Animal Welfare and the Resource Management Act 1991

Considering animal welfare under the Resource Management Act 1991 would improve the holism of resource management in Aotearoa and address shortcomings of the Animal Welfare Act 1999

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"Animals can communicate quite well… And they do.
And, generally speaking, they are ignored"

- Alice Walker *Living by the Word* (1988)

Contents

Glossary

Animals:	Used to refer to non-human animals.
Aotearoa:	Used interchangeably with New Zealand.
AWA:	Animal Welfare Act 1999.
Codes:	Codes of Welfare prepared under the Animal Welfare Act 1999.
Consent authority:	A regional, district or city council, or combination thereof, responsible for granting resource consents.
Director-General:	The chief executive of the Ministry for Primary Industries.
ECan:	Environment Canterbury (Canterbury Regional Council).
Five Freedoms:	Five core aspects of animal welfare; proper and sufficient food and water, adequate shelter, opportunity to display normal patterns of behaviour, handling which minimises pain and distress, and protection from injury and disease.
Inspectors:	Police constables and persons employed or appointed to enforce the Animal Welfare Act 1999.
MAF:	Ministry of Agriculture and Forestry (the Ministry for Primary Industries since 30 April 2012).
MPI:	Ministry for Primary Industries.
NAWAC:	National Animal Welfare Advisory Committee.
NES:	National Environmental Standard.
RMA:	Resource Management Act 1991.
RTT:	Research, testing and teaching.
Rule:	A rule in a Regional or District Plan, which functions as a regulation.
SPCA:	Royal New Zealand Society for the Prevention of Cruelty to Animals
The Code:	Refers to the Animal Welfare (Dairy Cattle) Code of Welfare 2010, and the 2014 and 2016 versions of the Dairy Cattle Code of Welfare.
The Minister:	The Minister for Primary Industries.
WAC:	Wild Animal Control Act 1977.
WDC:	Waitaki District Council.

Introduction

The Animal Welfare Act 1999 (AWA) of Aotearoa (New Zealand) recognises, in its long title; "that animals are sentient." Aotearoa is a country that uses a lot of non-human animals (hereafter referred to as animals),[1] and it is implicit in anthropogenic animal use that animal welfare will at times be compromised.[2] Under the status quo, managing this compromise is a task that falls on the AWA. In my first chapter, I set out how it does this, with a focus on the Act's permissive nature with regard to animal use, and its reliance on a reactive enforcement regime to protect animals' welfare,[3] both for their sake as sentient beings, and for the purpose of "maintaining New Zealand's trading reputation overseas."[4] I discuss the shortfalls of this approach, before turning to the Resource Management Act 1991 (RMA).

Designed as a broad, holistic statute, the RMA manages New Zealand's environment by taking, by contrast to the AWA, a cautious approach. This approach is predicated on proactive planning, and scrutinising the anticipated effects of activities before allowing them to occur. I discuss the limited attention RMA practitioners have hitherto paid to animal welfare, and its links to environmental management. In the second chapter I set out my substantive proposal in the second chapter. I interpret the RMA's wide conceptualisation of the environment as encapsulating animal welfare, and argue that decisions made under the RMA that impact animals should therefore be made with regard to effects on them. I discuss how this would work in practice, how the RMA's framework of instruments could support

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1 For example, at 30 June 2016 there were 6,619,000 dairy cattle, 3,533,000 beef cattle, 27,584,000 sheep, 835,000 deer and 254,600 pigs being used for agriculture in New Zealand, and the rolling average of animals manipulated in research, testing and teaching for the last three reported years is 272,048. See Stats NZ *Agricultural Production Statistics: June 2016 (final) – tables* (10 May 2017) at tables 1 and 7; and Ministry for Primary Industries *Statistics on the Use of Animals in Research, Testing and Teaching in New Zealand in 2015* (Information Paper 2016/27, December 2016) at 3.

2 Alison Loveridge "Farm Practices and Animal Welfare" (2011) 26(1) New Zealand Sociology 89 at 90; and JM Siegford, W Powers and HG Grimes-Casey "Environmental Aspects of Ethical Animal Production" (2008) 87 Poultry Science 380 at 380-381.

3 Ministry of Agriculture and Forestry *Safeguarding our Animals, Safeguarding our Reputation* (July 2010) at 11.

4 At 7.

consideration of animal welfare, and the improvements that taking this proactive approach would make. I believe that my proposal could improve animal welfare outcomes by enabling transparent discussion about animal use, and efficiently reducing the pressure on the AWA.

In my final chapter, I flex my proposal by applying it to the case study of intensive indoor dairy farming in the Mackenzie Basin. After outlining the controversial saga involved, I discuss how implementing my proposal could have changed the course of the decision-making involved, including how proactive use of RMA planning instruments could have aided the practitioners involved. I finish by setting out why I believe applying my proposal to such cases would, in the interests of both humans and animals, improve the quality of decision-making and reduce the risk of animal welfare being harmed.

1 *Status Quo: Animal Welfare Law in Aotearoa*

This chapter sets out the protection currently afforded to animals under New Zealand law. Firstly, I focus on the AWA, which provides the main legal framework for promoting animal welfare in Aotearoa. I set out the key elements of this Act, and then outline its shortcomings that are addressed by the proposal I set out in the following chapter. I then outline the proactive planning and consenting regime provided by the RMA, and examine the rare occasions where animal welfare has been considered under it. Because the proposal I set out in the following chapter applies to activities that already go through the resource consent process, I do not discuss provisions that apply to types of animal use that do not come within the purview of the RMA. This includes wild animals, who are offered protection through the Wildlife Act 1953,[5] and domestic pets, the ownership of which is regulated both by the AWA, and in the case of dogs, more specifically by the Dog Control Act 1996.[6]

(a) *The Animal Welfare Act 1999*

The AWA is the primary statute that serves to protect the interests of animals in Aotearoa New Zealand.[7] It provides all of the legal protection that is, in practice,[8] afforded to the welfare of animals in New Zealand. It built substantially upon its predecessor, the Animals Protection Act 1960, and the common law protection afforded to animals owned by humans by virtue of animals' legal classification as property. This common law protection is limited to people being deterred from harming someone else's animals due to the risk of being sued by the property-holder.[9] The AWA, by contrast, promotes animal welfare by imposing

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5 See, for example s 5 of the Dog Control Act 1996, which imposes obligations on dog owners to, inter alia, provide care, attention, food, water, shelter, and exercise.

6 Section 3 of the Wildlife Act 1953 declares all wildlife to be absolutely protected in New Zealand unless specified in one of schs 1-5, which list partially protected and non-protected species.

7 *Balfour v R* [2013] NZCA 429 at [12].

8 In chapter 2(c): "Animal Welfare is Relevant Under the Resource Management Act" I argue that the Resource Management Act 1991 (RMA) provides, in theory, for consideration of animal interests.

9 Peter Sankoff "The Protection Paradigm: Making the World a Better Place for Animals?" in Peter Sankoff, Steven White and Celeste Black (eds) *Animal Law in Australasia: Continuing the Dialogue* (2nd ed, The Federation Press, Sydney, 2013) 1 at 5; see, for example, *Finlinson v Police* [2016] NZHC

criminal liability on persons who ill-treat or fail to care for animals.[10] Provided that they adhere to the limits and standards set by the AWA, people are legally entitled to use animals that they own however they wish, in the same way as any other property.[11]

Part 1 of the AWA is aimed at ensuring that the welfare needs of animals under human control are attended to.[12] Section 10 imposes an obligation on owners and persons in charge of animals to meet their "physical, health, and behavioural needs" in accordance with "good practice" and "scientific knowledge." "Person in charge of an animal" has been expansively interpreted as covering people with "effective control" over animals.[13] Those in charge of animals must meet the following needs, commonly referred to as the "Five Freedoms":[14]

> (a) proper and sufficient food:
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> (ab) proper and sufficient water:
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> (b) adequate shelter:
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> (c) opportunity to display normal patterns of behaviour:
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> (d) physical handling in a manner which minimises the likelihood of unreasonable or unnecessary pain or distress:
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> (e) protection from, and rapid diagnosis of, any significant injury or disease, —
>
> being a need which, in each case, is appropriate to the species, environment, and circumstances of the animal.

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224 at [24], in which the shooting of a horse was considered to be wilful damage to property, but the pain suffered by the animal was not considered to be an aggravating factor.

10 Animal Welfare Act 1999, ss 12, 14, and 28-29.

11 Sankoff, above n 9, at 6.

12 Animal Welfare Act 1999, s 9.

13 *Kunicich v Royal Society for the Prevention of Cruelty to Animals* HC Whangarei, CRI-2008-488-67, 13 October 2009 at [36].

14 Animal Welfare Act 1999, s 4, definition of "physical, health, and behavioural needs"; and Arnja Dale and Steven White "Codifying Animal Welfare Standards: Foundations for Better Animal Protection or Merely a Façade?" in Peter Sankoff, Steven White and Celeste Black (eds) *Animal Law in Australasia: Continuing the Dialogue* (2nd ed, The Federation Press, Sydney, 2013) 151 at 152.

In addition, pt 1 requires the alleviation of "unreasonable or unnecessary pain or distress."[15] These obligations protect the interests of animals, and are enforceable as strict liability offences.[16] They carry maximum penalties of 12 months' imprisonment or a $50,000 fine in the case of an individual, and a fine of up to $250,000 in the case of a body corporate.[17]

Part 2 of the AWA prohibits ill-treatment of animals. This is defined as causing suffering:[18]

> by any act or omission, pain or distress that in its kind or degree, or in its object, or in the circumstances in which it is inflicted, is unreasonable or unnecessary.

Such ill-treatment is a strict liability offence. There are also offences relating to several specific forms of conduct, such as encouraging animals to fight or using prohibited traps.[19] These all carry the same maximum penalties as those for failing to meet pt 1 obligations, set out above.[20] The Act deems reckless and wilful ill-treatment as being more serious. The maximum penalties for reckless ill-treatment of animals are three years' imprisonment or a $75,000 fine for individuals,[21] and $350,000 fines for body corporates.[22] Wilful ill-treatment is punishable by up to five years' imprisonment or a $100,000 fine in the case of individuals,[23] and a $500,000 fine for a body corporate.[24]

The provisions of the AWA are softened with qualified language that serves to allow animal use notwithstanding adverse effects on animal welfare. The Act does not afford animals absolute protection from pain or distress; it targets what is "unreasonable or unnecessary."[25]

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15 Animal Welfare Act 1999, s 11.

16 Sections 12-13.

17 Section 25.

18 Section 2, definition of "ill-treat"

19 Sections 29-31 and 34.

20 Section 37.

21 Section 28A(3)(a).

22 Section 28A(3)(b).

23 Section 28(3)(a).

24 Sections 28(3)(b).

25 See, for example, Animal Welfare Act 1999, s 2, definition of "ill-treat", and ss 4(d) and 9(2)(b).

Furthermore, the needs protected by s 10 are qualified by what "is appropriate to the species, environment, and circumstances of the animal."[26] Ill-treatment is defined in relation to "the circumstances in which [pain or distress] is inflicted."[27] Under the Animals Protection Act 1960, it was held that pain or distress will be deemed unreasonable or unnecessary where it is out of proportion with resultant increased commercial efficiency.[28] The Court of Appeal, in *Erickson v Ministry for Primary Industries*, recently reaffirmed that what amounts to ill-treatment depends on the purposes for which an animal is kept.[29] It is MPI's view that "general accepted" practices should be allowed to occur.[30] The Act, therefore, allows humans to inflict some degree of pain and distress on animals. Its general tone is permissive; the duties it imposes regulate, rather than prevent, human use of animals.

Specific animal welfare standards may be set through the issuing of codes of welfare (codes). These set minimum animal welfare standards and outline best practice approaches to animal use.[31] Non-compliance with a minimum standard set out in a code is treated as a prima facie breach of the Act,[32] while compliance with any relevant minimum standards offers a defence to the AWA strict liability offences of failing to meet obligations of care under pt 1,[33] and ill-treatment of an animal.[34] Codes are issued by notice in the *New Zealand Gazette* at the discretion of the Minister for Primary Industries (the Minister), after considering advice from the National Animal Welfare Advisory Committee (NAWAC).[35] During the development of codes, NAWAC are required to consider, inter alia, submissions made, good practice,

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26 Animal Welfare Act 1999, s 4, definition of "physical, health, and behavioural needs".

27 Section 2, definition of "ill-treat".

28 *Garrick v Silcock* [1968] NZLR 595.

29 *Erickson v Ministry for Primary Industries* [2017] NZCA 271, [2017] NZAR 1015 at [34].

30 Shane Ardern *The Animal Welfare Amendment Bill – issues raised during consideration of the Departmental Report* (Ministry for Primary Industries, 11 March 2014) at 7.

31 Animal Welfare Act 1999, s 68.

32 Section 13(1A).

33 Section 13(2)(c).

34 Section 30(2)(c); this defence is not available for reckless or wilful ill-treatment.

35 Section 75.

scientific knowledge and available technology.[36] NAWAC may, and invariably does, take into account "practicality and economic impact."[37] In a similar vein, the Governor-General may, by Order in Council,[38] make regulations for purposes such as prescribing standards and policies,[39] setting animal welfare standards,[40] and prohibiting activities.[41] Before recommending such an Order, the Minister must consult persons they "believe are representative of interests likely to be substantially affected."[42] This consultation will typically be undertaken through MPI or NAWAC.[43]

The provisions of the AWA can be enforced by three types of "inspectors." These inspectors possess a range of powers to enforce the Act by, inter alia, investigating potential breaches,[44] seizing animals,[45] mitigating suffering,[46] and issuing infringement notices.[47] Firstly, there are inspectors employed by MPI,[48] which tend to focus on farming operations.[49] Secondly, the Royal New Zealand Society for the Prevention of Cruelty to Animals (SPCA) are an "approved organisation" empowered to recommend the appointment of inspectors.[50] Inspectors employed by the SPCA deal with both companion and farming animals.[51] No other

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36 Section 73.

37 Section 73(3); and Ministry for Primary Industries *Animal Welfare Amendment Bill* (Departmental Report, February 2014) at 17.

38 Animal Welfare Act 1999, ss 183(1), 183A(1), 183B(1) and 183C(1).

39 Section 183(1)(b).

40 Section 183A(1).

41 Sections 183A(1)(a)(iii) and 183B(1)(a).

42 Section 184(1).

43 Section 73(3); and Ministry for Primary Industries, above n 37, at 19 and 22.

44 Section 127.

45 Section 133(2).

46 Section130.

47 Section 162(1).

48 Section 124(1).

49 Ministry for Primary Industries, above n 37, at 14.

50 Animal Welfare Act 1999, ss 121 and 124(2).

51 Ministry for Primary Industries, above n 37, at 14.

such organisations have hitherto been approved to enforce the AWA.[52] Finally, the New Zealand Police are included in the AWA definition of inspector.[53] Unlike MPI and approved organisation inspectors, they hold an additional power to stop vehicles.[54] The monitoring and enforcement roles played by inspectors are crucial to the AWA, as it is predominantly a reactive statute that seeks to respond to animal welfare issues as they arise.[55]

The AWA takes a restrictive and proactive approach to managing the international export of live animals, and the use of animals in research, testing and teaching (RTT). These activities are prohibited, unless approved by the respective regimes set out in pts 3 and 6.[56] This is in contrast to the AWA's general approach, as outlined above, of permitting animal use and only stepping in through its enforcement mechanisms when animal welfare is unduly harmed. It is an offence to export a live animal without an animal welfare export certificate, which can be obtained by applying to the chief executive (Director-General) of the Ministry for Primary Industries (MPI).[57] In considering such applications the Director-General must have regard to, where relevant, matters such as the applicant's animal exporting experience, the species and state of the proposed animals, the nature of the proposed journey, international standards and New Zealand's reputation.[58] They may impose any number of conditions on the certificate to provide for animal welfare.[59] RTT involving animals is, by default, prohibited under the AWA,[60] but may be carried out and is exempted from the Act's criminal offence provisions where approved by an animal ethics committee following a code of ethical

52 SPCA New Zealand *2015 Annual Report* (1 June 2016) at 2; and Ministry for Primary Industries *Animal Welfare Amendment Bill* (Departmental Report, February 2014) at 14.

53 Animal Welfare Act 1999, s 2, definition of "inspector".

54 Section 127(2).

55 Ministry of Agriculture and Forestry, above n 3, at 11.

56 Animal Welfare Act 1999, ss 40 and 82.

57 Animal Welfare Act 1999, ss 40(1) and 42; and s 2, definition of "Director-General".

58 Animal Welfare Act 1999, s 43.

59 Animal Welfare Act 1999, s 45.

60 Animal Welfare Act 1999, s 82.

conduct that has been approved by the Director-General.[61] Although enforcement of the animal export and RTT regimes appears to be scant,[62] their existence does ensure that these forms of animal use undergo scrutiny, on a case-by-case basis, before occurring.

(b) *Shortcomings of the Animal Welfare Act*

The AWA's predominantly reactive approach to promoting animal welfare forgoes proactive control of activities with the capacity to be harmful to animals.[63] The scale of the task of monitoring animal use constrains the effectiveness of this approach.[64] With the exception of live animal export and using animals for RTT, the Act permits animal use by default.[65] This means there is an absence of critical scrutiny of animal uses ahead of them occurring.[66] Where users of animals do not comply with pts 1 and 2, the regime is reliant on such breaches being detected by inspectors. There are, however, inherent challenges in discovering animals being harmed. The task of monitoring animal use requires extensive resources and personnel in a country that uses as many animals as Aotearoa. These animals often exist on isolated paddocks, and behind the walls of indoor farms, slaughterhouses, and laboratories.[67] This prevents outsiders from being able to know if harms to animals are going beyond what could

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61 Animal Welfare Act 1999, s 84 and 87; and Virginia Williams "A New Zealand Commitment to Continuous Improvement in Animal Ethics Committee Decision-Making: Giving Operational Effect to Key Principles" (paper presented to the 8th World Congress on Alternatives and Animal Use in the Life Sciences, Montreal, 2011) 295 at 295.

62 The only research, testing and teaching case is *Attorney-General v Pickering* HC Hamilton CP24/98, 11 April 2002, where the weak penalties available at the time for breaches of pt 6 AWA were insufficient to dissuade unapproved testing of an eczema cream on sheep. No cases have addressed the animal welfare implications of granting export certificates. See chapter 1(b): "Shortcomings of the Animal Welfare Act" for my discussion of enforcement problems generally.

63 Vernon Tava "Cubicle (Factory) Farming and Ministerial 'Call-Ins' of Resource Management Consents" (14 January 2010) The Solution <https://thesolution.org.nz/2010/01/14/cubicle-factory-farming-and-ministerial-call-ins-of-resource/>.

64 Ministry of Agriculture and Forestry, above n 3, at 18.

65 Animal Welfare Act 1999, ss 15(1), 34, 40(1) and 82.

66 Tava, above n 63.

67 Stats NZ, above n 1, at tables 1 and 7; and Ministry for Primary Industries, above n 1, at 3.

be considered reasonable or necessary.[68] It is unlikely for inspectors to be informed of animal welfare breaches in these places, where the only people who see issues are likely to be implicated in the pain or distress, employed by the business responsible, or unwilling to report a fellow member of a small rural community.[69] This is exacerbated by the SPCA's policy of not accepting anonymous complaints.[70] Breaches of the AWA will inevitably often go unreported, due to animals being voiceless victims.[71] MPI (under their previous guise as the Ministry of Agriculture and Fisheries; MAF)[72] themselves have said that "[t]here is limited or no information available about animal welfare compliance on the 97.5 per cent of farms for which no complaint[s are] received."[73]

Shortcomings in the state's enforcement of the AWA serve to blunt its effectiveness. In practice, police in Aotearoa tend to be untrained in this area and make a minimal contribution to AWA enforcement.[74] MPI employs around 56 animal welfare inspectors to monitor the welfare of the tens of millions of commercial sector animals that it takes responsibility for.[75] There are also around 190 veterinarians (as of February 2014) operating as part-time animal

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68 Siobhan O'Sullivan *Animals, Equality and Democracy* (Palgrave Macmillan, Basingstoke, 2011) at 65-66, 68 , and 77.

69 At 72.

70 At 72; and SPCA "Report Cruelty" <www.rnzspca.org.nz/help-advice/report-cruelty>; and O'Sullivan, above n 68, at 72.

71 JE Schaffner *An Introduction to Animals and the Law* (Palgrave MacMillan, London, 2011) at 69.

72 The Ministry of Agriculture and Forestry was renamed the Ministry for Primary Industries on 30 April 2012, following mergers with the Ministry of Fisheries and the New Zealand Food Safety Authority. See David Carter "MAF to become Ministry for Primary Industries" (6 March 2012) beehive.govt.nz < www.beehive.govt.nz/release/maf-become-ministry-primary-industries>.

73 Ministry of Agriculture and Forestry, above n 3, at 6.

74 Unitec New Zealand *Animal Welfare Investigations* (Auckland, 2000) at [1.5]; Ministry of Agriculture and Forestry, above n 3, at 10. See, for example, *Balfour v R* [2010] NZCA 465 at [5] where a police officer referred concerns about the conditions a number of animals were being kept in to the Ministry of Agriculture and Fisheries and the SPCA, rather than using his powers as an AWA inspector.

75 Ministry for Primary Industries, above n 37, at 13; Stats NZ, above n 1, at tables 1 and 7; Ministry for Primary Industries, above n 1, at 3; Ministry of Agriculture and Forestry, above n 3, at 9.

welfare inspectors across slaughter premises.[76] MPI (then MAF) note that this approach means few "'eyes and ears' on farms."[77] Their annual budget for animal welfare compliance is around $3,100,000;[78] which is well under half of the $7,000,000 to $9,000,000 budget the SPCA struggle to run their National Inspectorate on.[79] Furthermore, MPI's long-term goals make no mention of animal welfare, but do include improving "sector productivity".[80] Given that increasing agricultural productivity usually involves reducing the welfare of animals involved,[81] this demonstrates a problematic conflict of interest within MPI as enforcers of the AWA. Inspecting and prosecuting New Zealand's farmers, for example, slows agricultural productivity and tarnishes the "brand" that MPI is charged with enhancing.[82] It is unclear if any safeguards are in place within MPI to manage tensions between animal welfare and sector productivity.

Enforcement of the AWA is heavily dependent on the SPCA; a charitable organisation that is reliant on volunteers, and donations from the public to fund its enforcement functions.[83] The SPCA employs around 75 inspectors to carry out this role as part of its National Inspectorate,[84] which "is primarily funded by donors, supporters, grants and… SPCA Op Shops."[85] The only government funding it currently receives is around $350,000 to $400,000 annually from MPI. This is not, however, a guaranteed regular income source, and only covers around five per cent of the SPCA's National Inspectorate budget.[86] In addition to

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76 Ministry for Primary Industries, above n 37, at 13.

77 Ministry of Agriculture and Forestry, above n 3, at 5.

78 Ministry for Primary Industries, above n 37, at 14.

79 SPCA, above n 52, at 5 and 8; and Ardern, n 30, at 5.

80 Ministry for Primary Industries "Our outcomes" (15 September 2015) <www.mpi.govt.nz/about-mpi/our-strategy-2030-growing-and-protecting-new-zealand/our-outcomes>

81 Siegford, Powers and Grimes-Casey, above n 2, at 381; and Loveridge, above n 2, at 90.

82 Ministry for Primary Industries, above n 80; and Siegford, Powers and Grimes-Casey, above n 2, at 381.

83 SPCA, above n 52, at 2.

84 At 8.

85 At 5.

86 At 5 and 16; and SPCA New Zealand *2014 Annual Report* (1 June 2015) at 16.

being underfunded, by enforcing the criminal law the SPCA is serving a function that is otherwise entirely performed by the state. It is expected to balance its monitoring and prosecutorial roles with functions such as animal rescue and advocating for social and political change.[87] Not only are these facets of the organisation in competition with each other,[88] it is unusual for a body that takes partisan political positions on certain issues, such as by calling for rodeo to be banned,[89] to be exercising powers of the state. The AWA's reliance on a charity and a government department, both with conflicting functions and relatively meagre funding and inspector numbers, is cause for concern regarding whether enough is being done to uphold the public interest in enforcement of the AWA. These concerns are noted by MPI, although they believe that their Memorandum of Understanding with the SPCA is sufficient to ensure adequate public accountability.[90]

Where animal welfare issues do come to the attention of inspectors, they must be particularly serious to warrant allocation of the resources necessary to commit to following up on concerns, gathering evidence, and pursuing prosecutions.[91] Intervening in cases of non-compliance with the AWA, through legal action, ongoing monitoring, and convincing and assisting animal uses to comply with the Act, carries high costs,[92] but those responsible for enforcement of the AWA are operating on tight budgets.[93] Not only must there be reasonable grounds to believe an offence has been committed for an inspector to be allowed to

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87 See, for example, *R v Balfour* (2009) 9 HRNZ211 (DC) at [204] and [222], where the prosecution was tarnished by delays caused by a lack of resources, and the SPCA was criticised for pursuing publicity objectives by being accompanied by a television crew when executing a search warrant.

88 Danielle Duffield "The Enforcement of Animal Welfare Offences and the Viability of an Infringement Regime as a Strategy for Reform" (2013) 25 New Zealand Universities Law Review 897 at 907-908.

89 SPCA New Zealand "Ban Rodeo Cruelty" (2016) <www.rnzspca.org.nz/animal-welfare/campaigns>.

90 Ardern, above n 30 at 5.

91 O'Sullivan, above n 68, at 73.

92 Ministry of Agriculture and Forestry, above n 3, at 7 and 11.

93 Ministry for Primary Industries, above n 37, at 14; SPCA, above n 52, at 8; and Ardern, above n 30, at 5.

investigate,[94] limited resources leads to cases being prioritised "based on urgency and seriousness."[95] This means that animals must be clearly unjustifiably harmed before steps are taken to prevent those responsible from harming animals again.

AWA prosecutions and sentencing can also be found wanting. Few cases of people failing to properly care for animals, or ill-treating them, are investigated and successfully prosecuted. In 2015, for instance, the SPCA investigated to 15,219 animal welfare complaints (13,577 in 2014) complaints, but successfully completed just 61 prosecutions (58 in 2014).[96] This does not include complaints not responded to, and only covers animal welfare offences that are actually reported. In the overall Aotearoa justice system, the rate of prosecution is estimated as being over one hundred times higher.[97] The sentencing of animal welfare offending is lenient and inconsistent. For example, relatively low fines are imposed in cases of farming malpractice causing large numbers of animals to suffer, whereas animal cruelty cases involving one or a few animals have used starting points of imprisonment for a year or more.[98] Sentences of fines in the agricultural context allows for them to be absorbed as costs of business, rather than sending a strong message about the importance of avoiding "unreasonable" animal suffering. Inconsistency also arises from a lack of access to precedents, and a dearth of guidance from the upper courts, due to very few cases being

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94 Animal Welfare Act 1999, s 131(1)(a).

95 SPCA, above n 70; and SPCA, above n 52, at 8.

96 At 5 and 8.

97 Duffield, above n 88, at 911.

98 See, for example, *R v Albert* CA126/03 19 December 2003, where twelve horses were found emaciated or bordering on emaciation, and one had to be destroyed; a fine of $13,000 was imposed. See also *Kunicich v Royal Society for the Prevention of Cruelty to Animals*, above n 13, in which 50 sheep had died because of a failure to care for them; a fine of $15,000 was imposed. Compare this with, for example, *Karena v Police* HC Hamilton CRI-2005-419-118, 13 October 2005, where a starting point of 12 months' imprisonment was employed where three cats were burnt to death, and *Karekare v Police* HC Hamilton CRI-2011-419-000067, 22 September 2011 where a starting point of 18 months' imprisonment was used where a kitten was kicked and thrown to death.

appealed beyond the District Court.[99] This state of affairs serves to rob the AWA of much of its potential to act as a deterrent for animal welfare offending.

(c) *The Resource Management Act 1991*

The RMA was enacted to create a single, holistic planning framework for Aotearoa.[100] Its central purpose is "to promote the sustainable management of natural and physical resources,"[101] which it seeks to achieve by governing uses of land,[102] the coastal marine area,[103] beds of lakes and rivers,[104] and water,[105] as well as discharges into or onto water, land, and air,[106] and unreasonable noise.[107] By contrast to the AWA, the RMA has a restrictive ethos and takes a proactive approach to regulating effects on the environment, by scrutinising the costs and benefits of activities before they are allowed to proceed.[108] It imposes a duty on every person "to avoid, remedy, or mitigate any adverse effect on the environment arising from an activity carried on by or on behalf of the person."[109] The RMA confers broad powers on the Environment Court to adjudicate on challenges to decisions made under the Act, and to enforce it.[110] This is a specialist court, well versed in dealing with the often complex and conflicting bodies of scientific evidence presented in the course of environmental adjudication.[111]

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99 Duffield, above n 88, at 912.

100 Bret Birdsong "Adjudicating Sustainability: New Zealand's Environment Court and the Resource Management Act" (2002) 29(1) Ecology Law Quarterly 1.

101 Resource Management Act 1991, s 5(1); I expand on the meaning of "sustainable management" in chapter 2(a): "Animal Welfare is Relevant Under the Resource Management Act" at 37-38.

102 Resource Management Act 1991, s 9.

103 Section 12.

104 Section 13.

105 Section 14.

106 Section 15.

107 Section 16.

108 Tava, above n 63.

109 Resource Management Act 1991, s 17(1).

110 Sections 17(3), 293 and 319(2).

111 Ceri Warnock "Reconceptualising the Role of the New Zealand Environment Court" (2014) 26 Journal of Environmental Law 507 at 508-510. Pursuant to s 265, the quorum for Environment Court sittings

The RMA provides for the creation of a hierarchy of documents which set policies and rules to guide people making decisions under the Act. National environmental standards (NES's) set regulations that prescribe national-level minimum standards, methods, and requirements.[112] National and regional policy statements set out objectives, policies and methods for achieving the Act's purpose.[113] Regional and district plans exist to assist the management of natural and physical resources by setting regional and district rules (rules),[114] which have the legal "force and effect" of regulations.[115] Regional plans manage the use of, inter alia, water, the coastal marine area, and discharges into or onto land, air and water on a regional scale.[116] District plans manage land-use, at the smaller district level.[117] These documents are used to determine whether activities require resource consent, and guide the consent application process.[118] Policy statements and plans are to prepared in order to achieve the purpose of the RMA,[119] and assist local authorities in carrying out their functions,[120] which include achieving integrated resource management.[121] All of these instruments must give effect to those that sit higher in the RMA hierarchy.[122] This means, for example, that district plans must be consistent with regional policy statements and plans, which must in turn be consistent with NES's.

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is usually one Judge and one Environment Commissioner. As per s 253, Commissioners must have knowledge of, inter alia, economic and community affairs, planning and heritage protection, environmental science, architecture, minerals technology, dispute resolution, and kaupapa Māori.

112 Resource Management Act 1991, s 43.

113 Sections 45(1) and 59.

114 Sections 63 and 72.

115 Sections 68(2) and 76(2).

116 Section 30(1).

117 Section 31(1).

118 Section 104(1)(b).

119 Sections 59, 61(1)(b), 63(1), 66(1)(b), 72 and 74(1)(b).

120 Sections 61(1)(a), 63, 66(1)(a), 72 and 74(1)(a)

121 Sections 30(1)(a) and 31(1)(a).

122 Sections 62(3), 67(3) and 75(3).

The process for creating policy statements or plans involves extensive public consultation.[123] Having prepared a proposal, local authorities are required to assess the extent to which it is appropriate for achieving the purpose of the RMA,[124] and publicly notify the proposed policy statement or plan.[125] Any person may make a submission on the proposed document,[126] and be heard at a hearing hosted by the local authority.[127] The local authority must then give, with reasons, a decision on each matter raised by submissions.[128] Persons who make submissions on proposed instruments are then entitled to appeal to the Environment Court on provisions or matters referred to in their submissions.[129] After hearing such appeals, the Court can direct the local authority to make changes or undertake further consultation.[130] A similar process applies to requests for changes of policy statements and plans,[131] which may be made by anyone.[132]

Where an activity would otherwise be in breach of the RMA, people may apply for the necessary resource consents to lawfully undertake it. Types of resource consent include land use consents, water permits, and discharge permits.[133] For example, depending on the relevant rules and regulations, a proposed dairy farm might require land use consent for erecting sheds,[134] a water permit for irrigation,[135] and a discharge permit for effluent runoff.[136] The RMA's default approach to uses of, inter alia, the coastal marine area, beds of

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123 Schedule 1, cl 3.

124 Section 32(1).

125 Schedule 1, cl 5(1)(b)(i).

126 Schedule 1, cl 6(3).

127 Schedule 1, cl 8B(a).

128 Schedule 1, cls 10(1) and 10(2)(a).

129 Schedule 1, cls 14(1) and 14(2)(a).

130 Section 293(1).

131 Schedule 1, cl 29(1).

132 Schedule 1, cl 21(1).

133 Section 87.

134 Section 2, definition of "use", and s 9.

135 Section 14.

136 Section 15.

lakes and rivers and water, and discharges of contaminants into the environment is restrictive. Such activities must be expressly allowed by a NES, other regulation, or rule.[137] The Act is relatively permissive with respect to land use, which is permitted without a resource consent unless it contravenes a NES or a rule. Resource consent is not required for land use that was lawfully established before a relevant rule became operative or the relevant proposed plan was notified; providing the effects of the use have not significantly changed or been discontinued.[138]

Applications for resource consents to carry out activities are considered by consent authorities, which are local government bodies with the power to grant the relevant consents.[139] Upon receiving an application, a consent authority decides whether to publicly notify it.[140] This is a discretionary decision,[141] but applications must be publicly notified if, inter alia, the consent authority decides the activities are likely to have "more than minor" effects on the environment, or a rule or NES requires public notification.[142] Consent authorities may disregard, inter alia, adverse effects if a NES or rule permits activities with such effects.[143] If the activity is classified as controlled or restricted discretionary, they must disregard adverse effects that do "not relate to a matter for which a rule or national environmental standard reserves control or restricts discretion."[144] If not publicly notified, limited notification must be given to any affected person or group.[145] If notified, people may make submissions on an application,[146] which may support or oppose it.[147] These

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137 Sections 12, 13, 14 and 15.

138 Section 10.

139 Section 2, definition of "consent authority".

140 Section 95(a).

141 Section 95A(1).

142 Section 95A(2).

143 Section 95D(b).

144 Section 95D(c).

145 Section 95B.

146 Section 96(1).

147 Section 96(7).

submissions may raise matters that influence the decision on whether to grant resource consent.

The Minister for the Environment may, either at their own initiative or at an applicant or local authorities' request,[148] "call in" a matter to be referred to a board of inquiry or the Environment Court, rather than the local authority, for decision.[149] They have discretion in deciding whether to do this, but may have regard to things like public concern or interest, significant resource use, features of national significance, international obligations, irreversible environmental changes, and the use of new technology and methods.[150] They must have regard to "the views of the applicant and the local authority" and the local authority's capacity "to process the matter."[151] If a matter is referred to a board of inquiry, the Minister for the Environment appoints such a board and may set it administrative terms of reference.[152] A board of inquiry will make a decision and provide a report,[153] whereas the Environment Court will act as if it is the relevant local authority.[154] The costs of making decisions using this process can be recovered from applicants by the relevant authorities.[155]

Activities may be classed by the Act, regulations, a NES, a plan, or a proposed plan in one of six ways.[156] The six classes of activities are permitted (no resource consent required),[157] controlled (resource consent required but will be granted, and can have conditions attached),[158] discretionary,[159] restricted discretionary (the consent authority's discretion is

148 Section 142(1).

149 Section 142(2).

150 Section 142(3)(a).

151 Section 142(4).

152 Sections 149J(2) and 149J(3B).

153 Sections 149R(1).

154 Sections 149U(2), 149U(3), 149U(4), 149U(6) and 149U(7).

155 Sections 149ZD(1) and149ZD(4).

156 Section 87A.

157 Section 87A(1).

158 Section 87A(2).

159 Section 87A(4).

restricted),[160] non-complying (the application must meet threshold criteria),[161] and prohibited (resource consent not available).[162] Pursuant to s 104(1) of the RMA, consent authorities must, when considering whether to grant resource consent:[163]

> have regard to—
>
> (a) any actual and potential effects on the environment of allowing the activity; and
>
> (b) any relevant provisions of—
>
> (i) a national environmental standard:
>
> (ii) other regulations:
>
> (iii) a national policy statement:
>
> (iv) a New Zealand coastal policy statement:
>
> (v) a regional policy statement or proposed regional policy statement:
>
> (vi) a plan or proposed plan; and
>
> (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

They must, however, disregard any adverse effects "if a national environmental standard or the plan permits an activity with that effect."[164] In order to better understand the anticipated effects of an activity, consent authorities may use s 92(1) to request further information from the applicant.[165] Alternatively, unless the applicant refuses, the consent authority may commission a report on any matter relating to the application under s 92(2).[166] These provisions help consent authorities perform the task of weighing various anticipated effects of a proposal, in order to decide whether it should go ahead. Unless limited by a NES, regulations, or plan rules, consent authorities have broad discretion to grant resource consent

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160 Section 87A(3)

161 Section 87A(5)

162 Section 87A(6).

163 Section 104(1).

164 Section 104(2).

165 Section 92(1).

166 Section 92(2).

on any conditions they consider appropriate.[167] Applicants, and any person who submits on a resource consent application, can appeal a resource consent decision to the Environment Court. The conditions attached to a consent, and any review of consent conditions,[168] are also amenable to challenge in the Environment Court by the applicant and submitters.[169]

Promoting sustainability by requiring applicants to show that benefits of activities justify any adverse effects is demonstrative of a precautionary approach to regulating effects on the environment. The precautionary principle is commonly understood with reference to degradation of the natural environment,[170] but has been used to manage uncertainty around a wide range of effects on the environment, as it is broadly conceptualised in the RMA.[171] Consent authorities, including the Environment Court, require evidence that there is a low probability of an large adverse effects occurring before granting resource consents.[172] They are expected to be satisfied by reliable scientific evidence showing an absence of adverse anticipated effects.[173] In *McIntyre v Christchurch City Council*, for example, the precautionary principle was used to manage conflicting expert evidence on the potential human health effects of transmission facility radiation.[174] It has been accepted as part of the RMA toolkit for managing effects on the environment, as it promotes the development and use of scientific knowledge so that major or irreversible environmental damage is avoided.

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167 Section 108(1).

168 Section 120(1).

169 Ibid.

170 United Nations General Assembly "Rio Declaration on Environment and Development" (annex I of the Report of The United Nations Conference on Environment And Development, Rio de Janeiro, June 1992), Principle 15.

171 Birdsong, above n 100, at 43. See chapter 2(a): "Animal Welfare is Relevant Under the Resource Management Act" at 30-31 for my discussion of the broad definition of the environment and the overall broad judgement approach to considering effects.

172 *McIntyre v Christchurch City Council* [1996] NZRMA 289, (1996) 2 ELRNZ 84 at 296.

173 At 307.

174 At 295.

The broadly proactive planning and consenting approach of the RMA is supported by reactive enforcement provisions.[175] Persons who, in the opinion of the Environment Court or an enforcement officer, are considered to have caused, or to be likely to cause, an adverse effect on the environment can be served with an enforcement order or abatement notice, if the adverse effect is not otherwise permitted by the Act, a plan rule, a resource consent or a designation. This can require them to cease or refrain from an activity, or do something to avoid, remedy, or mitigate an adverse effect.[176]

(d) *Consideration of Animal Welfare Under the Resource Management Act*

References to animal welfare in policy statements and plans that have been created under the RMA are sporadic and typically oblique. Plans sometimes specify that effects on animals should be included in resource consent applications, but do not make clear whether this includes effects on animal welfare.[177] Concern for animal health is often mentioned, invariably alongside human health and sometimes alongside plant health, as a justification for rules that restrict the use of hazardous substances and contaminant discharges.[178] The Hawke's Bay's Regional Resource Management and Coastal Environment Plans both mention that water takes for the primary purpose of maintaining "human or animal welfare" are allowed from rivers "flowing at or below the minimum flow."[179]

Animal welfare is otherwise mentioned rarely in RMA instruments, even in relation to activities where it is particularly pertinent. For example, the Wairarapa Combined District Plan lists "odour, noise, glare and dust" as assessment criteria for intensive farming

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175 Resource Management Act 1991, pt 12.

176 Sections 17(3) and 319(2).

177 See, for example, Hamilton City Operative District Plan 2012, r 2.1.3(c); and Regional Plan for Discharges to Land for the Wellington Region 2014, s 5.3.1(5)(a).

178 See, for example, Central Hawke's Bay District Plan 2003, pt 13.1; Bay of Plenty Regional Policy Statement 2014 at 123; Tairāwhiti Resource Management Plan 2017, pts B4.8.2(2)(h) and B5.5; Regional Air Quality Management Plan for the Wellington Region 2000, ss 2.4.1. and 4.2.9(7); Regional Plan for Discharges to Land for the Wellington Region 2014, ss 2.3.1 and 5.3.1(5)(a).

179 Hawke's Bay Regional Resource Management Plan 2015, s 5.5; and Hawke's Bay Regional Coastal Environment Plan 2014, at 28. 22.2

applications, but not effects on animals.[180] In several district plans, the only standards specifically set for activities involving animal use are set-back distances between buildings and site boundaries.[181] Sometimes, plans specifically call for animal interests to be curtailed. The Central Hawke's Bay District Plan, for example, invites conditions to be imposed "to ensure containment of animals."[182] It is clear that local authorities do not see setting animal welfare standards, or making provisions for the consideration of animal welfare, as part of their role. The Taranaki Regional Council's Director of Resource Management has explicitly said that "there isn't really a role for Councils in animal welfare."[183]

Mentions of animal welfare in resource consent decisions that have been appealed to the Environment Court are rare. The cases I have found do not include consideration of the interests of animals in relation to the Act's core purpose of promoting sustainable management, despite animal welfare being relevant to this. In *Stark v Waikato District Council*, possible effects of noise on animal welfare were considered "as a factual issue under s 104,"[184] as a result of the appellants' being concerned that the relocation of a gun club would affect "successful lambing and kidding of their sheep and goats."[185] This appeal was unsuccessful, but is a lone example of animal welfare science being presented before,[186] and

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180 Wairarapa Combined District Plan 2014, s 22.2.16. See also the Hauraki District Plan 2014, ss 5.1.7.5, 5.1.7.6 and 5.1.7.9, which specify containment of animals, buffer distances, effluent management, and "noise, small and glare," but not animal welfare, as assessment criteria for factory farms, animal feedlots, intensive outdoor farms, and boarding, breeding and training facilities.

181 See, for example, Far North District Plan 2017, rr 8.6.5.1.6, 8.7.5.1.10 and 8.8.5.1.6; and Hamilton City Operative District Plan 2012, rr 4.11.2(c) and 4.11A.2(g).

182 Central Hawke's Bay District Plan 2003, pt 14.3.4. See also the Hauraki District Plan 2014, ss 5.1.7.5 and 5.1.7.9, which include ensuring animals cannot escape as assessment criteria for factory farms, animal feedlots, and boarding, breeding and training facilities.

183 Email from Fred McLay (Director of Resource Management at the Taranaki District Council) to the author regarding animal welfare being considered under the RMA (8 September 2017).

184 *Stark v Waikato District Council* [2014] NZEnvC 150 at [8].

185 At [13].

186 At [22]-[35].

considered by,[187] the Environment Court.[188] In *Gray Cuisine v South Waikato District Council*, a condition was attached to a resource consent for a greyhound boarding, breeding and training facility requiring any "transportation trailer used for overnight kennelling" to "meet all applicable animal welfare requirements."[189] No other animal welfare issues were addressed, and this condition does no more than restate the existing requirements of the AWA. In *Craddock Farms Ltd v Auckland Council*, the Environment Court considered the "visual effects, traffic generation and safety, dust generation, potential effects on water supplies, noise, and odour"[190] of a proposed large-scale hen farm, and agreed with the Council's refusal of Craddock Farms' resource consent application on the basis of "the potential for objectionable odour that would be experienced by the neighbours."[191] They were not, however, concerned with animal welfare issues vociferously raised by protest actions.[192] It was accepted that the farm would comply with the Animal Welfare (Layer Hens) Code of Welfare 2012.[193] The Court did not assess what compliance with this code would mean in terms of effects of animals.

Some Environment Court decisions relating to enforcement have found that steps taken in the interests of animal welfare can contribute to breaches of the RMA. I have not, however, found any enforcement orders or abatement notices issued under the RMA due to adverse

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187 At [46]-[51].

188 In chapter 2(a): "Animal Welfare is Relevant Under the Resource Management Act" I argue that such an approach should be commonplace where proposed activities will have effects on animal welfare.

189 *Gray Cuisine v South Waikato District Council*, [2011] NZEnvC 121.

190 *Craddock Farms Ltd v Auckland Council* [2016] NZEnvC 51, (2016) 19 ELRNZ 390 at [24].

191 At [185] and [188].

192 Stop Craddock Farms "Egg farm owners get violent during peaceful protest" (29 March 2015) Scoop <www.scoop.co.nz/stories/PO1503/S00346/egg-farm-owners-get-violent-during-peaceful-protest.htm>; SPCA New Zealand "SPCA says Craddock Farms colony cage farm should not be built" (25 November 2015) <www.rnzspca.org.nz/news/38-press-releases/304-spca-opposes-colony-cage farm>; and Tao Lin "Animal activists protest as Craddock Farms appeal begins" (26 November 2016) Stuff <www.stuff.co.nz/business/farming/74429523/animal-activists-protest-as-craddock-farms-appeal-begins>.

193 *Craddock Farms Ltd v Auckland* Council, above n 190, at [3].

effects on animals. In *Northland Regional Council v Flood*, the defendant appeared for sentencing for offences relating to effluent run-off from his dairy farm, and contravention of an abatement notice.[194] Effluent had escaped into a local river as a result of the defendant allowing poorly-constructed feed pads to be used instead of paddocks, because weather conditions were making feeding cows on paddocks "impossible,"[195] causing animal welfare problems. The offending was explained in part, therefore, by a need to ensure the welfare of cows was provided for in terms of access to feed.[196] This need was not, however, included as a mitigating factor.

Northland Regional Council v Stanaway & Karl also involved multiple contaminant discharges from a dairy farm and a breach of an abatement notice.[197] In his decision on disputed facts, Judge Newhook acknowledged that the need to provide for animal health while using a farm "at the limits of the capability of the effluent system" had contributed to the discharge offences being committed.[198] When sentencing Karl, who managed the farm, Judge Newhook referred to his "passion for endeavouring to get things right… in terms of animal health" in finding that he should be discharged without conviction.[199] This formed part of a description of the defendant's character, rather than an analysis of the relevance of animal welfare to how farming is regulated by the RMA. Judge Newhook "found that blame for the state of affairs leading to the charges must rest almost entirely with the Stanaways,"[200]

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194 *Northland Regional Council v Flood* DC Auckland, CRI-2009-011-000697, 26 April 2012 at [2].

195 At [13]-[16].

196 At [16].

197 *Northland Regional Council v Stanaway & Karl* DC Whangarei, CRN10111500066, 2 August 2011 at [3] and [4].

198 At [88] and [100].

199 *Northland Regional Council v Karl* DC Whangarei, CRN10111500066, 1 December 2011 at [20] and [21].

200 *Northland Regional Council v Stanaway* DC Whangarei CRN10011500123, 20 February 2012 at [12].

who owned the farm, and made no mention of the contribution of animal health issues to their offending when fining them $67,000.[201]

By contrast, in *Waikato Regional Council v Smith*, a further unlawful dairy farm effluent discharge case, the role played by a concern for animal welfare contributed to Judge Harland discharging the defendant without conviction.[202] In *Waikato Regional Council v Cookson*, Judge Harland was sentencing Cookson for an offence of clearing vegetation in contravention of the Waikato Regional Plan.[203] Evidence of "a responsible approach to farming" was considered a mitigating factor.[204] This evidence included voluntary planting of native vegetation aimed at, inter alia, "improved animal welfare through the provision of shade."[205] These cases demonstrate judicial recognition of some of the ties between sustainable management and animal welfare, but to my knowledge no court has made a decision under the RMA that was expressly directed at avoiding effects on animal welfare.

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201 At [52].

202 *Waikato Regional Council v Smith* DC Hamilton, CRI-2009-063-000565, 15 March 2010 at [13] and [21].

203 *Waikato Regional Council v Cookson* DC Hamilton, CRI-2007-039-000927, 27 May 2009 at [1].

204 At [39].

205 At [1] and [38(c)(ii)].

2 *Proposal: Include Animal Welfare in Resource Management Practice*

In this chapter, I argue why incorporating animal welfare considerations into resource management decisions is both feasible and desirable. First, I argue that because of the way in which key terms, notably 'environment' and 'effect', are defined, animal welfare is relevant to decision-making under the RMA. I discuss how my proposal fits into the overall broad judgement approach that has been established for the granting of resource consents, and how incorporating animal welfare considerations would improve the holistic functioning of the RMA. I then set out how consideration of animal welfare would fit into RMA decision-making processes in practice at each stage of the consenting process. I discuss how the RMA's planning framework could be used to guide and support consideration of animal welfare issues, including by giving effect to standards set out by the AWA, and the codes that exist under it. Finally, I argue that this proposal would overcome flaws inherent in the AWA's reactive approach, and reduce reliance on it, by allowing for proactive, transparent scrutiny of the welfare implications of animal use.

(a) *Animal Welfare is Relevant Under the Resource Management Act*

Avoiding, remedying, or mitigating adverse effects of activities on animals forms part of the central purpose of the RMA. That purpose is "to promote the sustainable management of natural and physical resources."[206] "Sustainable management" is defined as:[207]

> managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

206 Resource Management Act 1991, s 5(1).

207 Section 5(2), definition of "sustainable management".

The environment is broadly defined to include:[208]

> (a) ecosystems and their constituent parts, including people and communities; and
>
> (b) all natural and physical resources; and
>
> (c) amenity values; and
>
> (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters

I interpret this definition as bringing the interests of non-human animals into the remit of the RMA. Animals are unequivocally a constituent part of ecosystems, and "natural and physical resources" are defined as including, inter alia, "all forms of plants and animals (whether native to New Zealand or introduced)."[209] I conclude, therefore, that the purpose of the RMA theoretically includes managing the use, development, and protection of animals in a way which enables people and communities to provide for their social, economic and cultural well-being while avoiding, remedying, or mitigating any adverse effects on animals.

"Effect" is also defined very broadly. The term includes:[210]

> (a) any positive or adverse effect; and
>
> (b) any temporary or permanent effect; and
>
> (c) any past, present, or future effect; and
>
> (d) any cumulative effect which arises over time or in combination with other effects—
>
> regardless of the scale, intensity, duration, or frequency of the effect

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208 Section 2, definition of "environment".

209 Section 2, definitions of "environment" and "natural and physical resources".

210 Section 3. See my discussion of the overall broad judgement below, at 30-31, where I demonstrate how wide the range of effects considered under the Resource Management Act 1991 (RMA) are.

Activities which include animal use involve a broad range of practices that have impacts which can be considered 'adverse effects' on animals.[211] For example, dairy farming, which I discuss in more depth in the following chapter, relies on subjecting cows to artificial impregnation,[212] separation from family, and slaughter.[213] In accordance with how I have interpreted the RMA, such effects are prima facie relevant to the s 17 "[d]uty to avoid, remedy, or mitigate adverse effects" and, because avoiding adverse effects on animals forms part of the RMA's central purpose, all provisions aimed at giving effect to the Act. These provisions include ss 30(1) and 31(1), which set out the functions of regional and territorial authorities, and ss 63(1) and 72 which set out the purpose of regional and district plans. Crucially, s 104(1)(a) requires consent authorities to "have regard to… any actual and potential effects on the environment" when considering resource consent applications, regardless of what type of resource consent it is for.[214]

Back Country Helicopters Limited v The Minister of Conservation supports my argument that, even in the absence of direct legislative reference to animal welfare, it can be considered in the course of environmental decision-making. This was a case of the Associate Minister of Conservation granting limited renewed concessions to an aerially-assisted trophy hunting operator.[215] In his High Court judgment, Kós J found that the breadth of ss 4(2), 5(1)(g) and 5(1)(h) of the Wild Animal Control Act 1977 (WAC) and s 17X of the Conservation Act 1987 meant that animal welfare concerns were not "irrelevant or improper."[216] The WAC provisions are directed at controlling and eradicating wild animals, and co-ordinating and regulating hunting operations, and gives the Minister of Conservation powers to licence and

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211 See chapter 3(b): "How Regard to Animal Welfare Might Have Affected the Decisions Made" at 56 where I outline some of the anticipated adverse effects on animals of intensive dairy farming.

212 Dairy Cattle Code of Welfare 2016, cl 5.12.

213 Clause 5.10.

214 See chapter 2(b): "How Regard to Animal Welfare Should Inform Resource Consent Decisions" for my full discussion of how my proposal should be implemented.

215 *Back Country Helicopters Limited v The Minister of Conservation* [2013] NZHC 982, [2013] NZAR 1474 at [4]-[5].

216 At [170].

impose conditions on hunting operations. The Conservation Act provision gives them the power to impose conditions on a concession. Neither make any reference to animal welfare.[217] Animal welfare fits far more neatly into the RMA's purpose of managing adverse effects on the environment, which is clearly defined to include animals.

RMA jurisprudence has developed the overall broad judgement approach to governing the use of natural resources. This is intended to ensure holistic environmental decision-making that considers all of the implications of allowing or disallowing an activity. The case of *North Shore City Council v Auckland Regional Council* used the term "overall broad judgement" to describe the RMA approach of considering applications to use the natural environment, or discharge contaminants into it, by assessing and balancing a range of considerations.[218] In *Watercare Services Ltd v Minhinnick*, the Court of Appeal described this approach as requiring them to "weigh all the relevant competing considerations and ultimately make a value judgment on behalf of the community as a whole".[219] All decision-makers operating under the RMA are expected to make such merits-based assessments, which are capable of going well beyond the matters expressly listed in the purpose and principles part of the Act.[220] In *Cook Islands Community Centre v Hastings District Council*, for example, the Court rejected a resource consent application for a Māori funeral parlour on the basis that it would offend deeply held cultural values of Cook Islanders, thereby adversely affecting their social and cultural well-being. This was despite pt 2 of the Act specifically providing for Māori values that the parlour would have served.[221] Other decisions have been influenced by community values as varied as public health, the availability of work, and cricket, despite

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217 Wild Animal Control Act 1977, ss 4(2) and 5(1)(g) and (h); and Conservation Act 1987, s 17X.

218 *North Shore City Council v Auckland Regional Council* (1996) 2 ELRNZ 305 (EnvC) at 347; the ubiquity of this approach is shown by its acceptance throughout Environment Court and High Court decisions, including *Man O'War Station v Auckland Regional Council* CIV-2010-404-005288 at [17]; *Foodstuffs (South Island) Ltd v Queenstown Lakes District Council* [2012] NZHC 135 at [284]; and *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2013] NZHC 1346 at [334].

219 *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 at 305.

220 Resource Management Act 1991, pt 2.

221 *Cook Islands Community Centre v Hastings District Council* [1994] NZRMA 375 at 379 and 381.

them not specifically mentioned in the RMA or relevant planning documents.[222] The overall broad judgement approach promotes the deciding of cases on their merits, and the courts have allowed stakeholders to raise values that merit consideration. I note, however, that the Supreme Court majority decision in *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* held that, at least in relation to plan changes, documents at the top of the RMA hierarchy can set 'environmental bottom lines' that constrain the discretion of decision-making using overall broad judgement.[223]

There is currently a dearth of consideration of effects on animals in the course of RMA decision-making which represents a significant gap in the overall broad judgement approach.[224] This is despite the fact that animal welfare is affected by, and within the purview of, the RMA. This exclusion amounts to a narrowing, in practice, of the RMA's broad definition of the environment.[225] The implication of this approach is that it prevents animal welfare concerns from influencing decisions. It allows harm to animals to go ahead without first scrutinising whether it is justified by the benefits of activities. It also excludes consideration of how physical resource uses interact with animal welfare, and vice versa. For example, agricultural systems that promote expression of natural behaviour have certain impacts the natural environment, for example by increasing nutrient leaching into waterways and air emissions.[226] According to the RMA's holistic ethos, both positive and negative impacts on animal welfare should be considered as a constituent of the environment alongside all the other things, like pollution and cultural impacts, that are considered and weighed in the course of overall broad judgement.

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222 *Tainui Hapu v Waikato Regional Council* (ENC Auckland A063/2004, 10 May 2004) at [185(c)]; *Buchanan v Northland Regional Council* [2002] BCL 530 at [109]; and *Re Canterbury Cricket Association Inc* [2013] NZEnvC 184 at [330] and [334].

223 *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [137], [152] and [154].

224 See chapter 1(d): "Consideration of Animal Welfare Under the Resource Management Act" for my discussion of the limited number of references to animal welfare in plans and consent and enforcement decisions issued under the RMA.

225 Resource Management Act 1991, s 2, definition of "environment".

226 Siegford, Powers and Grimes-Casey, above n 2, at 381.

In *Kaimanawa Wild Horse Preservation Society Inc v Attorney-General* it was affirmed that effects on animals are covered by the RMA,[227] albeit only in relation to activities that are otherwise governed by the Act.[228] The case related to a management plan that would remove wild horses from identified areas, which the appellant Society argued, inter alia, would compromise "unique genetic traits" and "natural selection processes."[229] This was said to amount to an adverse effect on the environment which contravened the principle of sustainable management and the s 17(1) "duty to avoid, remedy, or mitigate any adverse effect on the environment."[230] The Attorney-General sought dismissal of the applications on grounds that there was "no reasonable or relevant case," that it related instead to the Wildlife Act 1953, and that wild animal control is not "subject to the provisions of the RMA."[231] The case centred on the question of whether s 17 RMA was capable of applying to culling, mustering, and selling wild horses.[232]

In the Environment Court, Judge Sheppard identified that "sustainable management" is capable of applying to wild horses as a result of the broad definition of "natural and physical resources."[233] He found that the proposed activity was prima facie covered by the RMA, as it would adversely affect the environment.[234] This was consistent with *Zdrahal v Wellington City Council*, which was an appeal against an abatement notice issued

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227 Resource Management Act 1991, s 2, definitions of "environment" and "natural and physical resources".

228 *Kaimanawa Wild Horse Preservation Society Inc v Attorney-General* (1997) 3 ELRNZ 66, [1997] NZRMA 356 at 68, 74 and 80.

229 At 71-72.

230 At 69.

231 At 70.

232 At 73.

233 Resource Management Act 1991, s 2, definitions of "environment" and "natural and physical resources".

234 *Kaimanawa Wild Horse Preservation Society Inc v Attorney-General*, above n 228, at 77-78.

under the RMA requiring the appellants to remove swastikas that were visible to some neighbours.[235] In the course of dismissing the appeal, Greig J stated that:[236]

> In the end there can be no limit to the activities and the things [that] may be done or not done which come within the control and regulation of the Act so long as in the case of offensive or objectionable matters they have an adverse effect or objectionable matters they have an adverse effect on the environment.

Judge Sheppard, however, was concerned that such an interpretation of the RMA could also allow it to restrain activities such as possum control and weed clearing, and even human behaviour.[237] He cited *Falkner v Gisborne District Council*, in which Judge Barker said that "[t]he whole thrust of the regime is the regulation and control of the use of land, sea and air. There is nothing ambiguous or equivocal about this."[238] Judge Sheppard decided against imputing on Parliament an intention to restrain activities beyond "the use of land, sea and air," or that "were authorised under other legislation."[239] He distinguished *Zdrahal* on the basis that it was not a case directed at the limits of s 17(1).[240] Judge Grieg's analysis of s 17 was instead undertaken to ascertain the scope of abatement notices that may be issued under s 322 with respect to "offensive or objectionable matters."[241] The scope of s 17(1), however, was held to be impliedly restricted by the wider context of pt 3 of the RMA,[242] which only imposes specific duties relating to uses of land,[243] the coastal marine area,[244] river and lake

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235 *Zdrahal v Wellington City Council* [1995] 1 NZLR 700, [1995] NZRMA 289, (1994) 2 HRNZ 196 at 2.

236 At 11 and 18.

237 *Kaimanawa Wild Horse Preservation Society Inc v Attorney-General*, above n 228, at 78.

238 *Falkner v Gisborne District Council* [1995] 3 NZLR 622, [1995] NZRMA 462 at 29 as cited in *Kaimanawa Wild Horse Preservation Society Inc v Attorney-General*, above n 228, at 74.

239 At 68, 74 and 80.

240 At 79-80.

241 *Zdrahal v Wellington City Council* [1995] 1 NZLR 700, [1995] NZRMA 289, (1994) 2 HRNZ 196 at 9 at 11.

242 *Kaimanawa Wild Horse Preservation Society Inc v Attorney-General*, above n 228, at 82.

243 Resource Management Act 1991, s 9.

244 Section 12.

beds,[245] water,[246] discharges,[247] noise,[248] and emergencies.[249] Judge Sheppard held that culling and mustering horses was not a "use of land," or an activity involving, or ancillary to, the use or occupation of land.[250] It was, therefore, held to not be controlled by the RMA, or have adverse effects on the environment that the Environment Court has control over.[251] As a result of this finding, the Court did not hear the Society's substantive application.[252]

The result in *Kaimanawa Wild Horse Preservation Society* prima facie counters my assertion that effects on animal welfare can be considered under the RMA. Upon closer inspection of the ratio of Judge Sheppard's decision, however, it does not appear to preclude consideration of animal welfare with respect to any activity that involves use of land or water, or discharges into air. Judge Sheppard ruled against hearing the Society's substantive application on the basis that there was no activity of the kind controlled by the RMA involved; the proposed cull involved no conversion, utilisation, working, or occupation of land.[253] According to this judgement, the application of the RMA is limited to activities addressed in pt 3. This means that, as it is currently written, pt 3 of the RMA prevents my proposal from applying to activities that do not involve land or water use, or the discharge of contaminants into the environment. An example of such an activity, that would not be affected by my proposal, is the heli-hunting that was at issue in *Back Country Helicopters Limited*.[254] A broad range of animal uses, however, include activities of the kinds governed by pt 3 of the RMA; such as

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245 Section 13.

246 Section 14.

247 Section 15.

248 Section 16.

249 Section 18.

250 *Kaimanawa Wild Horse Preservation Society Inc v Attorney-General*, above n 228, at 81.

251 At 69.

252 At 83.

253 At 80-82.

254 *Back Country Helicopters Limited v The Minister of Conservation*, above n 215, at [7]-[8].

erecting structures,[255] disturbing habitats,[256] occupying the coastal marine area,[257] using water and discharging contaminants into the environment.[258] If such an activity involves animal use, its effects on animals can be considered under the RMA, notwithstanding the decision in in *Kaimanawa Wild Horse Preservation Society*.

There appears to be an understanding amongst RMA practitioners that animal welfare is not a relevant consideration under the RMA. In *Kaimanawa Wild Horse Preservation Society*, however, Judge Sheppard made no ruling on the respondent's assertion that the existence of the Wildlife Act 1953 precluded effects on wildlife from being considered under the RMA,[259] despite the fact that a management plan had been issued under the Wildlife Act authorising the cull.[260] The belief that animal welfare is irrelevant under the RMA has been shared by people working for the Taranaki and Waitaki District Councils, Environment Canterbury (ECan), the Ministry for the Environment and the Ministry for Primary Industries (then MAF).[261] References to the AWA in decisions discussed above indicate that the Environment

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255 Resource Management Act 1991, s 2, definition of "use", para (a)(i).

256 Section 2, definition of "use", para (a)(iii).

257 Section 12(2)(a).

258 Sections 14-15. Note, however, that the s 2 definition of "industrial or trade premises" excludes "production land" (land and auxiliary buildings used for producing primary products, including animal products). This in turn excludes "production land" from the prohibitions on contaminant discharges into or onto air and land (ss 15(1)(c) and (d). Given the other discharges and land and water uses involved in primary production, however, this exception does not prevent my proposal from applying to agricultural or pastoral animal use.

259 *Kaimanawa Wild Horse Preservation Society Inc v Attorney-General*, above n 228, at 74.

260 At 78.

261 McLay, above n 183; David Bruce "Resource consents for dairy farms" (12 December 2009) Otago Daily Times <www.odt.co.nz/regions/north-otago/resource-consents-dairy-farms>; Sally Raw "Deadline looms for dairy plans" (14 Jaunary 2010) Otago Daily Times <www.odt.co.nz/regions/north-otago/deadline-looms-dairy-plans>; Ministry for the Environment "Resource Consent Applications for Dairy Farming Under-Cover in the MacKenzie Basin" (8 January 2010) 10-B-00003 at [11]; Email from Sarah Gardner (Executive Director of Hazardous Incidents and Environmental Health at the New South Wales Environment Protection Authority) to the author regarding advice given by the Ministry for the Environment to the Hon Dr Nick Smith regarding

Court expects the AWA to fill this gap in RMA decision-making.[262] But for some specific provisions,[263] however, the AWA does not provide for prospective analysis of the effects of activities. Generally speaking, it sets out a reactive regime that cannot act as a substitute for consideration of effects of animals as part of the RMA's proactive planning and consenting processes.

It has been suggested that consideration of animal welfare under the RMA is precluded by the very existence of the AWA, a more specific piece of legislation (at least in relation to animal welfare) which was passed eight years later.[264] As I will go on to discuss in more detail,[265] in the course of considering consent applications for intensive dairy farming operations in the Mackenzie Basin, the Ministry for the Environment agreed with legal advice received by ECan that "animal welfare concerns… are for the Animal Welfare Act 1999 rather than the Resource Management Act 1991."[266] This may be the result of misunderstandings of the breadth of the RMA's definition of "environment,"[267] or the doctrine of implied repeal pro tanto being misconstrued. Not only is this reasoning contradicted by examples of animal welfare cropping up (albeit sporadically) in the course

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Mackenzie Basin dairy farming resource consent applications (24 August 2017); Interview with Andrea Speir, Manager of Legislation, Standards and International Team in the Ministry for Primary Industries Legal Team (the author, Wellington, 31 August 2017); Nick Smith "Minister calls in Mackenzie Basin dairy discharge consents" (27 Jaunary 2010) beehive.govt.nz <www.beehive.govt.nz/release/minister-calls-mackenzie-basin-dairy-discharge-consents>.

262 *Gray Cuisine v South Waikato District Council*, above n 189; and *Craddock Farms Ltd v Auckland Council*, above n 190, at [3]. See chapter 1(d): "Consideration of Animal Welfare Under the Resource Management Act" at 24 for my discussion of these cases.

263 See chapter 1(a): "The Animal Welfare Act 1999" at 9-10 in which I outline the prospective approaches taken to regulating live animal exports and research, testing and teaching.

264 McLay, above n 183; Bruce, above n 261; Raw, above n 261; Ministry for the Environment, above n 261; Gardner, above n 261; Speir, above n 261; Smith, above n 261; and Tava, above n 63.

265 See chapter 3(a): "The Proposed Farms and Resource Consent Application Process" at 52-53.

266 Ministry for the Environment, above n 261, at [11].

267 Resource Management Act 1991, s 2, definition of "environment"; and s 3; see chapter 2(a): "Animal Welfare is Relevant Under the Resource Management Act" at 28-29 for my interpretation of these definitions.

of RMA decision-making,[268] if it is an application of the doctrine of implied repeal it is legally incorrect.

As set out by Lord Langdale in *Dean of Ely v Bliss*:[269]

> If two inconsistent Acts be passed at different times, the last must be obeyed, and if obedience cannot be observed without derogating from the first, it is the first which must give way.

This is the doctrine of implied repeal.[270] It means that, if consideration of animal welfare under the RMA was inconsistent with the AWA, the enactment of the AWA in 1999 would have impliedly repealed, pro tanto, functions of the RMA with respect to animal welfare. "Pro tanto" implied repeal applies where a later, specific Act (such as the AWA) carves out an exception to an earlier, general one (like the RMA).[271] As stated by Chambers J in *Chief Executive of Land Information New Zealand v Luke*, "[t]here is a general maxim of interpretation requiring general statutory provisions… to yield to specific ones."[272] This seems to have been the thinking of practitioners who have considered whether animal welfare can be considered under the RMA.

The assumption that the AWA precludes consideration of animal welfare under the RMA, however, ignores the fundamentally different approaches of the two statutes. The courts strive to reconcile statutes and avoid implied repeal, and this is not difficult in this case.[273] The function I am arguing that the RMA should perform is prospective consideration of the

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268 See chapter 1(d): "Consideration of Animal Welfare Under the Resource Management Act"; in particular *Stark v Waikato District Council*, above n 184, at [22]-[35] and [46]-[51].

269 *Dean of Ely v Bliss* (1842) 2 Beav 575.

270 See also Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 471.

271 At 478.

272 *Chief Executive of Land Information New Zealand v Luke* [2008] NZCA 43 at [15].

273 Carter, above n 270, at 467; and Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 543.

effects of activities on animals, whereas the AWA performs a reactive role by responding to animal welfare issues when they arise. The RMA can be used to scrutinise animal welfare implications of proposed activities without limiting the ability of the AWA to enforce animal welfare standards. This is analogous to the case of *Reay v Minister of Conservation*, in which the Court of Appeal held that, in the absence of an express exclusion, the existence of the Fisheries Act 1996 did not preclude commercial fishing from falling within the purview of the Conservation Act 1987.[274] It was acknowledged that the two statutes performed different roles;[275] the Fisheries Act 1996 operates permissively (similarly to the AWA) while providing for fisheries sustainability, while the Conservation Act 1987 is cautious and restrictive, ala the RMA.[276]

Implied repeal may, however, prevent my proposal from operating with respect to animal export and RTT, as the AWA does provide for prospective licensing of these practices. It could be argued that Parliament would not intend for these activities to pass through the resource consent process in addition to the bespoke approval processes set out in the AWA. Legislative reform would, therefore, be required to move the licensing of these activities to the purview of the RMA. For similar reasons, it could be said that the duties imposed on people in charge of animals by the AWA, and their enforcement by inspectors, supersede the RMA duty "to avoid, remedy, or mitigate any adverse effect on the environment" and its enforcement.[277] Broadly speaking, however, the functions of the RMA and the AWA can be reconciled, and even support each other.[278] Given that implied repeal is a last resort doctrine that is not needed in this instance,[279] the existence of the AWA does not rule out my proposal.

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274 *Reay v Minister of Conservation* [2015] NZCA 461 at [15] and [17].

275 At [12].

276 At [19] and [23].

277 Resource Management Act 1991, s 17(1); see chapter 1(c): "The Resource Management Act 1991" at 22 for some detail on enforcement of the RMA.

278 See chapter 2(d): "Use of the Resource Management Act Would Improve Animal Welfare".

279 *Kutner v Phillips* [1891] 2 QB 267 (QBD) at 275.

(b) *How Regard to Animal Welfare Should Inform Resource Consent Decisions*

Effects on animal welfare should be considered by consent authorities when making their first decision regarding an application for resource consent; whether to publicly notify it.[280] Regard for of animal welfare is only precluded from this process where it is not a matter for consideration with respect to a controlled or restricted discretionary activity.[281] Consent authorities also have discretion to disregard effects on animals that occur in the course of any activities permitted by an NES or relevant rule.[282] This would allow them, for example, to disregard the effects of any permitted forms of animal agriculture. Otherwise, however, pursuant to the broad definitions of "effect" and "environment" discussed above,[283] consent authorities cannot reliably decide whether or not an "activity will have or is likely to have adverse effects on the environment that are more than minor" without having regard to the degree of likely adverse effects on animals.[284] If they were to consider such effects, they would be more likely to publicly notify resource consent applications for activities involving animal use. In the event of public notification, animal welfare matters may be raised by submissions. Any person may make a submission on a publicly notified application,[285] as can people served with notice with respect to limited-notification applications.[286]

Similarly, effects on animals should be considered by consent authorities when making the substantive decision on whether to grant consent. The requirement that consent authorities "have regard to… any actual and potential effects on the environment of allowing the activity" means that both positive and negative implications for animal welfare should be examined.[287] They should, therefore, be considering the adverse effects of things such as

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280 Resource Management Act 1991, s 95; see chapter 1(c): "The Resource Management Act 1991" at 17 21 for more detail on the entire resource consent process.

281 Resource Management Act 1991, s 95D(c).

282 Section 95D(b).

283 Section 2, definition of "environment"; and s 3; see chapter 2(a): "Animal Welfare is Relevant Under the Resource Management Act" at 28-29 for my interpretation of these definitions.

284 Resource Management Act 1991, s 95A(2)(a).

285 Sections 96(1) and 96(2).

286 Sections 96(3) and 96(4).

287 Sections 104(1)(a) and 3(a).

confinement, physical stress, and the separation of family members, as well as welfare gains for animals brought about things like safety, healthcare, and social interaction. When considering restricted discretionary activities, however, animal welfare may only be considered if it is a matter that a NES, regulations, or plan rules allow the consent authority have regard to.[288] As consent authorities may decline resource consent on the basis they have inadequate information to make a determination,[289] applicants may be required to discuss animal welfare in their resource consent applications. If a consent authority decided it should have regard to animal welfare, unless this was addressed by the applicant they would likely use s 92 to request or commission the provision of further information.[290]

Such consideration of animal welfare should form part of the overall broad judgement approach to ensure that the linkages between animal welfare and use of the natural environment are recognised and considered.[291] Agricultural practices in particular often bring the aims of allowing animals to express innate behaviour, reducing pollution and maximising production quantities into conflict.[292] For example, providing animals with more space increases surface area per excretion mass, which increases rates of methane and ammonia emissions. Allowing pasture grazing also increases methane production due to increased dietary fibre, compared to grain feeding.[293] Steps can also sometimes be taken which are conducive to simultaneously improving welfare and environmental outcomes. For example, cattle have been found to prefer drinking from water troughs, so providing troughs aligns with their desires while reducing effluent runoff into waterways.[294] While pasture grazing increases methane emissions, it also reduces ammonia emissions by allowing for urine to be

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288 Section 104C(1).

289 Section 104(6).

290 Sections 92(1) and 92(2).

291 See chapter 2(a): "Animal Welfare is Relevant Under the Resource Management Act" at 30-31 for discussion of the overall broad judgement approach.

292 Siegford, Powers and Grimes-Casey, above n 2, 380 at 381.

293 At 382.

294 Ibid.

quickly absorbed by soil.[295] These are just some examples of the complex competing factors at play that should be considered holistically when deciding whether an activity involving animals should proceed.

The classification of proposed activities will determine what impact any regard for animal welfare will have. If an application is for resource consent for a controlled activity, the consent will be granted regardless, but the consent authority may impose conditions for matters "over which control is reserved in national environmental standards or other regulations,"[296] or in the consent authority's plan or proposed plan.[297] After considering likely effects including, where relevant, effects on animals, consent authorities have discretion to grant or refuse resource consent for discretionary and restricted discretionary activities.[298] Consent authorities are only able to grant resource consent for non-complying activities if they are satisfied adverse effects, including on animals, will be minor,[299] or that the activity is not contrary to relevant objectives and policies.[300] Consent authorities are able to attached conditions to consents that could, inter alia, require monitoring of animal welfare and adherence to certain standards.[301] In the case of consents that have already been granted, consent authorities are entitled to review their conditions in order to deal with adverse effects on animals.[302] This follows a similar process to the consideration of a resource consent application at first instance.[303] Such reviews could improve animal welfare through changes in conditions,[304] or lead to consents being cancelled on the grounds of having "significant

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295 Ibid.

296 Resource Management Act 1991, s 104A(b)(i).

297 Section 104A(b)(ii).

298 Sections 104(b) and 104C(2).

299 Section 104D(1)(a).

300 Section 104D(1)(b).

301 Sections 108(1) and 108(4). See 1(d): "Consideration of Animal Welfare Under the Resource Management Act" at 24 for my discussion of *Gray Cuisine v South Waikato District Council*, above n 189, in which a condition of meeting animal welfare requirements was attached to a resource consent.

302 Resource Management Act 1991, s 128(1)(a)(i).

303 Section 130.

304 Section 132(1).

adverse effects" on animals.[305] The applicant, and people who have submitted on a resource consent application, can appeal decisions on resource consents and reviews of consent conditions to the Environment Court on the grounds that insufficient regard was had to effects on animal welfare.[306]

Pursuant to the ratio of *Kaimanawa Wild Horse Preservation Society*, my proposal would only apply to activities which involve "the use of land, sea and air."[307] Animal use that does not involve use of land or water, or any contaminant discharges (a commercial hunting operation, for example), is not covered by the RMA and would, therefore, not be covered by my proposal.[308] It would also not apply to situations where activities do not otherwise require consent because they are classed as permitted activities by the "Act, regulations (including any national environmental standard), a plan, or a proposed plan."[309] In order for all animal use to fall under the RMA, pt 3 would need to be amended to include a section that imposes restrictions on the use of animals, with a corresponding form of 'animal use consent' introduced as a type of resource consent under s 87.

(c) *Accommodating Animal Welfare in the Resource Management Act Framework*

The consideration of animal welfare in the course of the resource consent process could be supported by provisions in instruments that exist in the RMA framework. NES's, regional policy statements and plans, and district plans, are able to provide consent authorities and the Environment Court with guidance on assessing animal uses and their effects. The very purpose of these documents is to aid achieving the purpose of the Act,[310] which I interpret as

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305 Section 132(3)(c).

306 Section 120(1).

307 *Kaimanawa Wild Horse Preservation Society Inc v Attorney-General*, above n 228, at 82; and *Falkner v Gisborne District Council*; above n 238 at 29.

308 Resource Management Act 1991, pt 3 and s 87; see chapter 2(a): "Animal Welfare is Relevant Under the Resource Management Act" at 32-35 for my full discussion of *Kaimanawa Wild Horse Preservation Society Inc v Attorney-General*, above n 228.

309 Resource Management Act 1991, s 87A(1).

310 Sections 59, 61(1)(b), 63(1), 66(1)(b), 72 and 74(1)(b).

including avoiding, remedying, or mitigating any adverse effects on animals.[311] This could be done by setting uniform standards across Aotearoa via NES's and other national-level regulations.[312] Regional policy statements, regional plans and district plans set policies and rules to be adhered to at the smaller regional or district levels.[313] Such documents could, inter alia, specify certain animal-use activities as permitted,[314] controlled,[315] restricted discretionary,[316] discretionary,[317] non-complying,[318] or prohibited,[319] require animal-users to obtain certificates of compliance with animal welfare standards,[320] require reviews of existing consents that allow animal use,[321] and require consent authorities to give public notification for animal use consent applications.[322] They could also set out animal welfare objectives and policies,[323] and particular animal welfare matters to be controlled by consent authorities.[324] Expanding the scope of RMA instruments in this way could proactively instigate or prevent consideration of animal welfare during the resource consent process, such as by making animal welfare a mandatory or a prohibited consideration. It could also direct or constrain such consideration, as a response to it beginning to occur in practice in the absence of national- or local-level guidance.

A 'National Environmental Standard for Animal Welfare' could be created to set nationally consistent minimum standards for the use of land and water, and the discharge of

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311 See chapter 2(a): "Animal Welfare is Relevant Under the Resource Management Act".

312 Resource Management Act 1991, s 43(4)(a).

313 Sections 59, 63 and 72.

314 Sections 43A(1)(b) and 77A(2)(a).

315 Sections 43A(6)(a)(i) and 77A(2)(b).

316 Sections 43A(6)(a)(ii) and 77A(2)(c).

317 Sections 43A(6)(a)(iii) and 77A(2)(d).

318 Sections 43A(6)(a)(iv) and 77A(2)(e).

319 Sections 43A(1)(a) and 77A(2)(f).

320 Section 43A(1)(d).

321 Section 43A(1)(f).

322 Sections 43A(7)(a) and 77D(a).

323 Sections 62(1), 67(1)

324 Section 43A(6)(b)(i).

contaminants, with respect to effects on animals.[325] This would involve the Minister for the Environment following the process set out in s 46A RMA which requires, inter alia, offering the public "adequate time and opportunity" to make submissions.[326] It would have the effect of requiring consent authorities to have regard to relevant animal welfare standards when considering resource consent applications.[327] Presently, NES's exist for issues such as air quality,[328] telecommunication facilities,[329] and soil contamination.[330] They are rather similar to the codes which, under the AWA, set nationally consistent standards for particular animals and animal uses, such as dairy cattle,[331] layer hens,[332] and rodeo.[333] One option for forming, at least in part, a National Environmental Standard for Animal Welfare would be incorporate codes by reference into a NES,[334] thereby drawing the attention of consent authorities to applicable minimum standards and best practice when deciding whether to grant resource consent to activities involving animal use.

Other possible starting points are the AWA's "care of animals" obligations and prohibitions on misconduct toward animals.[335] For example, the Five Freedoms could be used as assessment criteria for applications,[336] or consent authorities could be required to assess the

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325 Section 43(1)(a).

326 Sections 44 and 46A(4)(b).

327 Section 104(1)(b)(i); currently, s 104(1)(b)(ii) requires consideration of "other regulations," but this does not include codes, as s 2 of the RMA defines "regulations" as "regulations made under this Act".

328 Resource Management (National Environmental Standards for Air Quality) Regulations 2004.

329 Resource Management (National Environmental Standards for Telecommunication Facilities) Regulations 2016.

330 Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011.

331 Dairy Cattle Code of Welfare 2016.

332 Animal Welfare (Layer Hens) Code of Welfare 2012.

333 Rodeos Code of Welfare 2014; See chapter 1(a): "The Animal Welfare Act 1999" at 7-8 for more on codes of welfare.

334 Resource Management Act 1991, s 46A and sch 1AA.

335 Animal Welfare Act 1999, pts 2 and 3.

336 Section 4.

likelihood of ill-treatment of animals occurring.[337] If animal welfare standards were set in the form of a NES, the operation of the RMA hierarchy of planning documents prescribes that any more specific standards set at regional or district level would have to be consistent with them.[338] In light of the majority decision of the Supreme Court in *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd*, it seems an apex document in the RMA hierarchy, such as an NES, could be used to set animal welfare "bottom line[s]."[339] These would be resolutely worded provisions that prevent overall broad judgement from being used to allow activities that fall below certain welfare standards.

Alternatively, or in addition to national-level guidance, regional or district level documents could set out policies and rules that would aid consent authorities looking to have regard to animal welfare. Regional policy statements and documents could aid consideration of animal welfare in cases where activities involve the use of water, the coastal marine area, or contaminant discharges,[340] while district plans could manage the welfare implications of different forms of land use.[341] Like NES's, plans can incorporate documents such as codes by reference,[342] and could use AWA concepts to set assessment criteria. Local authorities could also set bespoke animal welfare rules in order to meet particular regional or territorial objectives. A council could, for example, make a rule requiring all applications for resource consent that involve animal use be publicly notified,[343] so as to maximise opportunities for public discussion of welfare concerns. Communities are able to argue that animal welfare, and particular animal welfare objectives, policies, and standards, should be incorporated into local RMA instruments by making submissions on proposed documents and being heard at

337 Section 2, definition of "ill-treat".

338 Resource Management Act 1991, ss 62(3), 67(3) and 75(3).

339 *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd*, above n 223, at [132] and [152]; and Warnock, above n 111, at 516.

340 Resource Management Act 1991, s 30(1).

341 Section 31(1).

342 Schedule 1, cl 30.

343 Section 77D.

hearings.[344] They can also request changes to plans to reflect animal welfare concerns.[345] Local authorities would have to decide on such matters, and give reasons for their decisions,[346] and the submitters would be entitled to appeal the decisions on animal welfare matters to the Environment Court.[347]

(d) *Use of the Resource Management Act Would Improve Animal Welfare*

I believe that expanding the scope of the RMA's proactive approach to managing resource use would improve animal welfare in Aotearoa by augmenting the AWA's predominantly reactive approach. Where resource consent applicants are proposing activities that would involve animal use, my proposal would require them to justify any adverse effects on animal welfare. This process would amount to more than a box-checking exercise; it would allow for increased, ongoing, and iterative scrutiny of animal use on a case-by-case basis as animal welfare science and social attitudes toward animal use, and the harms involved, evolve. It would also ensure that applicants are aware of their animal welfare obligations.[348] Each time an application came before a consent authority or the Environment Court would be a fresh opportunity for consideration of what is considered acceptable in terms of animal use. This would allow evaluation of individual, specific animal welfare issues and the public's interest in them as they arise and in light of the most up-to-date relevant scientific information. This change in practice would, with respect to how animal welfare is considered in New Zealand's legal system, follow the approach set by RMA for proactively managing effects on the rest of the environment.[349] Promoting animal welfare in this way is not without precedent;

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344 Schedule 1, cls 6(3) and 8B(a).

345 Schedule 1, cls 21(1) and 22(1).

346 Schedule 1, cls 10(1) and 10(2)(a).

347 Schedule 1, cls 14(1) and 14(2)(a).

348 This is part of the goal of compliance set out by the Ministry of Agriculture and Forestry, above n 3, at 16.

349 Resource Management Act 1991, s 2, definition of "environment".

practices like live animal export and RTT are already managed using proactive licensing systems under the AWA.[350]

This proposed change would enable public input and transparent discussion around what forms of animal use are considered acceptable in Aotearoa. Humans react to harm caused to animals, as they do to damage caused to other aspects of the environment.[351] It matters to people, as well as animals, how animals are treated, and we tend to believe we have a responsibility to ensure the needs of animals in human care are met.[352] People's subjective connections to the environment extend to valuing good animal welfare, regardless of whether they are involved in the use of the animals.[353] The overall broad judgement approach to resource consenting has developed to give weight to such community values.[354] Furthermore, animal welfare scientists are constantly developing knowledge around how best to promote animal well-being. Currently, such experts and the public are only given opportunities input into how animal welfare is promoted in Aotearoa when a draft code of welfare is notified for public consultation by NAWAC,[355] or the Minister is undertaking consultation ahead of creating regulations under the AWA.[356] However, opportunities for such consultation are sporadic, and in the case of regulations the Minister is not required to consult the public, and

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350 Animal Welfare Act 1999, pts 3 and 6; see discussion of these regimes in chapter 1(a): "The Animal Welfare Act 1999" at 9-10.

351 Ministry for Primary Industries *Animal welfare matters: New Zealand Animal Welfare Strategy* (May 2013) at 4.

352 Siegford, Powers and Grimes-Casey, above n 2, 380 at 380; and Katherine Baker "Consorting with Forests: Rethinking Our Relationship to Natural Resources and How We Should Value Their Loss" (1995) 22 Ecology L Q 677 at 680 and 697.

353 At 685, 691, 694-696 and 699-700; and Loveridge, above n 2, at 93-94.

354 *Cook Islands Community Centre v Hastings District Council*, above n 221, at 379 and 381; *Tainui Hapu v Waikato Regional Council*, above n 222, at at [185(c)]; *Buchanan v Northland Regional Council*, above n 222, at [109]; and *Re Canterbury Cricket Association Inc*, above n 222, at [330] and [334]. See chapter 2(a): "Animal Welfare is Relevant Under the Resource Management Act" at 47-48 for my discussion of the relevance of community values to decision-making.

355 Animal Welfare Act 1999, ss 71 and 72.

356 Section 184(1).

MPI expects people who want to make submissions to be signed up to a NAWAC email alert list.[357] By contrast, a central tenet of the RMA is allowing public input into a range of ongoing planning and consenting decisions.[358]

The RMA envisages people being able to express their values and have them borne in mind by decision-makers, both when policy statements and plans are being prepared or changed, and when resource consent applications for activities involving animal use are being considered. Decision-makers should be considering the value of good animal welfare in cases where this is something that the public is concerned about. My proposal would involve a paradigm shift from such consideration only occurring when high-level AWA policy documents, like codes, are open for consultation, to a situation where the public can have input into individual decisions that are going to affect animals. It is true "that most of us live in a willed blindness towards the issue of animal suffering."[359] Ignorance, uncertainty and denial around the true welfare implications of animal use prevent society from confronting it and addressing welfare shortcomings.[360] Animals that are more visible in society are typically afforded greater legal protection.[361] It is MPI's "position that "practices that are generally accepted should be allowed to take place."[362] I think this is a callous point of view. Being unwilling to undertake proactive, critical assessment of animal use contributes to inertia that slows animal welfare improvements. My proposal would allow those who are aware of potential suffering to bring it to the attention of decision-makers so it does not occur without first being justified.

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357 Ibid; and Ministry for Primary Industries, above n 37, at 21-23.

358 Geoffrey Palmer "The Making of The Resource Management Act" in *Environment – The International Challenge: Essays* (Victoria University Press, Wellington, 1995) at 146; and *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014], above n 223, at [15].

359 Mickey Gjerris "Willed Blindness: A Discussion of Our Moral Shortcomings in Relation to Animals" (2015) 28 J Agric Environ Ethics 517 at 525.

360 At 525; and O'Sullivan, above n 68, at 158.

361 O'Sullivan, above n 68, at 65-66.

362 Ardern, above n 30 at 7.

This proposal would reduce the pressure on the AWA's monitoring and enforcement regime. As I have discussed, the shear amount of animal use, and the unexposed nature of many harms to animals, makes the task of enforcing the AWA very difficult.[363] Animal welfare issues are far less detectable than, for example, unauthorised land or water use, or contaminant discharges. Reliance on the AWA to ensure good animal welfare strikes of dependence on an ambulance at the bottom of a cliff.[364] The flaws in this approach could be addressed, in part, by increasing numbers of AWA inspectors and the support available to them. My proposal, however, would reduce the pressure on the AWA's enforcement regime by being the equivalent of putting a fence at the top of the cliff. MPI have themselves recognised that "[m]any animal welfare problems can be avoided with better planning."[365] Including consideration of animal welfare in RMA processes would prevent activities from going ahead where an applicant cannot show they will ensure adequate animal welfare, or that effects on animals are not expected to have commensurate benefits. It would promote, as MPI have called for, planning to prevent identified risks to animal welfare, and designing facilities that meet animals' core needs.[366] While this proposal would only affect activities that pass through the resource consent process, rather than all animal use,[367] it would reduce occurrences of activities which might have adverse, and irreversible, "unreasonable or unnecessary" effects on animal welfare. This would in turn reduce dependence on punishing AWA offenders after the fact.[368]

These improvements to animal welfare law in Aotearoa would make efficient use of the existing RMA framework. As I have discussed, this framework operates holistically; with

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363 Stats NZ, above n 1, at tables 1 and 7; Ministry for Primary Industries, above n 1, at 3; and Siobhan O'Sullivan, above n 68, at 65-66, 68 , and 77.

364 See chapter 1(b): "Shortcomings of the Animal Welfare Act".

365 Ministry for Primary Industries, above n 351, at 6.

366 Ibid.

367 *Kaimanawa Wild Horse Preservation Society Inc v Attorney-General*, above n 228, at 68, 74 and 80. See my discussion of this case in chapter 2(a): "Animal Welfare is Relevant Under the Resource Management Act" at 32-25.

368 Tava, above n 63.

the Act, regulations, policy and planning documents, and practitioners working with local authorities and the Environment Court, combining to manage resource use.[369] My proposal is to improve animal welfare by inserting animal welfare considerations into this structure, thereby making use of existing institutions and processes. It essentially amounts to a small expansion of the existing overall broad judgement approach, so as to increase the attention paid to applications that pass through the resource consent process. Animal welfare gains could be achieved with minimal additional time, cost, and effort from people working in the fields of animal and resource management law. MPI has identified that the government could be using "regulatory and other interventions to ensure [animal welfare standards] are met."[370] I think the resource consent process is an ideal candidate. Considering the animal welfare implications of activities that go through the resource consent process would not only be legally correct and beneficial, it is practicable.

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369 See chapter 1(c): "The Resource Management Act 1999" and my discussion of the overall broad judgement approach in chapter 2(a): "Animal Welfare is Relevant Under the Resource Management Act" at 30-31.

370 Ministry for Primary Industries, above n 351, at 7.

3 *Case Study: Intensive Dairy Farming in the Mackenzie Basin*

In this final chapter, I test my proposal using an example of a contentious plan that raised significant animal welfare concerns when it entered the resource consent process. Firstly, I provide some background information and describe the unsuccessful resource consent process the applicants went through. I explain how the consent authorities involved could have considered animal welfare, and the implications this might have had. I then discuss how such consideration could have been aided by the existence of animal welfare standards set out in a NES or the relevant plans. Finally, I argue that following my proposal would have ensured better decision-making in this case by weighing all of the significant issues at play, and being proactive to avoid a potential animal welfare disaster.

(a) *The Proposed Farms and Resource Consent Application Process*

In 2009, plans were announced by Williamson Holdings Ltd, Southdown Holdings, and Five Rivers Limited to establish 16 new dairy farms in the Omarama and Ohau areas of the Mackenzie Basin, in New Zealand's South Island. These farms would use under-cover 'cubicle' stalls to house up to 17,850 cows.[371] The cows would be confined to these cubicles for 24 hours a day for eight months of the year between March and October, and 12 hours a day between November and February.[372] While this method of dairy farming was expected to better manage emissions of pollutants into air, land and water, and potentially utilise methane to generate power for farming and the grid,[373] it raises significant animal welfare

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371 Neal Borrie *Applications by Williamson Holdings Ltd, Southdown Holdings Ltd and Five Rivers Ltd for a resource consents to take and use water* (Aqualine Research Limited, Evidence, 16 October 2009) at [7]; and Raw, above n 261.

372 Borrie, above n 371, at [8]; and Paul Gorman "Cubicle dairy farms' fate may lie with Govt" (6 January 2010) Stuff <www.stuff.co.nz/business/farming/3210439/Cubicle-dairy-farms-fate-may-lie-with-Govt>.

373 Borrie, above n 371, at [25]; Claire Browning "National Policy Statement: wholly happy cows" (21 December 2009) Pundit <www.pundit.co.nz/content/national-policy-statement-wholly-happy-cows>; and Vernon Tava "'Cubicle' Dairy Farming: Factory farming by another name" (12 December 2009) The Solution <https://thesolution.org.nz/2009/12/12/cubicle-dairy-farming-factory-farming-by another-name>.

issues, such as increased rates of disease and the trauma of confinement.[374] One of the companies' directors, however, publicly claimed that the cows would be sufficiently free and comfortable.[375] Land use consent applications were submitted to ECan for building, and using, effluent storage ponds and the cubicle stables. ECan also received discharge permit applications relating to depositing solid and diluted effluent onto land, and contaminants from the ponds into the air.[376]

Analysis of submissions received in relation to the resource consent applications suggests that around 75 per cent of them raised welfare concerns.[377] As mentioned above, the relevant consent authority, ECan, received advice that effects on animal welfare could not be considered because "issues in terms of animal welfare are more appropriately addressed via the Animal Welfare Act."[378] This was despite the same legal advice stating that effects on New Zealand's international reputation; a factor not present in the RMA, might fit the Act's scope. Furthermore, this advice stated that welfare concerns were irrelevant because "the application is for a discharge permit,"[379] and only effects that relate to the activity for which consent is sought need to be considered.[380] In actual fact, nine of the 15 applications at issue

374 Jes Lynning Harfeld and others "Seeing the Animal: On the Ethical Implications of De-animalization in Intensive Animal Production Systems" (2016) 29 J Agric Environ Ethics 407 at 411; Sara Shields and Geoffrey Orme Evans "The Impacts of Climate Change Mitigation Strategies on Animal Welfare" (2015) 5 Animals 361 at 374; and Tava, above n 373.

375 Jarrod Booker "PM watches out for 'free-range' brand" (9 December 2009) NZ Herald <www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10614363&ref=rss>.

376 Smith, above n 261.

377 Letter from Bryan Jenkins (Chief Executive of Canterbury Regional Council) to Nick Smith (Minister for the Environment) regarding resource consent applications in the Mackenzie Basin (23 December 2009).

378 Ibid.

379 Ibid.

380 Ibid.

were for land use consent,[381] and s 104(1)(a) of the RMA requires broad regard to "any actual and potential effects... of allowing the activity," contrary to ECan's limited interpretation.[382]

In advising the Minister for the Environment on 'calling-in' the applications for national-level consideration, government officials concurred with the advice that welfare concerns should be left to the AWA,[383] and concluded that both "animal welfare and of New Zealand's farming image… sit outside the powers of the [RMA]."[384] On 27 January 2010, the Minister for the Environment, the Hon Dr Nick Smith MP, called in the resource consent applications lodged with ECan on the grounds that they were nationally significant; due to their scale, the fragile and iconic nature of the Mackenzie Basin environment, the importance of freshwater quality to the Government, and the high level of public interest." Despite making up a substantial portion of the public interest, animal welfare concerns were not mentioned as a factor, and Dr Smith reiterated that "animal welfare issues fall outside the jurisdiction of the RMA."[385]

Land use consents for earthworks and intensive farming were granted by Waitaki District Council (WDC), without public notification, a few months prior to the applications for 15 other consents being called in. The Council had not considered effects on animal welfare in concluding that the effects were not more than minor. They too believed that the existence of the AWA precluded them from considering animal welfare issues.[386] One aspect of the application that supported the granting of the resource consents was the fact that the proposed facilities would not be visible from State Highway 8. Furthermore, a condition was attached

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381 Smith, above n 261

382 See chapter 2(a): "Animal Welfare is Relevant Under the Resource Management Act" at 29 where I point out that animal welfare is theoretically relevant to decisions on all types of resource consent.

383 Ministry for the Environment, above n 261, at [11].

384 At [35].

385 Smith, above n 261. See chapter 1(c): "The Resource Management Act 1991" at 19 for an explanation of the call in process.

386 Bruce, above n 261.

requiring landscaping to further obscure views of the dairying sheds.[387] These are precisely the sorts of things that contribute to the difficulties inherent in enforcing the AWA, and in this case helped the applicants obtain resource consent.[388]

The land use consents granted by WDC were overturned following a challenge by the Environmental Defence Society in the High Court. This resulted from a discovery during court proceedings that a Council officer had acted without proper authority in the course of the decision-making. The challenge had originally alleged errors of law in the decisions themselves, including deciding against public notification.[389] Applications for these consents were refiled in October 2010, but put on hold pending decisions from ECan on the associated water permits. The companies withdrew from the board of inquiry process for the consents specific to the 'cubicle' elements of the proposal, apparently because of the "extraordinary cost of the call-in process."[390]

(b) ***How Regard to Animal Welfare Might Have Affected the Decisions Made***

In this case, there were several stages at which consideration of animal welfare might have led to different decisions being made. Firstly, the WDC decided against publicly notifying the consent applications for earthworks and intensive farming. This means that they decided that the activities were not "likely to have adverse effects on the environment that are more

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387 Ibid.

388 See chapter 1(b): "Shortcomings of the Animal Welfare Act" at 10-11 for my discussion of how the tendency for animal use to be hidden poses barriers to enforcing welfare standards; and chapter 3(b): "How Regard to Animal Welfare Might Have Affected the Decisions Made" for my thoughts on how my proposal could have led to contrasting conditions being imposed.

389 Gary Taylor "Environmental Defence Society's court challenge" (26 February 2010) Mackenzie Guardians <http://mackenzieguardians.co.nz/2010/02/environmental-defence-societys-court-challenge>.

390 David Bruce "Change of plan on dairy farms" (19 March 2010) Otago Daily Times <www.odt.co.nz/regions/north-otago/change-plan-dairy-farms>; and David Bruce "New bids for indoor dairying" (29 October 2010) Otago Daily Times <www.odt.co.nz/regions/north-otago/new-bids-indoor-dairying>.

than minor."[391] It is clear that animal welfare was not considered by the WDC neither in the course of this decision, nor when it applied s 104 in making the subsequent decision to grant the consents.[392] Perhaps if animal welfare had been considered, the decision would have been publicly notified, leading to submissions that might have encouraged the WDC to decline, rather than grant, the land use consents. ECan also decided they would consider the applications lodged with them without regard to animal welfare, which was then excluded as a factor behind the Ministerial call in. Issues covered in evidence submitted to ECan,[393] and matters on which ECan requested further information,[394] were things like land disturbance, water allocation, discharges of effluent, nutrients, and odour, and noise effects; but not animal welfare. Pursuant to my argument, however, if either ECan or the board of inquiry had gone ahead with considering the applications they could, and should, have paid attention to the animal welfare concerns raised by thousands of public submissions.[395] As I discuss in the following section, animal welfare issues could have been addressed by planning documents under the RMA, thereby providing the consent authorities with guidance on how to incorporate effects on animals into any resource consent decisions made.[396]

If the WDC, ECan, the Board of Inquiry or the Environment Court had considered animal welfare to be relevant, there are a range of things to which they could have had regard. These include the decreased ratio of human employees to cows on more densely populated farms that results in less individualised attention to the welfare of animals, as their health is

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391 Resource Management Act 1991, s 95A(2)(a).

392 Bruce, above n 261.

393 John Kyle *Resource consent applications made by Various Parties to the Canterbury Regional Council associated with the irrigation of properties within the Upper Waitaki Catchment* (Canterbury Regional Council, Evidence, 22 November 2011) at [3.2]; and Borrie, above n 371, at [6].

394 Letters from Anita Warnock (Consents Project Leader, Environment Canterbury) to Craig McKibbin (Mitchell Partnerships Environmental Consultants) regarding requests for further information on consent applications submitted by Five Rivers Limited, Southdown Holdings Limited and Williamson Holdings Limited (18 January 2010).

395 See chapter 2(a): "Animal Welfare is Relevant Under the Resource Management Act" at 30-31 for my substantive argument and discussion of the relevance of community values to decision-making.

396 See chapter 3(c): "Animal Welfare Standards Could Have Provided Guidance".

addressed at a herd level.[397] Compared to conventional New Zealand dairy farming, in such a scenario there is a greater chance of the obligation to alleviate ill or injured cows' pain or distress not being met, leading to adverse effects on their welfare.[398] As grazing animals, cows are unable to express normal behaviour if housed inside,[399] and housing of cows appears to increase aggression.[400] Being kept in sheds in an area where temperatures can exceed 35°C is clearly risky,[401] and lack of sunlight and high concentrations of ammonia and pathogens are particular concerns.[402] Such farming practices increase rates of conditions like mastitis, hock lesions, and lameness,[403] and decrease the average lifespan of cows from around 15 to six years.[404] There is also concern that, by holding animals in industrial rather than natural or semi-natural settings, and reducing opportunities for them to express innate behaviour, they are perceived as less morally relevant, leading to those with control over them doing less to promote their welfare.[405] In sum, there are a broad range of adverse effects on animals that could, in tandem with other adverse effects, have led to consent being declined. As mentioned above,[406] in granting resource consents the WDC viewed the fact that facilities would not be visible from the road favourably, and imposed a condition requiring the dairying sheds to be further obstructed from public view with landscaping.[407] Had animal welfare been a

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397 Shields and Evans, above n 374, at 374; and Harfeld and others, above n 374, at 414-415.

398 Animal Welfare Act 1999, s 11(1).

399 Harfeld and others, above n 374, at 410; and G Arnott, CP Ferris and NE O'Connell "Review: welfare of dairy cows in continuously housed and pasture-based production systems" (2017) 11(2) Animal 261 at 265.

400 At 266.

401 Paul Rogers, Michael Bowden, James Cooke and Edward Ellison *Williamson Holdings Limited – CRC041788 and CRC073115* (Canterbury Regional Council, Report and Decision of Hearing Commissioners Part B - Site Specific Decision, 22 November 2011) at [9.43]; and Arnott, Ferris and O'Connell, above n 398, at 269.

402 At 263; and Harfeld and others, above n 374, at 414.

403 At 411; and Arnott, Ferris and O'Connell, above n 398, at 262-263.

404 Shields and Evans above n 374, at 375.

405 Harfeld and others, above n 374, at 408 and 414.

406 See chapter 1(a): "The Proposed Farms and Resource Consent Application Process" at 53-54.

407 Bruce, above n 261.

consideration, perhaps the WDC would have taken an opposing view, and attached conditions to aid, rather than hinder, oversight of how cows are being treated.[408]

There is also evidence that this practice may have some animal welfare benefits, relative to other methods of dairy farming. These include the avoiding or mitigation of muddy pasture trails, certain diseases, and hoof and leg injuries through the use of a more controlled environment.[409] It is a farming system that increases consistency in terms of things like temperature and food supply, and reduces exposure to adverse weather and gastrointestinal parasites.[410] Animal welfare is a multi-faceted concept; animal use practices affect various aspects of it differently.[411] It is important to bear in mind that the RMA requires consideration of positive effects,[412] so inclusion of regard for animal welfare in the overall broad approach would include considering how a proposal might improve, as well as diminish, animal welfare outcomes. Using the RMA to promote better treatment of animals, as well as avoiding adverse effects on them, would address some of the AWA's shortcomings. It would help achieve the aim of ensuring the welfare of animals is properly attended to.[413]

(c) *Animal Welfare Standards Could Have Provided Guidance*

The lack of reference to animal welfare in district and regional plans means that there was little guidance immediately available to the consent authorities on how to consider animal welfare.[414] Assessments of the proposals against relevant planning documents had no reason to reference animal welfare.[415] The WDC, ECan, the Board of Inquiry and the Environment Court would have been much more able to have regard to animal welfare had existing

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408 See chapter 1(c): "The Resource Management Act 1991" at 20-21 for more detail on resource consent conditions.

409 Gjerris, above n 359, at 521; and Arnott, Ferris and O'Connell, above n 398, at 263 and 269.

410 Gjerris, above n 359, at 521; and Arnott, Ferris and O'Connell, above n 398, at 269.

411 Ibid.

412 Resource Management Act 1991, s 3(a).

413 Animal Welfare Act 1999, s 9(1).

414 See chapter 1(d): "Consideration of Animal Welfare Under the Resource Management Act" at 22-23 where I outline the lack of references to animal welfare in RMA instruments.

415 Kyle, above n 393, at [1.5] and [3.2].

documents in the RMA framework provided some assistance. The Canterbury Land and Water Regional Plan makes no reference to animal welfare, with the exception of provisions made for ensuring sufficient quantity and quality of animal drinking water.[416] The Waitaki District Plan provides for consideration of "odour, noise, outlook or nuisance" effects of farming,[417] "methods used to ensure containment of animals" and "[t]he difficulty of eliminating escaped animals," but not animal welfare.[418] While the lack of reference does not preclude consent authorities from having due regard to effects on animals, including relevant animal standards in the RMA framework would aid such consideration.[419]

It was acknowledged by the Prime Minister of the time, the Rt Hon John Key, that there was a need to consider setting specific animal welfare standards for indoor dairy farming.[420] His government, and the multi-national dairy co-operative Fonterra, were concerned that allowing "factory farming" would negatively impact New Zealand's "brand."[421] The first Dairy Cattle Code of Welfare (the Code) issued under the AWA was in a draft stage at the time these plans came to light, and was published just over three weeks after the applications lodged with ECan were called in for national-level consideration.[422] Prior to it being finalised, the then Minister of Agriculture (the role now entitled Minister for Primary Industries) the Rt Hon David Carter asked NAWAC to urgently review the welfare issues involved in this sort of dairying.[423] When published, the Code included a section on "Housing Cows and

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416 Canterbury Land and Water Regional Plan 2017, s 5.36.

417 Waitaki District Plan 2010, s 18.1(ix)(i).

418 Sections 18.1(xxvii)(b) and (c).

419 See chapter 2(c): "Accommodating Animal Welfare in the Resource Management Act Framework" for my discussion of how such standards could be set.

420 (8 December 2009) 659 NZPD 8292.

421 Booker, above n 375; and Andrea Fox "Fonterra sticks by criticism of 'factory' plan" (9 December 2009) Stuff <www.stuff.co.nz/business/farming/3145150/Fonterra-sticks-by-criticism-of-factory-plan>.

422 (8 December 2009) 659 NZPD 8292; and Animal Welfare (Dairy Cattle) Code of Welfare 2010.

423 (8 December 2009) 659 NZPD 8292; and Browning, above n 373.

Calves" that has been retained in its two subsequent versions.[424] This section sets standards that could, if incorporated into the RMA framework, guide consent authorities considering the animal welfare implications of allowing intensive indoor dairy farming.[425]

The Code notes that "[t]here is an increasing interest in the housing of dairy cattle" and that "[i]n these situations animals are totally dependent on stockpeople."[426] It calls for dairy cattle housing to provide "dry, well ventilated and draught free" accommodation that allows each cow to lie down for eight hours per day.[427] It recommends, as best practice, providing dry and comfortable bedding, not allowing soiled bedding to accumulate to a point that is poses a threat to welfare, ensuring circulation keeps "dust levels, temperature, relative humidity and gas concentrations" within safe limits, and providing lighting sufficient to enable animal inspection without being "so intense as to cause discomfort."[428] It also sets "Minimum Standard No. 9," which requires:[429]

> (a) Dairy cattle must be able to lie down and rest comfortably for sufficient periods each day to meet their behavioural needs.
>
> (b) All fittings and internal surfaces, including entry races and adjoining yards that may be used by the housed animals, must be constructed and maintained to ensure there are no hazards likely to cause injury to the animals.
>
> (c) Ventilation must be sufficient to prevent a build-up of harmful concentrations of gases such as ammonia and carbon dioxide.
>
> (d) If ammonia levels of 25 ppm or more are detected within the housing, immediate action must be taken to reduce the ammonia levels.

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424 Animal Welfare (Dairy Cattle) Code of Welfare 2010, cl 4.5; Dairy Cattle Code of Welfare 2014, cl 4.5; and Dairy Cattle Code of Welfare 2016, cl 4.5.

425 Schedule 1AA of the Resource Management Act 1991 sets out the process for incorporating documents by reference into national environmental standards.

426 Animal Welfare (Dairy Cattle) Code of Welfare 2010, cl 4.5.

427 Ibid.

428 Ibid.

429 Ibid.

(e) All sharp objects, protrusions and edges, including damaged flooring likely to cause injury to dairy cattle, must be removed, repaired or covered.

It is worth noting that the recommended best practice set out in codes have no legal effect under the AWA, and the minimum standards are not directly enforceable. Non-compliance with a minimum standard is merely evidence of an AWA breach,[430] while compliance provides a defence to certain AWA offences.[431] Things like dry bedding, circulation that ensures safe dust and temperature levels, and comfortable lighting, are, under this code, only recommendations. They could, however, provide a consent authority with helpful guidance when deciding whether to grant consent for indoor dairying. The consent authority could satisfy itself that the cows would be sufficiently safe and comfortable according to these criteria in the course of granting consent. Alternatively, they might find that the proposal would have majorly adverse effects on cows in terms of exposure to damp, cramped, hazardous, gaseous, unclean or bright conditions, and decline the consent on those grounds.

RMA instruments could have directed the consent authorities to consider the relevant standards in the Code or, as an alternative, called on them to have regard to the Five Freedoms.[432] This would have ensured they at least went through how the proposal would provide cattle with their "physical, health, and behavioural needs" in terms of food and water, shelter, opportunity to display normal behaviours, pain- and distress-free handling, and protection from injury and disease.[433] They could similarly have been advised to assess the applicant's ability to ensure animals are not ill-treated,[434] so as to proactively reduce pressure on pt 2 of the AWA. The AWA provides a starting point for imagining what animal welfare factors the WDC, ECan, and the board of inquiry could have considered, but in the future

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430 Animal Welfare Act 1999, s 13(1A).

431 Sections 13(2)(c) and 30(2)(c). See my discussion of codes of welfare in chapter 1(a): "The Animal Welfare Act 1999" at 9-10.

432 See my discussion of the Five Freedoms in chapter 1(a): "The Animal Welfare Act 1999" at 5.

433 Animal Welfare Act 1999, s 4.

434 Section 2, definition of "ill-treat".

such criteria could be set out in policy statements and plans developed with input from the Waitaki and Canterbury communities to reflect local values and objectives.[435]

(d) *Considering Animal Welfare Would Have Ensured Better Decision-Making*

The indoor farming of dairy cows has been recognised as a practice which raises complex environmental and animal welfare issues.[436] If it is to occur in Aotearoa, it is a practice that should, at the very least, attract in-depth scrutiny in terms of *all* of its effects on the environment.[437] The RMA exists to "mediate when private or commercial interests collide with the public and environmental interest."[438] Indeed, the scale of public interest and the expected effects of this activity were the very reasons given for the applications being called in for national-level consideration.[439] Failure to consider a major focus of that public interest; animal welfare,[440] is particularly troubling given that this method of dairy farming is novel to Aotearoa.[441] It is not something that has garnered environmental, ethical, or social acceptance in this jurisdiction, and as noted by the government has the potential to tarnish New Zealand's reputation.[442] Along with regard for things like water quantity and quality, the landscape, and the economy, serious consideration of effects on the animals ought to occur. This requires detailed scrutiny of the welfare implications of how the cows will be used. Issues such as the proposed herd density and facilities and care available should be assessed in a precautionary, evidence-based manner.[443] The RMA is supposed to operate

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435 See chapter 2(c): "Accommodating Animal Welfare in the Resource Management Act Framework" at 45-46 for my discussion of including animal welfare in local policy statements and plans.

436 Gjerris, above n 359, at 520-521.

437 Browning, above n 373. See chapter 2(a): "Animal Welfare is Relevant Under the Resource Management Act" at 28 for my analysis of the broadness of the definition of "environment" in s 2 of the RMA.

438 Browning, above n 373.

439 Smith, above n 261.

440 Jenkins, above n 377.

441 Browning, above n 373.

442 Booker, above n 375; and Fox above n 421.

443 Gjerris, above n 359, at 523.

holistically,[444] but in cases such as this one an absence of regard for animal welfare considerations prevents RMA decision-making from truly occurring in the round.

The reduction of this decision to consideration of economic benefits and pollution ignores a significant elephant in the room; the wellbeing of tens of thousands of cows.[445] This is precisely the kind of situation where prospective consideration of animal welfare issues could avoid reliance on the enforcement arm of the AWA down the line.[446] Animals' interests could, and should, be considered alongside things like, for example, the prospects of some methane emissions being harnessed as a power source or fertiliser.[447] The Code says that "dairy cattle housing needs to be" designed and constructed "with the well-being of the animals in mind."[448] Meeting this "need" is not, however, obligatory under the AWA. It is, along with a long list of recommended practices found throughout the codes, recognised as a thing that is good for animal welfare, but the law currently does nothing proactive to promote it. However, at the design stage, prior to construction, the RMA does have control over proposals for things like intensive dairy farms.[449] Consent authorities determine what evidence has to be produced to prove a proposal's acceptability,[450] and how standards are to be met, such as by imposing conditions.[451] This control could be used to improve animal welfare outcomes across a range of activities that involve animal use and pass through the resource consent process. It is an Act that could be used to ensure that new farming operations are established with appropriate regard to animal welfare. This would fill a gap in New Zealand's animal welfare law; the lack of proactive measures to reduce harm to animals.[452] In this case, it would manage the risk of such a novel operation generating unanticipated

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444 See my discussion of the overall broad judgement approach in chapter 2(a): "Animal Welfare is Relevant Under the Resource Management Act" at 30-31.

445 Tava, above n 373.

446 Tava, above n 63.

447 Tava, above n 373.

448 Animal Welfare (Dairy Cattle) Code of Welfare 2010, cl 4.5.

449 Resource Management Act 1991, ss 104A-104D.

450 Section 92.

451 Section 108.

452 Tava, above n 63.

welfare problems that would then have to be addressed, after animals had been harmed, by MPI.[453] To say that dairy farms should be developed with regard to promoting animal welfare is an uncontroversial proposition. The RMA is capable of giving effect to it.

453 Ministry for Primary Industries, above n 37, at 14.

Conclusion

Reliance on the Animal Welfare Act 1999 for the promotion of animal welfare in Aotearoa is inherently limited by its modus operandi. The AWA is broadly permissive with respect to animal use, and reliant on reactive enforcement measures kicking in when animals that are suffering ill-treatment or a lack of care are detected by inspectors. These inspectors are hamstrung trying to carry out this role by restrictive budgets and the hidden nature of many of modern society's uses of animals. The Resource Management Act 1991 offers a solution to this problem. It sets out a cautious, proactive regime, that hitherto has rarely considered animal welfare, but is in fact perfectly capable of doing so.

Widening the overall broad judgement approach, in accordance with the Act's broad definitions of environment and effect, could provide animals with a valuable first line of defence against the impacts of human activity. The RMA provides a readymade framework of instruments, institutions and practitioners that can be expanded slightly to provide for having regard to effects on animals. This is legal and practicable, and would produce opportunities for transparent discussion about the acceptability of different animal uses, leading to improved animal welfare outcomes, and reducing reliance on AWA enforcement. The legal state of affairs that I have set out, and the social desire to see proposals such as indoor dairy farming considered with regard to animal welfare, lead me to believe that my proposal is ready to be put into effect.

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"I saw no horrors, no drug-testing laboratories, no factory farms, no abattoirs. Yet I am sure they are here. They must be.
They simply do not advertise themselves. They are all around us as I speak, only we do not, in a certain sense, know about them."

- JM Coetzee *The Lives of Animals* (1999)