²¹ Public Consultation Draft, *Game and Feral Animal Control Regulation 2012* (NSW), 3 April 2012, cl 14. The proposed clause excluded hunting with a firearm and required written parental consent.

²² Department of Primary Industries, Government of NSW, ‘Public Consultation Outcomes, *Game and Feral Animal Control Regulation 2012*’ (Report, Department of Primary Industries, August 2012).

²³ See RSPCA NSW Annual Financial Reports <<http://www.rspcansw.org.au/services/publications>>. The annual grant for the work of the inspectorate should not be confused with a substantially larger one-off grant announced by the NSW government in 2011 for the specific purpose of rebuilding the RSPCA’s main Sydney shelter. This grant, a pre-election promise, is to be paid over two years. See Barry O’Farrell, Premier, Minister for Western Sydney, “NSW Government to Help RSPCA to Rebuild Yagoona Animal Shelter” (Media Release, 18 December 2011).

²⁴ Evidence to Legislative Council General Purpose Standing Committee), Parliament of NSW, Sydney, September 2010, 7 (Steve Coleman, CEO, RSPCA NSW).

²⁵ RSPCA Australia, ‘National Statistics 2011-12’ (Report, RSPCA Australia), Table 5 <<http://www.rspca.org.au/assets/files/Resources/AnnualStatistics/RSPCA%20Australia%20National%20Statistics%202011-2012.pdf>>. An additional problem is that in some jurisdictions there is no power to conduct routine inspections.

Funding is not the only problem however. An important, though less obvious consequence, is that to outsource the enforcement of a penal statute to private charities is to frame the protection of animals as a charitable concern, one less deserving of attention than other areas of public policy. The message that animal welfare depends upon community benevolence rather than state action reinforces the idea of individual responsibility invoked by the Minister with respect to the purchase of eggs. It is hardly surprising then that animal welfare charities are only able to carry out their enforcement functions with the financial support of private donors and the professional support of pro bono lawyers. This unusual arrangement simultaneously allows governments to save considerable funds while also appearing to take animal welfare seriously, by deferring to those with a long and trusted history of caring for animals. But this notion, that governments are simply making good use of specialist expertise, does not withstand scrutiny. If this were the case, much greater deference would be paid to RSPCA policies in the regulation of animal welfare; in fact, the views of the RSPCA are regularly trumped by commercial considerations in a wide range of animal settings, as the reference to layer hens illustrates. Such a selective reliance on the expertise of animal welfare charities suggests opportunism rather than sound public policy. This conclusion is reinforced by the choice of agency where governments have assumed some responsibility for animal welfare law, for example primary industries departments noted for the conflicts of interest described previously.

IV FRAGMENTATION OF REGULATORY RESPONSIBILITY

Sound public policy also appears to be lacking in the choice of food safety agencies as the principal regulators of animal welfare in domestic abattoirs, as recent events in NSW illustrate. Following the release of “disturbing video footage showing the gross mistreatment of animals” in a western Sydney abattoir, the NSW Food Authority reviewed the operations of all State domestic abattoirs.²⁶ The Minister for Primary Industries sought to assure the public that the problems revealed by the footage are “not representative of the general standard in other New South Wales abattoirs,” although she noted that confidence and skill levels varied.²⁷ According to the NSW Food Authority, the “findings from the abattoir review strongly suggest that staff competency and skills in animal welfare, including accountability of management, need to be addressed to change practices and culture in some premises”.²⁸ In response to the findings, additional requirements for domestic red meat abattoirs are being phased in, including the appointment of an animal welfare officer to oversee processing, mandatory meat industry training in stunning, sticking and shackling operations for relevant employees, and an additional annual audit focusing on animal welfare.²⁹ That such basic requirements were not already standard is in itself evidence of regulatory failure, as is the fact that the mistreatment which sparked the review was not exposed by the Food Authority but by an abattoir employee, Animal Liberation and the media.³⁰

²⁶ NSW Food Authority, ‘Safer Food, Clearer Choices, Annual Report, 2011-12’ (Annual Report, NSW Food Authority, 2012) 16.

²⁷ NSW, *Parliamentary Debates*, Legislative Assembly, 23 May 2012, 11851 (Katrina Hodgkinson).

²⁸ NSW Food Authority, ‘Training Requirements for Red Meat Domestic Abattoirs’ (General Circular, NSW Food Authority, 5 May 2012) 2.

²⁹ Ibid.

³⁰ Jen Rosenberg and Ben Cubby, “Covert Evidence of Cruelty Halts Abattoir”, *The Sydney Morning Herald* (online) 10 February 2012 <<http://www.smh.com.au/environment/animals/covert-evidence-of-cruelty-halts-abattoir-20120209-1rx7w.html>>.

For breach of its licence conditions, the NSW Food Authority fined the abattoir a total of \$5,200 and placed it on the name and shame register. In addition, separate enforcement action under POCTAA has been initiated by the RSPCA.³¹ Apart from the practical problems of communication and co-ordination between different agencies, this fragmented regulatory response is symptomatic of a crude distinction between animal welfare and animal cruelty, with the RSPCA considered relevant only in the latter case. This kind of unsophisticated regulatory response is not unique to animal law but reflects the enduring difficulty of defining the role of the criminal law where harm is caused in the context of economic activity. Indeed, the reluctance of governments to invoke the “full force of the criminal law against respectable employers engaged in productive economic activity”³² has been debated for decades in the context of workplace deaths and injuries. More recently, problems with the regulation of native vegetation clearing have been attributed in part to the inherent tension between conservation and development.³³ In relation to animals, however, problems associated with conceptual incoherence and fragmented regulatory responsibility are only just starting to be debated yet need to be urgently addressed because of the hidden nature of animal use and the inability of animals to represent their own interests.

V INVISIBILITY

As the case of the Sydney abattoir illustrates, members of the public often only become aware of animal mistreatment through the work of whistleblowers, animal protection agencies and the media. In relation to abattoirs, this problem has led to calls for mandatory CCTV surveillance. In February 2013, the NSW Greens introduced the Food Amendment (Recording of Abattoir Operations) Bill 2013 into the NSW Legislative Council to require video and audio recordings of animals in abattoirs and knackeries before and during the slaughter process. Mandatory installation of CCTV in all abattoirs is not an option currently supported by the NSW Minister for Primary Industries, despite her professed regard for informed consumer choice. Yet less than a year after the Minister assured the NSW Parliament that “tough new requirements aim to foster a culture in which management and employees in abattoirs adhere to the improved animal welfare standards”,³⁴ footage of multiple acts of cruelty at a poultry processing plant were aired on ABC television.³⁵ Once again, the incidents were identified by persons other than the regulator.

The issue of invisibility at federal level is no less troubling. Following an address to the National Press Club in Canberra on 20 January 2013, the Prime Minister, Julia Gillard, was asked about the suspension of the live cattle trade to Indonesia in 2011 following community outrage at the footage broadcast by the ABC. Ms Gillard’s reply was unapologetic: if the government had not acted at that time, “the Australian people would have effectively withdrawn the social licence of (the live export) industry and campaigns would have started in

³¹ NSW, *Parliamentary Debates*, Legislative Assembly, 23 May 2012, 11851 (Katrina Hodgkinson).

³² Neil Gunningham and Richard Johnstone, *Regulating Workplace Safety: System and Sanctions* (Oxford University Press, 1999) 7.

³³ Audit Office of NSW, ‘Performance Audit: Department of Land and Water Conservation: Regulating the Clearing of Native Vegetation’ (Auditor-General’s Report, Audit Office of NSW, August 2002) <http://www.audit.nsw.gov.au/ArticleDocuments/134/101__Land_Water_Conservation.pdf.aspx?Embed=Y>.

³⁴ NSW, *Parliamentary Debates*, Legislative Assembly, 23 May 2012, 11851 (Katrina Hodgkinson).

³⁵ ABC Television, *Lateline*, 20 March 2013.

a way that meant it could not be a continuing industry in our nation.”³⁶ While the Prime Minister made brief reference to animal welfare, she appeared unconcerned that conduct so grave as to constitute a threat to the continued existence of an entire industry had only come to the attention of the public through the work of animal protection organisations. A few months after the Prime Minister’s speech, further extreme cruelty to exported Australian cattle as exposed, again not by the government but by animal advocates and the media.³⁷

The invisibility of animal use is matched by a lack of transparency with respect to the relevant regulatory processes. While animal welfare charities provide only basic public data about their enforcement activities,³⁸ government agencies fare even worse in terms of their own administrative and compliance procedures. A few examples should suffice. The NSW Food Authority requires a formal application under the *Government Information (Public Access) Act 2009* (NSW) if seeking detailed enforcement data about abattoirs. The website of the NSW DPI is very general and includes no data on compliance activities in relation to the *Exhibited Animals Protection Act 1986* (NSW). Information about animals used in research and testing in NSW is included in the Annual Reports of the Animal Research Review Panel but the data lacks specificity in terms of whether, and how, the key principles of Replacement, Reduction and Refinement are being implemented. A similar lack of transparency is evident in relation to animal ethics committees, whose efficacy is difficult to test due to the secrecy of their deliberations. The desirability of greater institutional transparency is acknowledged by cl 2.1.11 of the 2011 public consultation draft of the *Australian Code of Practice for the Care and Use of Animals for Scientific Purposes*. While this draft clause provides that institutions should consider making an annual report of compliance with the Code, as well as a summary of external reviews, publicly available, the provision is recommendatory only.³⁹ Even in relation to companion animals, routine data is difficult to generate because of the involvement of local councils, as well as animal welfare charities, in managing animal populations.

All these problems are exacerbated by a federal system in which the States and Territories retain primary responsibility for animal welfare but the Commonwealth also has some role. When the fragmentation of regulatory responsibility and the existence of various national codes of practice are factored in, obtaining a clear picture of enforcement activity becomes both difficult and time-consuming. Data collection in relation to the commercial killing of kangaroos provides an illustration of these problems.⁴⁰ The resulting information gap with respect to animal welfare regulation means that little is known about the extent of animal suffering, while any reforms that are introduced cannot be readily evaluated. As noted in a review of the AAWS published in 2010, “the lack of quantifiable data on animal welfare in Australia makes it difficult to know if the effort going into AAWS is achieving outcomes on

³⁶ ABC News, National Press Club, 30 January 2013 <<http://www.abc.net.au/news/2013-01-30/national-press-club-julia-gillard/4491528>>.

³⁷ ABC News, “Live Exports to Egypt Suspended amid Cruelty Probe”, 6 May 2013 <<http://www.abc.net.au/news/2013-05-04/livestock-exports-suspended-amid-cruelty-investigation/4669478>>.

³⁸ POCTAA requires that approved charitable organisations report to the Minister as set out in s 34B (3) and (4) and cl 34 of the Regulation. These reports do not appear to be released publicly.

³⁹ The current *Code of Practice for the Care and Use of Animals for Scientific Purposes* is the 7th edition (2004). The revised edition of the Code is due to be finalised by mid 2013. See Australian Government, National Health and Medical Research Council, *Review of the Australian Code of Practice for the Care and Use of Animals for Scientific Purposes* <<http://www.nhmrc.gov.au/health-ethics/animal-research-ethics/review-australian-code-practice-care-and-use-animals-scientific>>.

⁴⁰ Keely Boom, Dror Ben-Ami and Louise Boronyak, *Kangaroo Court: Enforcement of the law governing commercial kangaroo killing* (2012, THINKK).

the ground”.⁴¹ More generally, without access to reliable information, animal advocates are vulnerable to a charge of being ill-informed, even if ignorance on a subject is not of their making.

VI CONCLUSION

This article has sought to demonstrate that the regulation of animal welfare has failed to engage with the more complex debates in this field, with attendant inconsistencies in terms of policy and legislation. Regulatory responsibility is fragmented both within and between States and Territories, with conflicts of interest a dominant feature of policy development and standard-setting. Enforcement is largely outsourced and significantly under-resourced and transparency is minimal. These regulatory deficiencies reflect modes of thinking that privilege individual action over community responsibility and frame animal protection as a charitable concern. The cumulative effect of these inter-related forces is a regulatory system which leaves animals vulnerable to competing interests while obscuring community knowledge about the extent to which animals are protected by law. This is at odds with much public rhetoric about animal welfare and with the values of open and accountable government. While some of the failings outlined in this article are found in other regulatory settings, they assume a particular significance in the context of animal welfare. Despite their sentience, animals are routinely used as a human resource, often in ways involving bodily harm and generally hidden from the public. In these circumstances, and unable to assert their own claims, animals are peculiarly dependent upon human agency for their protection.

Awareness of existing regulatory inadequacy is gaining momentum. Following a successful motion at the ALP National Conference in December 2011, a Labor caucus committee is developing a model to establish an Independent Office of Animal Welfare at the federal level.⁴² It appears that the work of the Independent Office would include the management of standard-setting, as well as oversight of the live export trade.⁴³ Although issues would remain with respect to the role of State primary industries departments, as well as enforcement more generally, the establishment of the proposed authority would be an important first step in introducing some balance into animal welfare policy. Ideally, this body would also act as a clearing house for national statistics on all facets of animal welfare regulation, though this would require the active co-operation of the States and Territories. In any event, with the likelihood of a change of government at the 2013 federal election, the Coalition’s response to this initiative will be critical.

Coinciding with the push for an independent office, DAFF has advertised for tenders to review the Animal Welfare Standards and Guidelines development process. The review is to include the strengths and weaknesses of the existing process, alternative models for developing standards and guidelines and the effectiveness of stakeholder consultation under the current model.⁴⁴ Whether or not this review will support an independent office remains to

⁴¹ Bruce Gemmell, *Review of the Australian Animal Welfare Strategy 2009*, (2010, Department of Agriculture, Fisheries and Forestry, Government of Australia) 3
<http://www.daff.gov.au/__data/assets/pdf_file/0006/1935591/review-aaws.pdf>.

⁴² Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2013, 119 (Melissa Parke).

⁴³ *Ibid.*

⁴⁴ Department of Agriculture, Fisheries, and Forestry, Government of Australia, *Review of the Animal Welfare Standards and Guidelines Development Process* (20 February 2013) AusTender
<<https://www.tenders.gov.au/?event=public.atm.show&ATMUID=F5B014F7-ECF7-254A-804D4C40A1482B9A>>.

be seen. Meanwhile, Luke Bowen, the executive director of the Northern Territory Cattlemen's Association, reportedly welcomed the review, stating both that it is important to have "sensible" national standards and that "it is critical for those with an interest in animal welfare to have a seat around the table".⁴⁵ With greater recognition of the failings of the current regulatory approach it may be that industry is prepared to show some flexibility in relation to existing arrangements if this helps to avoid more radical change.

But the time for compromise at the margins may have already passed. A regulatory system in which governments assumed greater responsibility for animal welfare would arguably be characterised by clear and consistent legislative provisions, genuinely independent standard-setting, administration and enforcement, much greater transparency about animal use, and resourcing commensurate with these imperatives. A useful starting point would be the routine provision of up to date, comprehensive and accessible information about the operation of all aspects of animal regulation to enable the community to participate in a more complex and contextualised animal protection debate. By helping to expose the shortcomings of current regulatory practices, this step would also specifically address that aspect of the principle of legality that exhorts parliaments, and by implication governments, to "squarely confront" the exercise of power and to "accept the political cost".⁴⁶ If consumers have a right not to be misled about how their eggs are produced, citizens have a right to be fully informed about the operation of food production systems, and the people and processes that determine these and other important animal welfare matters.

⁴⁵ Milanda Rout, "Livestock Standards for Review", *The Australian* (online), 25 February 2013, <http://www.theaustralian.com.au/national-affairs/foreign-affairs/livestock-standards-for-review/story-fn59nm2j-1226584625035>>.

⁴⁶ *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).