

## **A Fair Go for Farm Animals:**

*How Australian Law Can Better Protect Animals Used in the Agricultural Industry*

16<sup>th</sup> July 2021

Word Count: 5617 words

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*“The plains are all awave with grass,*

*The skies are deepest blue;*

*And leisurely the cattle pass*

*And feed the long day through;*

*But when we sight the station gate,*

*We make the stockwhips crack,*

*A welcome sound to those who wait*

*To greet the cattle back...”*

- With the Cattle, Banjo Patterson

### **A Introduction**

The Man from the Snowy River wove treasured ideals of an Australian outback that continues to endure in new generations’ conceptions of Australian identity. Since colonial times, images of free-roaming cattle and the ‘bushman’ are cultural images that have helped define our nation.<sup>1</sup> This narrative is recalled in classrooms throughout the nation, bolstering the idea of a free land for the musterer and his cattle.<sup>2</sup> If this is the story we have learnt from childhood on the natural conditions of our farm animals, it is no wonder Australians shirk from news of the modern realities these non-human animals face.

In the first three months of this year, 1.4 million cattle, 1.2 million sheep, 4.6 million lambs, 1.4 million pigs, and 170 million chickens were slaughtered for meat production in

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<sup>1</sup> John Hirst, *The Sentimental Nation: the Making of the Australian Commonwealth* (Oxford University Press, 2000).

<sup>2</sup> Australian Curriculum Lessons, *Classic Australian Australian Identity Unit*(2007) Australian Curriculum Lessons <<https://pdf4pro.com/amp/view/classic-australian-australian-identity-unit-2766e9.html>>

Australia.<sup>3</sup> The Farm Transparency Project estimates that 520-620 million animals are killed in abattoirs, mainly for meat, each year.<sup>4</sup> According to Animals Australia, most of these animals are killed without effective independent oversight.<sup>5</sup> Before slaughter, most animals are raised in factory farming conditions. Factory farming, or ‘concentrated animal feeding operations’, involves raising livestock in densely populated environments. Common practices include raising cows in feedlots, hens in cages stacked on top of one another, and pregnant pigs in gestation crates so small they cannot turn around.<sup>6</sup> Compared to 50 other nations which were classified by the World Animal Protection Animal Protection Index, Australia scored a D, alongside Brazil, Kenya, and Thailand.<sup>7</sup> The modern lives of our farm animals are ones of incredible stress, fear, and pain.

These realities appear contradictory: how can a nation so proud of its agricultural heritage allow the state of factory farming in Australia today? This essay seeks to answer that question, and suggest improvements to Australian law to better protect farm animals.

This will be achieved in three parts: first, by exploring a brief overview of current legislation concerning farm animals in Australia. Second, it will be argued that that Australian factory farming continues in its extensively harmful form due to a lack of political responsiveness to the growing public concern for animal welfare. Third, three improvements to existing law will be presented, including amending legislative definitions of unnecessary suffering, separating control of regulation from government agencies with inherent conflicts of interest to a new National Animal Welfare Department, and increasing representation of and support for animals interests in Australian courts.

## **B A History of Farm Animals in Australian Law**

Early colonial settlers brought similar concerns for animal welfare that existed in UK society at the time. Animal cruelty was a matter of public concern over 200 years ago, demonstrated through newspaper articles from 1804 and 1805.<sup>8</sup> The first colonial animal

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<sup>3</sup> Australian Bureau of Statistics, *Livestock Products, Australia* (19 March 2021) Australian Bureau of Statistics <<https://www.abs.gov.au/statistics/industry/agriculture/livestock-products-australia/latest-release>>

<sup>4</sup> Farm Transparency Project, *Abattoirs / Slaughterhouses* (13 October 2017) Farm Transparency Project <<https://www.farmtransparency.org/kb/abattoirs>>

<sup>5</sup> Animals Australia, *How are animals slaughtered in Australia* (24 June 2021) Animals Australia <<https://www.animalsaustralia.org/features/how-are-animals-slaughtered-australia.php>>

<sup>6</sup> Jonathan Anomaly, ‘What’s Wrong With Factory Farming?’ (2015), 8(3) *Public Health Ethics*, 246-254, 246.

<sup>7</sup> World Animal Protection, ‘Animal Protection Index (API) 2020: Commonwealth of Australia: Ranking D’, (Report, World Animal Protection, 3 March 2020).

<sup>8</sup> Philip Jamieson, ‘Duty and the Beast: The Movement of Reform in Animal Welfare Law’ (1991) 16 *University of Queensland Law Journal* 238-255.

protection legislation, the Act for the Better Prevention of Cruelty to Animals, passed in Van Dieman's Land (Tasmania) in 1837. The Act emulated the scope of protection afforded by the seminal UK Martin's Act, which aimed to prevent the cruel and improper treatment of cattle.<sup>9</sup> Clearly, interest in extending legal protections to farm animals is not a new phenomenon.

However, such interest was not a reflective of all public opinion at the time. According to Jamieson, such legislative protections passed by the government were perceived particularly by rural Australians as "mere urban meddling."<sup>10</sup> This led to an increasingly reinforced trend of providing a broad range of exemptions in favour of the rural animal owners from being held responsible for the ill-treatment of farm animals under their care.<sup>11</sup> Now effected through State and Territory Codes of Practice, farm animals are often excluded from anti-cruelty protection.<sup>12</sup> The ongoing effect of this mentality has been to preserve a double standard in our laws, where farm animals are given much less protection than other animals not needed for industrialised food production.<sup>13</sup>

In line with this legally protected attitude, there was limited political interest in including provisions concerning any non-human animals in the Constitution at the time of Australian Federation. The key responsibilities of the Commonwealth, as outlined in s 51, include no reference to non-human animals, outside of the fisheries (s 51(x)) provision.<sup>14</sup> Suffice to say the concern of that provision is not the welfare of individual fishes.

Today, only one of eight Australian States and Territories, Victoria, has passed a specific Act to regulate the treatment of farm animals.<sup>15</sup> When farm animals are referred to in other general animal welfare laws, they are disconnected from emotive labelling, referred to as "stock."<sup>16</sup> Such commodification shines light on the sort of respect extended, which goes

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<sup>9</sup> *An Act for the Better Prevention of Cruelty to Animals 1822* (3 Geo. IV).

<sup>10</sup> Philip Jamieson, 'Duty and the Beast: The Movement of Reform in Animal Welfare Law' (1991) 16 *University of Queensland Law Journal* 238-255.

<sup>11</sup> *Ibid.*

<sup>12</sup> CSIRO Publishing, *Primary Industries Report Series* (2021) CSIRO Publishing <<https://www.publish.csiro.au/books/series/11>>

<sup>13</sup> Deborah Cao, *Animal Law in Australia* (Thomson Reuters, 2<sup>nd</sup> Edition, 2015) 216.

<sup>14</sup> *Commonwealth of Australia Constitution Act 1901* (Cth).

<sup>15</sup> *Livestock Management Act 2010* (Vic); Katrina Sharman, 'Farm Animals and Welfare Law: An Unhappy Union' in Peter Sankoff, Steven White, and Celeste Black, *Animal Law in Australiasia* (Federation Press, 2<sup>nd</sup> ed, 2013) 66-71.

<sup>16</sup> *Animal Care and Protection Act 2001* (Qld) s 13(2).

as far as appreciating their value in economic terms, and falls short of respecting their individual lives as suffering entities.<sup>17</sup>

The prime concern here is not in the apparent number of general legislative instruments that seem to address animal welfare, which appears on its surface adequate, and the early times in which they began to be developed, which suggests long term consideration. The concern is the efficacy of those instruments. From early colonial times to the present day, the scope and ‘bite’ of Australian law to actually protect farm animals from extensive suffering has remained limited.

### **C Australian Views Today: A Need for Reform**

This section will briefly address the views of the modern Australia public and the positions taken by politicians, and how the incongruity between these affects the potential for reform of legislative standards.

#### *a) The Legal Gap*

There is a crucial gap between what most Australians believe current legislation should achieve for farm animals and the actual protections afforded. According to Futureye, 95 per cent of Australian view farm animal welfare as a concern, and 91 per cent want some reform to address this.<sup>18</sup> This report was commissioned by the Federal Government, and as such cannot be easily dismissed as a partisan product conducted by any special interest group. In an increasing trend, 55 per cent of respondents believed that cattle, sheep, goats, and pigs were sentient, and 57 per cent believed that animals had awareness of their pain.<sup>19</sup> While readers should note that respondents may be giving what they believe are more socially acceptable answers, it appears that the majority of Australians from this quantitative research accept the sentience and awareness of suffering of farm animals.<sup>20</sup> It follows that only 10 per cent of respondents found current regulation adequate.<sup>21</sup>

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<sup>17</sup> Katrina Sharman, ‘Farm Animals and Welfare Law: An Unhappy Union’ in Peter Sankoff, Steven White, and Celeste Black, *Animal Law in Australasia* (Federation Press, 2<sup>nd</sup> ed, 2013) 61-83.

<sup>18</sup> Futureye, ‘Australia’s Shifting Mindset on Farm Animal Welfare’ (Report, Futureye, 2018) 4.

<sup>19</sup> *Ibid*, 6.

<sup>20</sup> Peter John Chen, *Animal welfare in Australia: Politics and policy* (Sydney University Press, 2016) 59.

<sup>21</sup> Futureye, ‘Australia’s Shifting Mindset on Farm Animal Welfare’ (Report, Futureye, 2018) 7.

On the other hand, according to Meat & Livestock Australia, 95 per cent of households across Australia still buy beef, and 76 per cent buy lamb.<sup>22</sup> When asked about the specifics of the industry, reportedly consumers said the Australian cattle and sheep farmers made positive contributions to society. This data is easy fodder for Australian politicians to justify ongoing support for the current standards of factory farms. As a private company with a purpose to “foster the long-term prosperity of the Australian red meat and livestock industry,” one should remain sceptical at least of the neutrality of this data.<sup>23</sup> Still, it raises questions of the potential disparity between different sectors of the Australian public and what they choose to focus on when it comes to Australian meat production. It also raises the possibility that while the average Australian may care about animal welfare, they also care about consuming meat, and can be unaware of the cognitive dissonance between these two points of view.

As it stands, farm animal cruelty intrinsic in modern meat production methods is currently legally sanctioned in Australia.<sup>24</sup> Cruel practices within the Australian context have been featured in every current affairs program, both public and commercial channels, including *Four Corners*, *60 Minutes*, *A Current Affair*, *7.30*, *The Project*, and *Landline*.<sup>25</sup> Recent protests by animal welfare activists against Australian factory farming were labelled as “un-Australian” by the Australian Prime Minister, signifying how high the institutional bias reaches against those who advocate for improved animal welfare.<sup>26</sup> Until there are leaders who are ready to listen to the full breadth of public opinion, it will be difficult to improve the legal protections for the sentient and suffering beings in Australian factory farms right now.

#### *b) Consumer Confusion on Food Origins*

A continuing issue for creating consensus on the need to improve standards is ignorance about the source of meat and other animal products. Around 95 per cent of meat chickens and pigs in Australia are factory farmed, which as an industry employs efficient and cruel means

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<sup>22</sup> Jon Condon, *Surveys provide ten-years of insight into changing consumer attitudes about red meat* (18 November 2018) Beef Central <<https://www.beefcentral.com/news/surveys-provide-ten-years-of-insight-into-changing-consumer-attitudes-about-red-meat/>>

<sup>23</sup> Meat & Livestock Australia, *MLA at a glance* (2021) Meat & Livestock Australia <<https://www.mla.com.au/about-mla/mla-at-a-glance/>>

<sup>24</sup> Animals Australia, *How laws are failing animals: Codes of Cruelty* (2021) Animals Australia <<https://www.animalsaustralia.org/issues/codes-of-cruelty.php>>

<sup>25</sup> Jane Mummery, ‘Mediation for affect: Coming to care about factory-farmed animals’ (2017) 165(1) *Media International Australia*, 37-50.

<sup>26</sup> Misha Ketchell, *Not just activists, 9 out of 10 people are concerned about animal welfare in Australian farming* (15 May 2019) The Conversation <<https://theconversation.com/not-just-activists-9-out-of-10-people-are-concerned-about-animal-welfare-in-australian-farming-117077>>

of production.<sup>27</sup> Of the five freedoms<sup>28</sup> endorsed by the World Organisation for Animal Health (OIE),<sup>29</sup> Steven White points out that Australian factory farming may breach “four of these five freedoms.”<sup>30</sup> And yet, many young Australians remain unaware of the origins of their food. An online poll, led by charity LEAF (Linking Environment and Farming), found that a third of 2000 surveyed people aged 16 to 23 did not know bacon came from pigs.<sup>31</sup> There is clearly a need to empower consumers to be more aware of the reality of where their food actually comes from by lifting the veil on factory farming practices.<sup>32</sup>

It is ironic then that politicians are now opposing the labels used by meat-free products using the argument that it will confuse consumers of what they’re actually buying. Senators have commenced an inquiry to investigate the labelling on non-animal proteins as misleading, mainly so that red meat “investments are protected.”<sup>33</sup> Australia’s competition regulator, the ACCC, has recently submitted to the inquiry that “it had never found evidence of misleading claims by alternative meat products” and that plant-based meat was “unlikely to mislead an ordinary consumer.”<sup>34</sup> As was pointed out in the US case of *Turtle Island Foods, SPC v Thompson*,<sup>35</sup> the packaging of plant-based meat alternatives is so obvious that no rational human would be misled into thinking they are actually meat. Further, Food Frontier found in 2019 that 91 per cent of Australian have never mistakenly bought a meat free product or vice versa.<sup>36</sup>

The shift of consumers away from meat and towards meat-alternatives seems the more likely motivation behind the inquiry. The Food Frontier found that one in three Australians

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<sup>27</sup> Michael Kirby, *Factory farming masks meat's true costs* (21 June 2013) ABC News <<https://www.abc.net.au/news/2013-06-21/kirby-modern-meat/4770226>>

<sup>28</sup> Freedom from hunger freedom from hunger, malnutrition and thirst; freedom from fear and distress; freedom from heat stress or physical discomfort; freedom from pain, injury and disease; and freedom to express normal patterns of behaviour. See Farm Animal Welfare Council, *Five Freedoms* (16 April 2009) The National Archives <<https://webarchive.nationalarchives.gov.uk/ukgwa/20121010012427/http://www.fawc.org.uk/freedoms.htm>>

<sup>29</sup> The OIE is an independent inter-governmental international organisation established in 1924. It was created as an international decision-making forum to guard against the regional and global spread of infectious and trade sensitive animal diseases and zoonosis. See G.K. BRÜCKNER, ‘The role of the World Organisation for Animal Health (OIE) to facilitate the international trade in animals and animal products’ (2009) 76 *Onderstepoort Journal of Veterinary Research*, 141-146.

<sup>30</sup> Steven White, ‘Regulation of Animal Welfare in Australia and the Emergent Commonwealth: Entrenching the Traditional Approach of the States and Territories or Laying the Ground for Reform?’ [2007] 14 *FedLawRw* , 347.

<sup>31</sup> Livia Gamble, *Kids still don't know where their food comes from* (27 May 2014) The Sydney Morning Herald <<https://www.smh.com.au/lifestyle/kids-still-dont-know-where-their-food-comes-from-20140526-zrmk1.html>>

<sup>32</sup> Brian Sherman, *Calling a Halt to Factory Farming* (2 January 2013) Voiceless <<https://www.voiceless.org.au/content/calling-halt-factory-farming>>

<sup>33</sup> Jess Davies, *Is a sausage a sausage without the meat? Senate to investigate 'fake meat' labelling laws* (16 June 2021) ABC News <<https://www.abc.net.au/news/2021-06-16/senate-to-investigate-fake-meat-labelling-laws/100219140>>

<sup>34</sup> Matt Brann and Eric Barker, *Definition of meat inquiry heats up with ACCC submission firing up farmers* (14 August 2012) ABC News <<https://www.abc.net.au/news/2021-08-14/definition-of-meat-heats-up-in-australian-senate-inquiry/100372052>>

<sup>35</sup> 992 F.3d 694 (8<sup>th</sup> Cir. 2021).

<sup>36</sup> Campbell Cooney, *New survey shows willingness to try meat alternatives* (29 October 2019) Farm Online National <<https://www.farmonline.com.au/story/6455457/new-survey-shows-willingness-to-try-meat-alternatives/>>

are limiting their red meat consumption, and six in 10 Australians are interested in trying meat free alternatives. It is unlikely to be coincidental that this inquiry commenced as Australian's consumption patterns are turning away from meat towards plant-based products. If Australian leaders were truly concerned about confusing the public, they would put more time and energy into educating them about where their meat actually comes from, rather than attacking the competitors of a protected industry.

c) *The Society Collapse Argument*

This leads to a consideration of the professed state of reliance of our economy on the agricultural industry. An Agricultural Competitiveness Green Paper, released by the Australian Government in late 2014, emphasised the need for profitability of agriculture, framing Australian families as the cornerstone of modern production.<sup>37</sup> The broad narrative painted in this policy document harks back to 20<sup>th</sup> Century ideals of small family farms as the backbone of our economy. In reality, the Productivity Commission has pointed to clear trends towards concentration (larger farming companies) and intensification (more intensive production techniques).<sup>38</sup> It is extremely difficult to obtain exact given the veiled nature of meat industry practices. Michael Kirby estimated that around 95 per cent of animals raised for meat are raised in factory farms.<sup>39</sup> Katrina Sharman estimated more than two-thirds of all pigs, 80% of chickens, and a third of cattle are owned by large corporations who raise them in factory farm conditions.<sup>40</sup> While exact numbers remain difficult to obtain, raising animals in factory farm conditions appears to be the widespread norm in Australia.

An argument posed against the idea of industry reform is that it will be detrimental for our culture and economy if we upset the ways of farming in Australia. There are several points to raise against this belief. First, it is indefensible to claim that modern factory conditions which limit the freedom and capacity to express normal behaviours of non-human animals is in any way reflective of the smaller family farms of the early 20<sup>th</sup> Century. Second, approximately 75 per cent of Australian farm businesses as of 2015 do not generate enough return to meet business growth nor personal needs.<sup>41</sup> These businesses are mostly the smaller

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<sup>37</sup> Commonwealth of Australia, *Agricultural Competitiveness Green Paper* (2014) Australian Government <<https://www.agriculture.gov.au/sites/default/files/documents/ag-competitiveness-green-paper.pdf>>

<sup>38</sup> Productivity Commission, *Trends in Australian Agriculture* Research Paper (2005).

<sup>39</sup> Michael Kirby AC, *Factory farming masks meat's true costs* (21 June 2013) ABC News <<https://www.abc.net.au/news/2013-06-21/kirby-modern-meat/4770226>>

<sup>40</sup> Katrina Sharman, 'Farm Animals and Welfare Law: An Unhappy Union' in Peter Sankoff, Steven White, and Celeste Black, *Animal Law in Australasia* (Federation Press, 2<sup>nd</sup> ed, 2013) 37–9.

<sup>41</sup> Stewart Lockie, 'Australia's agricultural future: the social and political context' (2015) *Australian Council of Learned Academies (External Commissioned Report)* v.

farms that cannot keep up with larger factory farm conglomerates. Third, there is an increasing trend towards Australia becoming a net importer of farm management expertise and capital from foreign labour migrants, rather than employing Australians.<sup>42</sup> This calls into the question the perceived cultural value of farming in Australia when gradually more those working on our farms are not, in fact, Australian.

On the other hand, a growing global population indicates trends for higher consumption of meat and dairy products.<sup>43</sup> As a major exporter of meat, producing 4% of global beef production and about 16% of world trade in beef, this is reassuring news for the profitability of Australian agricultural businesses.<sup>44</sup> The demonstrated reticence of Australian leaders to effectively legislate is not surprising then, considering the increased pressure for animal industries to keep up with international competition and profitability.<sup>45</sup> However, with rising animal welfare and COVID-19 health concerns about the excessive use of antibiotics in factory farming,<sup>46</sup> there is also indication of increasing growth opportunities for alternative protein sources in Australia. According to CSIRO Futures, alternative proteins are becoming more popular and could see up to 18% of the CSIRO's \$25 billion Food and Agribusiness Roadmap by 2030.<sup>47</sup>

If the meat industry is to continue in Australia, for economic or cultural reasons, it does not necessitate maintenance of cruel farming practices. While profits get far more attention than ethics in politics and mainstream media, it will become increasingly problematic for the industry to ignore growing sections of the public who care more about humane treatment than cheaper meat. The image of conservative attitudes towards such improvements should not necessarily be loped just against farmers, but politicians in charge of agricultural policy. Democratic representatives have a responsibility to ensure that the agricultural industry's need for profits do not outweigh the expectation by a growing majority of their constituents for improved animal welfare standards.

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<sup>42</sup> Ibid.

<sup>43</sup> Food and Agriculture Organization of the United Nations, *The future of food and agriculture* (2018) FAO <<http://www.fao.org/3/I8429EN/i8429en.pdf>>

<sup>44</sup> Safefood Queensland, *Spotlight on Australia's red meat industry* (16 March 2021) Safefood Queensland <<https://www.safefood.qld.gov.au/newsroom/spotlight-on-australias-red-meat-industry/>>

<sup>45</sup> Ibid.

<sup>46</sup> It is estimated that antibiotic use on farm animals will double in Brazil, Russia, India, China and South Africa between 2010-2030, and that factory farming in middle-income counties will account for up to a third of the increase in global use of antibiotics. The widespread use of antibiotics can lead to antibiotic-resistant bacteria that can pose a serious threat to human health. See Andrew Wasley, *The World's Hunger for Meat Is Accelerating the Rise of Superbugs* (July 6 2021) The Bureau of Investigative Journalism <<https://www.thebureauinvestigates.com/stories/2021-07-06/the-worlds-hunger-for-meat-is-accelerating-the-rise-of-superbugs>>

<sup>47</sup> Katherine Wynn and Brian Sebastian, *Growth opportunities for Australian food and agribusiness* (2019) CSIRO Futures <<https://research.csiro.au/foodag/>>



## D Looking Forward

### a) 'Unnecessary Suffering'

Animals Welfare Acts in all Australian States and Territories employ 'welfare words'. This exemption tool derives from terminology used in NSW legislation from 1850, which included a provision making it an offence to subject a transported animal to "unnecessary pain or suffering."<sup>48</sup> Subsequent colonial legislation adopted similar language. States and territories qualify their protections to the extent that the suffering is not 'unnecessary', 'unjustifiable', or 'unreasonable'.<sup>49</sup> Unfortunately there is little Australian case law concerning the interpretation of these words.<sup>50</sup> In a rare recent case, Magistrate Crawford, citing Chief Justice Coleridge, asserted that the "beneficial or useful ends sought to be attained must be reasonably proportionate to the extent of suffering caused..."<sup>51</sup> Acts which may be perceived as overt cruelty are therefore excused if more value is placed on whatever is deemed useful enough to justify it.

Resting on the purported legitimacy of purpose makes animal suffering permissible whenever the "purpose for which the act is done is to make the animal more serviceable for the use of man."<sup>52</sup> If one can justify a reasonable need to inflict suffering, it becomes necessary. The status quo remains that the legitimacy of means of production is permissible if it promotes economic efficiencies. Animal welfare becomes subjugated by-to the economic efficiency of cruel practices, and so cruelty can be legally sanctioned depending on the court's interpretation of what is necessary.

I suggest that definitions of what constitutes 'unnecessary suffering' be more in line with the 'Ten Capabilities' approach. Nussbaum and Sen (1993) proposed ten capabilities that should be used to measure the welfare of an individual, extending consideration beyond sentience alone.<sup>53</sup> These include: 1) Life, 2) Bodily health, 3) Bodily integrity, 4) Senses, imagination and thought, 5) Emotions, 6) Practical reason, 7) Affiliation, 8) Other species, 9) Play, and 10) Control over one's environment. Nussbaum's approach holds that these capabilities should be protected by political structures to ensure individuals can lead

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<sup>48</sup> *An Act for the more effectual prevention of Cruelty to Animals 1850* 14 Vict 40 (NSW).

<sup>49</sup> *Animal Care and Protection Act 2001* (Qld) ss 3(c), 17, 18(2)(a) and (f)(iii), 19.

<sup>50</sup> Deborah Cao, *Animal Law in Australia* (Thomson Reuters, 2<sup>nd</sup> Edition, 2015) 214.

<sup>51</sup> *Department of Regional Government and Local Government v Emmanuel Exports Pty Ltd* (2008) (unreported, Perth Magistrates Court) at [98]; *Ford v Wiley* (1889) 23 QB 203.

<sup>52</sup> *Murphy v. Manning* (1887) 2 Ex. D. 307 [314].

<sup>53</sup> Martha Nussbaum and Amartya Sen, *The quality of life* (Oxford University Press, 1993).

flourishing lives. Nussbaum expanded this approach to include all sentient beings, allowing for different interpretations of the capabilities based on species.<sup>54</sup> A benefit of integrating this approach into legislation is that it focuses on an individual entity's value, rather than only protecting an entity for its worth as part of a group or species.

Integrating this detailed “moral individualism” approach to animal welfare in our legislation would expand the available factors for courts to consider beyond an abstract concept of ‘suffering’.<sup>55</sup> Reflecting on the true extent of pain experienced by other species does not come as readily as it does for fellow human animals. The ‘Ten Capabilities’ approach obliges a more specific contemplation, which is both observable and clearer to identify.<sup>56</sup>

Both the legislature, through amending the definition of ‘unnecessary suffering’, and advocates, through introducing the approach into the courtroom, can work to improve the current understanding of what suffering is, if ever, necessary.

#### *b) National Animal Welfare Department*

There is no national body in charge of enforcing laws relating to farm animals. Animal welfare is regulated at State and Territory levels, with some jurisdictions placing primary responsibility on the privately funded charity, the Royal Society for Prevention of Cruelty to Animals (RSPCA).<sup>57</sup> This unorthodox approach to law enforcement is not the result of careful consideration of what is best for non-human animals in our country, but is the product of a governance history which passes the responsibility of protecting non-humans to third parties.<sup>58</sup>

Placing so much responsibility on State and Territory RSPCA branches to spearhead enforcement creates two major problems. First, no other criminal statute relies so heavily on a private charity to ensure enforcement, which is dependent almost entirely on donations to function. In 2019, of the \$53.5 million spent by RSPCA NSW on operational costs, only \$1 million was provided by the State government.<sup>59</sup> Enforcement of animal welfare predictably

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<sup>54</sup> Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2006), 393.

<sup>55</sup> *Ibid.*, 338.

<sup>56</sup> Phil Glatz, Christine Lunam, and Irek Malecki, *The Welfare of Farmed Ruminants* (Springer, 2011) 5.

<sup>57</sup> Malcolm Caulfield, *Handbook of Australian Animal Cruelty Law* (Animals Australia, 2009) 171-172.

<sup>58</sup> For further discussion of the history of the RSPCA, see Richard Ryder, *Animal Revolution* (Bloomsbury Publishing, 1<sup>st</sup> ed, 2000).

<sup>59</sup> RSPCA NSW, Submission No 136 to the Legislative Council Select Committee on Animal Cruelty Laws in NSW, *Inquiry into Animal Cruelty Laws in New South Wales*, 6 December 2019, 1).

becomes reliant on occasional political attention. In the 2019-2020 financial year, of the 18,260 cruelty complaints investigated by RSPCA Queensland, 129 prosecutions were successful.<sup>60</sup> That amounts to 0.007% of complaints leading to successful prosecution. Sadly, this figure represents the highest number of investigations and prosecutions of any State or Territory in Australia. Second, given that the RSPCA focuses on all areas of animal welfare, the demarcation of time and resources to other matters has historically only left 9%, or 24 total, of RSPCA prosecutions for cruelty against farm animals.<sup>61</sup> As the Animal Defenders Office (a national non-profit community legal centre) has expressed, “it is unreasonable to expect a privately funded charity to be able to monitor compliance with our animal welfare laws adequately.”<sup>62</sup> Where the RSPCA is responsible for enforcement in Australia, they still ultimately operate under government oversight. As such, it is the government departments that should be the focus of enforcement reform.

Creating a National Animal Welfare Department would take the pressure off an inadequately funded private organisation and improve the status quo in three key additional ways. First, the conflict of interest inherent in the Department of Agriculture, Water and the Environment would be relieved by the creation of a separate body entirely dedicated to animal welfare protection law and enforcement. While the Australian constitution leaves legislative responsibility for animal welfare to State and Territory governments, the Federal Department is in charge of the Model Codes of Practice for the Welfare of Animals, which are then implemented at the State and Territory Level.<sup>63</sup> The Department is currently charged with both promoting animal welfare and supporting the agricultural industry to be profitable.<sup>64</sup> An independent department would better ensure animal welfare needs are protected, by updating the Model Codes to protect animal welfare first and foremost.<sup>65</sup>

Second, an independent department can conduct a review of existing ‘Model Codes’, which are currently used as a tool for extensive defences to those who commit cruel acts against farm animals. Animal Welfare Acts in all States and Territories incorporate in their

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<sup>60</sup> RSPCA, *RSPCA Australia National Statistics 2019-2020* (2020) RSPCA

<<https://www.rspca.org.au/sites/default/files/RSPCA%20Australia%20Annual%20Statistics%202019-2020.pdf>>

<sup>61</sup> RSPCA, *RSPCA National Statistics 2011-2012* (2012) RSPCA <<https://www.rspca.org.au/sites/default/files/website/Facts/Statistics/RSPCA%20Australia%20National%20Statistics%202011-2012.pdf>>

<sup>62</sup> Productivity Commission, Submission No 79 to the Australian Government, *Regulation of Australian Agriculture*, 2016, 5.

<sup>63</sup> Department of Agriculture, Water and the Environment, *Australian Animal Welfare Standards and Guidelines* (2 March 2021) Australian Government: Department of Agriculture, Water and the Environment <<https://www.agriculture.gov.au/animal/welfare/standards-guidelines>>

<sup>64</sup> Ibid.

<sup>65</sup> Animals Australia, Submission No 53 to Productivity Commission, *Regulation of Australian Agriculture* (19 February 2016) 10.

regulations that compliance with the Model Codes is an offence exemption. These Codes effectively exclude farm animals from the protective reach of the legislation that claims to protect their welfare.<sup>66</sup> A department dedicated to animal welfare could review these Codes without the profit interests of the agricultural industry looming over them.

Third, having a national body in charge of animal welfare would help co-ordinate the different standards of Australian States and Territories. Inconsistent implementation has resulted in the failure to achieve a nationally uniform approach to animal welfare and the treatment of farm animals.<sup>67</sup> One example of the many troubles this leads to is the lack of nationally consistent definition of ‘free range’ or any requirements for the labelling of eggs in Australia.<sup>68</sup> With around 65 per cent of Australian consumers buying free range eggs in 2016, there is a clear interest in supporting practices which apparently better protect the welfare of chickens. While a National Information Standard governing ‘free range’ egg production came into place on 26 April 2017, there is no equivalent standard for other ‘free range’ products.<sup>69</sup> Further, it remains unclear whether these standards are being effectively implemented currently. A national body could help direct clear national standard of what ‘free range’ really constitutes to better inform consumers.

This initiative has been recommended by the Animal Defenders Office and has been previously proposed to Parliament in the Voice for Animals (Independent Office of Animal Welfare) Bill 2015. Andrew Wilkie MP more recently introduced a bill to the same effect in May 2021.<sup>70</sup> With increasing public awareness and concern for Australia’s treatment of farm animals, there will ideally be increasing political impetus to support the creation of a National Animal Welfare Department.

### *c) Standing and Sentencing*

Animal cruelty cases that do make it to court can face the hurdle of gaining standing, and if granted, the disappointment of weak sentencing. As legally proscribed personal property under Australian law, farm animals do not enjoy standing in their own right.<sup>71</sup> Gibbs J in *Australian Conservation Foundation*, held that “an interest, for present purposes, does not

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<sup>66</sup> *Animal Care and Protection Act 2001* (Qld) ss 38, 40.

<sup>67</sup> Arnja Dale, ‘Animal Welfare Codes and Regulations — The Devil in Disguise?’ in Peter Sankoff and Steven White (eds), *Animal Law in Australasia: A New Dialogue* (Federation Press, 2009) 174, 176–7.

<sup>68</sup> *Animal Care and Protection Amendment Regulation (No.2) 2013* (QLD) and *Eggs (Labelling and Sales) Act 2001* (ACT).

<sup>69</sup> ACCC, *ACCC releases guidance on free range egg standard* (6 February 2018) ACCC <<https://www.accc.gov.au/media-release/accc-releases-guidance-on-free-range-egg-standard>>

<sup>70</sup> Independent Office of Animal Welfare Bill 2021 (No 46) 2021 (Cth).

<sup>71</sup> Halbury’s *Laws of Australia* (LexisNexis, Sydney, 2007), [20]-[105].

mean a mere intellectual or emotional concern.”<sup>72</sup> Accordingly, in *Animal Liberation Ltd v Department of Environment and Conservation*, the Court refused to grant an injunction sought by Animal Liberation Ltd to restrain aerial shooting of pigs and goats on New South Wales nature reserves.<sup>73</sup> The Court held that Animal Liberation Ltd did not have the necessary special interest. However, in *Animals’ Angels v Secretary, Department of Agriculture*, the Court found that Animals’ Angels in this particular case did have standing because of the fact that “relevant government department has recognised the appellant’s particular status in the area of live animal export”.<sup>74</sup> This leaves open the point that if an entity without statutory authorisation or recognition by the relevant government department, including nearly all animal welfare organisations, cannot seek legal remedies to cruelties committed against farm animals, there is little hope of effective and extensive advocacy of their interests in court. As these organisations represent living entities who cannot speak for themselves, the traditional rules of standing need to be expanded in animal welfare matters to allow for well-established animal welfare organisations to adequately represent sentient beings who lack any other access to justice.

If prosecution of animal cruelty is successful, the penalties imposed in sentencing have typically been very lenient. While the penalties listed for animal cruelty offences in State and Territory animal welfare Acts are seemingly harsh,<sup>75</sup> a judicial cycle of leniency has been the historical norm.<sup>76</sup> For example, in *Joyce v Visser*, eight charges of animal cruelty, including aggravated cruelty, against a number of dogs were found against the accused who was sentenced to three months imprisonment. On appeal, the Court found the penalty to be manifestly excessive.<sup>77</sup> Currently fines, considered the least severe option, are the most common penalty imposed, while imprisonment is the least common.<sup>78</sup> More broadly, Deborah Cao summarises the state of penalty impositions for animal cruelty in Australia as a “judicial cycle of leniency” despite “significant changes in community expectations.”<sup>79</sup> Cases prosecuting farm animal cruelty are rare, and given the higher regard that pets are still held in by the general populace and courts, it is presently unlikely that sentencing would be any

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<sup>72</sup> *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 [530].

<sup>73</sup> *Animal Liberation Ltd v Department of Environment and Conservation* [2007] NSWSC 221.

<sup>74</sup> (2014) 228 FCR 35 [119].

<sup>75</sup> E.g. *Animal Care and Protection Act 2001* (Qld), s18(1); *Animal Welfare Act 1993* (Tas), s 13; *Prevention of Cruelty to Animals Act 1986* (Vic), s10.

<sup>76</sup> Annabel Markham, ‘Animal Cruelty Sentencing’ in Peter Sankoff and Steven White (eds), *Animal Law in Australasia: A New Dialogue* (Federation Press, Sydney, 2009) 292-295.

<sup>77</sup> *Joyce v Visser* [2001] TASSC 116.

<sup>78</sup> Rochelle Morton, Michelle L. Hebart and Alexandra L. Whittaker, ‘Increasing Maximum Penalties for Animal Welfare Offences in South Australia—Has It Caused Penal Change?’ (2018) 8(12) *Animals*, 236.

<sup>79</sup> Deborah Cao, *Animal Law in Australia* (Thomson Reuters, 2<sup>nd</sup> Edition, 2015) 156.

harsher than this already low standard. There is a need for penalties to better reflect the severity of acting cruelly towards all non-human animals under human care.

Despite a significant increase in community expectations for improved animal welfare consideration, lenient sentencing and inadequate opportunities to defend farm animals remains the norm. As Salter concludes, “the protection of the animal was always legally invisible next to the primary issue of animal possession.”<sup>80</sup> Though courts are a slow-moving engine of change on issues of social justice, the evidence suggests that a 19<sup>th</sup> century conception of animal interests is more prevalent than one that belongs a 21<sup>st</sup> century.

### ***E Conclusion***

The Australian public wants change. Australians are increasingly and overwhelmingly in support of improving the treatment of farm animals. Improved education on the methods of production used in the factory farming industry can result in further changes to consumer consumption of animal products and a larger majority that wants protection standards improved. Better policy coordination through a National Animal Welfare Department, an updated conception of unnecessary suffering which applies consideration of the ‘Ten Capabilities’, and more opportunities for animal organisations to defend non-human animals in court with harsher penalties imposed would all work together to significantly improve the lives of farm animals currently suffering in factory farms all around Australia. Only then will these sentient beings have the sort of freedom Banjo Patterson idealised in his poetry and that they truly deserve.

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<sup>80</sup> Brett Salter, ‘Possess or Protect? Exploring the Legal Status of Animals in Australia’s First Colonial Courts: Part I’ (2009) 2 *Australian Animal Protection Law Journal*, 35-48.