

**Whose Interests Are We Really Protecting?
Regulatory Capture in the New Zealand Animal
Welfare Regime**

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Table of Contents

Introduction	1
CHAPTER 1: Overview of the New Zealand Animal Welfare Scheme	4
<i>I. The Animal Welfare Act 1999</i>	4
<i>II. Codes of welfare</i>	5
<i>III. Regulatory bodies</i>	6
CHAPTER 2 Regulatory Capture and Animal Welfare	8
<i>I. What is regulatory capture?</i>	8
<i>II. The public interest theory</i>	8
<i>III. Legislating for animal welfare – Intention and public interest justifications</i>	9
CHAPTER 3 Is Regulatory Capture Happening in New Zealand’s Animal Welfare Regime?	12
<i>I. Brief overview of Australia’s animal welfare scheme</i>	12
<i>II. Indicators of regulatory failings</i>	14
<i>A. Inadequate animal welfare standards</i>	14
1. Public conceptions	14
2. Animal welfare standards in other countries	16
3. Legislative mandate	19
<i>B. Prevalence of serious animal welfare incidents within the agricultural sector</i>	20
<i>C. Presence of regulatory process deficiencies</i>	22
1. Industry influence in the process of developing standards	22
2. Industry Influence over the development of animal welfare science	24
3. Insufficient compliance and monitoring standards	27
<i>D. Legislative Deficiencies</i>	28
<i>III. Pathways to regulatory capture</i>	30
<i>IV. Productivity vs animal welfare</i>	31
<i>V. Reputation vs animal welfare</i>	33
CHAPTER 4 Options for Reform	36
<i>I. Independent animal welfare authorities</i>	36
<i>II. Inspector-General or Ombudsman for animal welfare</i>	37
<i>A. A body for animal welfare independent of the Executive</i>	38
<i>III. Tripartism</i>	41
Conclusion	44
Bibliography	45

Introduction

Farm animals contribute greatly to New Zealand's economy.¹ New Zealand's primary industries generate about \$42 billion a year in exports, with animal products taking up a large percentage of it.² The United Nations COMTRADE database reports that in 2019, New Zealand exports of dairy products, eggs, honey, edible products were worth US\$10.66 billion, exports of meat and edible meat offal were US\$5.31 billion and exports of live animals were US\$200.24 million.³ The most common destinations for New Zealand's exports in 2019 were China, Australia, United States, Japan and South Korea.⁴

Given how profitable animal products are in the exports industry, it is without question that the New Zealand government as well as industries themselves value New Zealand's farming industries as they have a lot to gain. The key players in the farming industry include New Zealand Pork (NZPork), DairyNZ, Egg Producers Federation of New Zealand (EPF), the Poultry Industry Association of New Zealand (PIANZ) and the Meat Industry Association (MIA). These industry boards are not only responsible for representing their respective industries, but they also claim to promote high welfare standards for their animals. For example, DairyNZ claims to take animal welfare seriously, NZPork mentions "reinforcing welfare standards" and the EPF talks about "supporting an egg farming industry that looks to employ the highest possible standards, encompassing not just egg quality but hen welfare as well".⁵ The American Veterinary Medical Association provides an explanation on what exactly animal welfare is.⁶

Animal welfare means how an animal is coping with the conditions in which it lives.

An animal is in a good state of welfare if (as indicated by scientific evidence) it is healthy, comfortable, well-nourished, safe, able to express innate behavior, and if it is

¹ For the purposes of this dissertation, all discussion is limited to the industries involved in the agricultural sector, and "farm animals" refers to animal in that sector, mainly dairy cows, beef cattle, pigs, layer hens and broiler chickens.

² Ministry for Primary Industries "Exporting" <<https://www.mpi.govt.nz/exporting/>>.

³ Trading Economics "New Zealand exports of dairy products, eggs, honey, edible products" <<https://tradingeconomics.com/new-zealand/exports/dairy-products-eggs-honey-edible-products>>; Trading Economics "New Zealand exports of meat and edible meat offal" <<https://tradingeconomics.com/new-zealand/exports/meat-edible-meat-offal>>; Trading Economics "New Zealand exports of live animals" <<https://tradingeconomics.com/new-zealand/exports/live-animals>>.

⁴ Trading Economics "New Zealand Exports by Country" <<https://tradingeconomics.com/new-zealand/exports-by-country>>.

⁵ DairyNZ "Animal Welfare" <<https://www.dairynz.co.nz/animal/welfare>>; New Zealand Pork "Welcome" <<https://www.nzpork.co.nz/>>; Egg Producers Federation of New Zealand "About EPF" <<https://www.eggfarmers.org.nz/about-eggs/about-epf>>.

⁶ American Veterinary Medical Association "Animal Welfare: What Is It?" <<https://www.avma.org/resources/animal-health-welfare/animal-welfare-what-it>>.

not suffering from unpleasant states such as pain, fear, and distress. Good animal welfare requires disease prevention and veterinary treatment, appropriate shelter, management, nutrition, humane handling, and humane slaughter. Animal welfare refers to the state of the animal; the treatment that an animal receives is covered by other terms such as animal care, animal husbandry, and humane treatment. Protecting an animal's welfare means providing for its physical and mental needs.

Ensuring animal welfare is a human responsibility that includes consideration for all aspects of animal well-being, including proper housing, management, nutrition, disease prevention and treatment, responsible care, humane handling, and, when necessary, humane euthanasia.

Ultimately, this dissertation will show that animal welfare is not as big a priority to both industries and government in New Zealand as they claim.

There are laws in place to protect the interests of animals and maintain higher animal welfare standards. New Zealand has the Animal Welfare Act 1999 (AWA), the Animal Welfare (Care and Procedures) Regulations 2018 and the codes of welfare, all of which will be further explained in the coming chapters. This dissertation argues that regulatory capture exists within New Zealand laws intended to protect farm animals and those laws favour the interests of industries over the interests of animals. In short, regulatory captures means industries influencing the regulatory process to advance their own interests. This argument is made by analysing provisions within the AWA, explanatory notes of the Animal Welfare Bill (No. 2), permitted practices under the codes of welfare made under the Act, reports by the Ministry for Primary Industries (MPI) and the National Animal Welfare Advisory Committee (NAWAC), who are both functionaries under the Act, and literature or articles on regulatory capture in farm animal welfare regimes both in New Zealand and in Australia. In analysing these materials, I discuss whether New Zealand's animal welfare laws reflect industry or animal interests, the extent of industry influence and other factors contributing to the occurrence of regulatory capture.

Chapter 1 provides a brief introduction to the animal welfare regime we have in New Zealand by outlining the relevant parts of the AWA, the codes of welfare and the regulatory bodies responsible for animal welfare such as the MPI and NAWAC.

Chapter 2 defines “regulatory capture” and looks at the purpose behind legislating for animal welfare. There is also discussion on the public interest theory and animal welfare being

in the public's interest. The main argument is that it is in the interest of the public to have higher animal welfare standards, but because of regulatory capture, the public interest has become subordinate to industry interest.

Chapter 3 draws out the issues embedded within New Zealand's animal welfare regime that allow for regulatory capture to occur. Comparisons are made to Australia's farm animal welfare regime while reviewing the work of Jed Goodfellow on regulatory capture in that sector. Arguments made by Goodfellow serve as a good base for discussion that regulatory capture is happening in New Zealand too. He uses indicators of regulatory failings that are useful in setting up and guiding my analysis on New Zealand's farm animal welfare regime. It also demonstrates how regulatory capture in farm animal welfare laws is an occurring problem in other countries. This chapter analyses the indicators of regulatory failings, pathways to regulatory capture and the debate between productivity and reputation verses animal welfare.

Chapter 4 is a discussion on possible options for reform. It looks at what an ideal system would be to reduce industry influence and prevent regulatory capture from happening.

CHAPTER 1: Overview of the New Zealand Animal Welfare Scheme

New Zealand's animal welfare scheme comprises of the Animal Welfare Act 1999 (AWA), the Animal Welfare (Care and Procedures) Regulations 2018 and the codes of welfare. The AWA sets out primary offences which are punishable by convictions, fines, prosecution, or imprisonment. The codes set out detailed standards in relation to particular industries or uses of animals. Regulations replicate certain standards in codes and are directly enforceable either by infringement fine or regulatory prosecution, but only a small fraction of standards from codes are incorporated into regulations. This dissertation looks more closely at the Act and codes. This chapter intends to provide a brief introduction to the Act, codes of welfare and regulatory bodies responsible for animal welfare in New Zealand as this will help with understanding the arguments and context of this dissertation better.

I. The Animal Welfare Act 1999

The AWA came into force in 2000, replacing the Animals Protection Act 1960. The AWA shifts the focus of animal welfare legislation from being punitive based to placing an expectation on owners or those in charge of animals to properly attend to their welfare.⁷ The Act has a very broad definition of “animal”, including any live member that is a mammal, bird, reptile, amphibian, fish or crustacean.⁸

Part 1 of the AWA is on the care of animals. Its purpose is to ensure that owners and people in charge of animals attend properly to the welfare of animals.⁹ This part of the Act sets out obligations of owners or people in charge of animals to meet an animal's physical, health and behavioural needs and to alleviate pain and distress.¹⁰ These obligations reflect the “five freedoms” of animal welfare, which are freedom from hunger and thirst by providing access to fresh water and a good diet; freedom from discomfort by providing suitable shelter and resting environment; freedom from pain, injury and disease by prevention or immediate diagnosis and treatment; freedom to behave naturally by providing sufficient space, facilities and company from the same species; and freedom from fear and distress which is to ensure mental suffering is avoided.¹¹

⁷ Kevin J Stafford *Animal Welfare in New Zealand* (NZSAP, Cambridge (NZ), 2013) at 18.

⁸ Animal Welfare Act 1999, s 2.

⁹ Section 9.

¹⁰ Sections 10 and 11.

¹¹ N Wells and MB Rodriguez Ferrere *Wells on Animal Law* (2nd ed, Thomson Reuters, Wellington, 2018) at 98.

Part 2 of the AWA regulates conduct towards animals. The purpose of this part is to state what conduct is and is not permissible.¹² This part of the Act creates the offence of ill-treatment, wilful ill-treatment and reckless ill-treatment.¹³ It also regulates practices like hunting, animal fighting, and use of traps and devices.

II. Codes of welfare

The processes for drafting and recommending codes of welfare are set out in Part 5 of the AWA. Codes of welfare establishes minimum standards and recommendations on best practices for how people care for animals and conduct themselves towards such animals (s 68).¹⁴ New Zealand has 19 different codes of welfare that set out detailed requirements for a particular species of animals or specific practices.¹⁵ The codes also contain example indicators that the standards have been met. For example, minimum standard no. 4(a) in the Code of Welfare for Dogs states that “dogs must not be contained or tethered in a way that causes them injury or distress”.¹⁶ The recommended best practice for that standard is that dogs should not be left unattended, or routinely tethered by choke-chains or other devices, collars should be checked frequently and loosened if they become tight.¹⁷

Codes are legally binding but not directly enforceable. That means a breach of a minimum standard within a code does not in itself constitute an offence and it is not a ground for a prosecution. It is rebuttable evidence at best that a person has failed to comply with a relevant provision of the AWA. On the other hand, compliance with a code will be a defence if a person is charged under the Act for ill-treatment offences or failure to meet behavioural needs of animals. If a defendant can prove that he met or exceeded minimum standards of a code of welfare when the alleged offence occurred, then he has a defence.¹⁸

Codes of welfare are issued by the Minister for Primary Industries following advice from NAWAC after a public consultation process.¹⁹ The Act allows any person or organisation to draft a code of welfare and submit it to NAWAC for consideration.²⁰ “Person” includes

¹² Animal Welfare Act, s 27.

¹³ Sections 29, 28 and 28A.

¹⁴ Section 68.

¹⁵ These are: Circuses, Cats – pet or companion, Dairy Cattle, Deer, Dogs, Goats, Horses and donkeys, Layer hens, Llamas and alpacas, Meat chickens, Ostriches and emus, Painful husbandry procedures, Pigs, Rodeos, Sheep and beef cattle, Slaughter of animals, Temporary housing of companion animals, Transport of animals, and Zoos.

¹⁶ Code of Welfare: Dogs (2018), minimum standard 4(a), at 12.

¹⁷ Code of Welfare: Dogs (2018), recommended best practice, at 12.

¹⁸ Animal Welfare Act, ss 13(2)(c) and 30(2)(c).

¹⁹ Section 75.

²⁰ Section 70.

“corporation sole, a body corporate, and an unincorporated body”.²¹ NAWAC must then publicly notify the draft code if they are satisfied that the draft should proceed, it complies with the purposes of the AWA, it is clearly written and indicates matters that should be dealt with by regulations, the representatives of persons likely to be affected by the draft has been consulted and the Minister has approved the notification of the draft.²² NAWAC may consult with those who make submissions on the draft code of welfare.²³ Before making a recommendation to the Minister, NAWAC must be satisfied that the proposed standards are the minimum necessary to ensure that the purposes of the AWA are met and that the recommended best practices are appropriate.²⁴ NAWAC must also take into account all submissions, good practice and scientific knowledge, available technology or any other relevant matters.²⁵ If relevant, NAWAC may also consider practicality and economic impact.²⁶

III. Regulatory bodies

The primary regulatory responsibility for animal welfare rests with the Ministry of Primary Industries (MPI), formerly the Ministry of Agriculture and Forestry (MAF). The MPI is advised by two committees – the National Animal Welfare Advisory Committee (NAWAC) and the National Animal Ethics Advisory Committee (NAEAC).²⁷ The role of the MPI will be discussed further in Chapter 3.

Part 4 of the AWA creates NAWAC out of the existing Animal Welfare Advisory Committee (AWAC) formed in 1989 when Hon Colin Moyle acceded to a submission from the animal welfare lobby.²⁸ NAWAC’s functions, that are set out in the AWA, include advising and making recommendations to the Minister on matters regarding animal welfare in New Zealand.²⁹ The membership of NAWAC consists of a chairperson, the chairperson of the NAEAC and up to nine other members.³⁰

This chapter provided background into the relevant legislation, codes and regulatory bodies that are important to the upcoming discussion of regulatory capture in the farm animal

²¹ Interpretation Act 1999, s 29.

²² Animal Welfare Act, s 71.

²³ Section 72.

²⁴ Section 73(1).

²⁵ Section 73(2).

²⁶ Section 73(3).

²⁷ Stafford, above n 7, at 13.

²⁸ Wells and Ferrere, above n 11, at 219.

²⁹ Animal Welfare Act, s 57.

³⁰ Ministry for Primary Industries “NAWAC members” <<https://www.mpi.govt.nz/protection-and-response/animal-welfare/national-animal-welfare-advisory-committee/nawac-members/>>.

welfare regime. Arguments will be made that the Act, codes or welfare, MPI and NAWAC all play a role in enabling regulatory capture, but first, chapter 2 will provide further explanation into what regulatory capture is and other underlying theories of this dissertation.

CHAPTER 2 Regulatory Capture and Animal Welfare

In this chapter, regulatory capture is explained to allow for a better understanding of the arguments to be made in the chapter 3. The opposite of the capture theory, the public interest theory, is also introduced along with the justifications of having animal welfare laws in the first place. Those justifications support the argument that animal welfare is in the public interest, but when regulatory capture is present, those interests become subordinate to the interest of industries.

I. What is regulatory capture?

Regulatory capture for the purpose of this dissertation is best defined by Martin Lodge as “the result or process by which regulation, in law or in application, is consistently or repeatedly directed away from the public interest and toward the interest of the regulated industry, by the intent and the action of the industry itself”.³¹

“Regulatory capture” is said to have a broad and narrow interpretation. Broadly speaking, regulatory capture is “the process through which special interests affect state intervention in any of its forms”. If narrowly confined, regulatory capture is the process where “regulated monopolies end up manipulating the state agencies that are supposed to control them”.³²

Regulatory capture highlights how the interests of certain groups play a part in the formation of public policy.³³ It describes people involved in the regulatory process as having narrow, self-interested goals.³⁴ For example, certain groups would try to influence the government’s decision-making process because of how it will affect the industry and welfare of consumers.³⁵

II. The public interest theory

The public interest theory is in many ways the opposite of regulatory capture. The “public interest” theory comes from a perspective that government regulation is necessary to protect the public from monopoly behaviour, “destructive” competition, abuse of economic

³¹ Martin Lodge “Regulatory Capture Recaptured” (2014) 74(4) PAR 539 at 539.

³² Ernesto Dal Bó “Regulatory capture: A review” (2006) 22 Oxford Rev Econ Policy 203 at 203.

³³ Jean-Jacques Laffont and Jean Tirole “The Politics of Government Decision-Making: A Theory of Regulatory Capture” (1991) 106(4) QJ Econ 1089 at 1089.

³⁴ Bó, above n 32, at 169.

³⁵ Laffont and Tirole, above n 33, at 1090.

power, or effects of externalities.³⁶ Potter describes “public interest” as the “affectively desired outcome” and that a tension exists between balancing the “broadest possible public interest and the more narrow private interest” when government departments regulate private institutions or in this case, industries.³⁷ When industry interests are prioritised, the public interest becomes subordinate. If animal welfare is in the public interest and regulatory capture exists in the animal welfare regime, then a conflict arises.

III. Legislating for animal welfare – Intention and public interest justifications

When legislating for animal welfare, a common base is used in legislation worldwide. A 1965 report by the Brambell Committee laid down the “five freedoms” for animals which have since heavily influenced animal welfare legislation around the world.³⁸ The five freedoms are: freedom from thirst, hunger and malnutrition; freedom from discomfort and exposure; freedom from pain, injury and disease; freedom from fear and distress; freedom to express normal behaviour. These can be divided into three categories – physical health and biological functions, affective states, and the ability to live in a reasonably natural manner.³⁹ Vapnek and Chapman argue that these elements justify why we promote animal welfare despite how some animal welfare laws lead to unfavourable outcomes on production costs and other economic concerns.⁴⁰

Lundmark and others looked at the intentions and values of 14 pieces of animal welfare legislation and standards in the United Kingdom, Sweden, Germany and Spain.⁴¹ They found that animal welfare was not always the main consideration when developing the standards. For example, public concern, negative impacts of intensification of food production and new knowledge sparked animal welfare legislation in the United Kingdom and Sweden, and Spain’s legislation exists due to demands from the European Union.⁴² There were other focus areas apart from animal welfare involved when regulating standards such as food safety, disease control, environmental protection, milk composition, food quality, conservation of rural or

³⁶ Michael E Levine and Jennifer L Forrence “Regulatory capture, public interest, and the public agenda: Toward a synthesis” (1990) 6 *JL Econ & Org* 167 at 168.

³⁷ Michael R Potter, Amanda M Olejarski, Stefanie M Pfister “Capture Theory and the Public Interest: Balancing Competing Values to Ensure Regulatory Effectiveness” (2014) 37 *Int'l J Pub Admin* 638 at 639.

³⁸ FW Rogers *Brambell Report of the Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems* (Her Majesty’s Stationery Office, 1967).

³⁹ Jessica Vapnek and Megan Chapman *Legislative and regulatory options for animal welfare* (Food and Agricultural Organization of the United Nations, FAO Legislative Study 104, 2010) at 5.

⁴⁰ At 5.

⁴¹ Frida Lundmark and others “Intentions and Values in Animal Welfare Legislation and Standards” (2014) 27 *J Agric Environ Ethics* 991 at 994.

⁴² At 997.

peasant agriculture, regionalism, fair prices and stopping rural depopulation. When these concerns come into play, there is a risk of conflicting goals.⁴³ Lundmark and others note conflicting legislation and standards, for example how animals should be protected from suffering but painful procedures like castration without anaesthetics are permitted, as well as the German animal welfare legislation which aims to protect the lives of animals but allows for the slaughter of young and healthy animals for consumption.⁴⁴ Vapnek also notes a conflict between animal welfare and other economic goals. Oftentimes, animals kept in good health improve production efficiency and reduces production costs. Conversely, requirements to provide space and other amenities to allow animals to display natural behaviours may increase costs.⁴⁵

Why do we have animal welfare laws to begin with? It has been acknowledged that animal welfare is in the public interest, which is why we need laws regulating animal welfare standards. Nurse argues that:⁴⁶

Animal welfare is now accepted as an issue on which governments legislate in the public interest and on which the courts should interpret law in the context of social conditions and the manner in which society has socially constructed the public interest.

The first justification for animal welfare laws is that harming animals indirectly harms human interests. This is based on Locke and Kant's theories that humans who are cruel to animals are less compassionate and do not have feelings when dealing with other humans.⁴⁷ Criminologists have suggested that humans who abuses animals may also exhibit other criminal behaviour and violence towards humans.⁴⁸ Thus, as Nurse argues:⁴⁹

Promoting good animal welfare and preventing cruelty thus benefits society not only by preventing possible violence towards humans but also protects and improves society by improving human interaction with biodiversity and the better integration of human society with the environment to create a strongly institutionalised protection of universal civil liberties.

⁴³ At 998.

⁴⁴ At 999.

⁴⁵ Vapnek and Chapman, above n 39, at 5.

⁴⁶ Angus Nurse "Beyond the Property Debate: Animal welfare as a public good" (2016) 19 *Contemp Justice Rev* 174 at 179.

⁴⁷ Steven White "Making the interests of animals count" (2003) 28(6) *Alt LJ* 277 at 278.

⁴⁸ Nurse, above n 46, at 176.

⁴⁹ At 176.

The second justification is that society recognises animal welfare as being important enough to warrant legal protection and provide animals with legal rights.⁵⁰ Despite what benefits humans reap, we should treat animals in a proper manner because they have inherent value.⁵¹ There are arguments as to whether animal interests should be of equal weight to the interests of humans, or if animal interests should only be recognised to the extent that they do not impose on human interests.⁵² However, in recent times, society have acknowledged animals as sentient beings and this is also reflected in the AWA, hence animals deserve legal rights to an extent.

Thirdly, animal welfare laws are beneficial to the agricultural sector, a country's economy and consumers of animal products, all of which are considered to be in the public's interest. Nurse argues that it is a public good when industries are able to endure the demands of ethically conscious consumers and also meet the high demands of the European Union to provide for effective animal welfare.⁵³ There may also be a health benefit to humans, as animals raised according to higher welfare standards are more resistant to harmful pathogens that are harmful to human health.⁵⁴

The three justifications given above reflect how both human beings and industries benefit if animal welfare is protected, thus animal welfare is in the interest of the public. However, when animal welfare laws are captured by industries, these other benefits of animal welfare will not be advanced. In short, when regulatory capture is present in a regulatory scheme, the industries have control over the regulatory process and have the ability to skew the laws to favour themselves at the expense of animal welfare and the public interest.

Chapter 3 will go into the discussion of regulatory capture in New Zealand's farm animal welfare regime. With a better understanding of what regulatory capture is, the effects of regulatory capture in the area of animal welfare discussed in the next chapter will become clearer. Also, knowing why we have animal welfare laws in the first place, the discussion in chapter 3 will show how the public interest and benefits in having high animal welfare standards are completely ignored and overshadowed by industry interests.

⁵⁰ At 176.

⁵¹ White, above n 47, at 278.

⁵² At 279.

⁵³ At 177.

⁵⁴ At 177.

CHAPTER 3 Is Regulatory Capture Happening in New Zealand’s Animal Welfare Regime?

Now that we know the negative effects of regulatory capture, this chapter presents the main argument that regulatory capture is an existing problem in New Zealand’s farm animal welfare regime. The work of Jed Goodfellow on regulatory capture in Australia’s farm animal welfare regime is studied closely and used as a base for the argument that the same is happening here in New Zealand.

New Zealand and Australia were described as the two most connected countries in the world.⁵⁵ The modern relationship between the two countries include military, government, economy and free movement across the Tasman.⁵⁶ Just like New Zealand, Australia’s primary industries contribute greatly to its economy, valuing at about AU\$69 billion in 2018-2019, with agriculture taking up to 47 per cent of that production value.⁵⁷ Exports of meat and live animals have been growing rapidly, increasing 99 per cent in value over the past 20 years.⁵⁸ With the close connection of Australia and New Zealand and the same economic interest in animals and animal products, this dissertation makes a comparison between the ways both countries deal with farm animal welfare.

According to the Australian Department of Agriculture, Water and the Environment, the state and territory governments are primarily responsible for animal welfare and laws to prevent cruelty, whereas the Australian Government is responsible for trade and international agreements relating to animal welfare.⁵⁹ There are certain similarities in the animal welfare legislative regime between New Zealand and Australia that is discussed below.

I. Brief overview of Australia’s animal welfare scheme

Australia’s animal welfare regime has some similarities with New Zealand’s, but also significant differences. There are eight different Acts for the eight States and Territories. Some of which focus on prevention of cruelty like New South Wales and Victoria, and others like the Australian Capital Territory and Queensland focus on imposing obligations and a duty of

⁵⁵ Chris Seed “The Anzac Connection: Trans–Tasman Ties in the Century since Beersheba (Senate Occasional Lecture Series, Parliament House, Canberra, 20 October 2017) at 25.

⁵⁶ At 32.

⁵⁷ Australian Government Department of Agriculture, Water and the Environment “Snapshot of Australian Agriculture 2020” <<https://www.agriculture.gov.au/abares/publications/insights/snapshot-of-australian-agriculture-2020#agricultural-production-is-growing>>.

⁵⁸ Australian Government Department of Agriculture, Water and the Environment, above n 57.

⁵⁹ Australian Government Department of Agriculture, Water and the Environment “Animal Welfare” <<https://www.agriculture.gov.au/animal/welfare>>.

care on people to protect the welfare of animals. New Zealand's AWA would be the latter, with sections that impose obligations on people in charge of animals to provide for the physical, health, behavioural needs of animals and to alleviate pain or distress of ill animals.⁶⁰

The Acts in Australia are as follows:⁶¹

State/Territory	Animal Welfare Act
ACT	Animal Welfare Act 1992
NSW	Prevention of Cruelty to Animals Act 1979
NT	Animal Welfare Act 1999
QLD	Animal Care and Protection Act 2001
SA	Animal Welfare Act 1985
TAS	Animal Welfare Act 1993
VIC	Prevention of Cruelty to Animals Act 1986
WA	Animal Welfare Act 2002

Similar to the codes of welfare we have in New Zealand, Australia has subordinate legislation known as the Model Codes of Practice for the Welfare of Animals, which there are 14 of.⁶² There is no mandatory obligation on the States and Territories to comply with the codes and South Australia is the only state to adopt all codes. Others only convert selected provisions of the codes of practice into regulations under their jurisdiction's animal welfare Act, or refer to the codes in a schedule to the regulations on the Acts as adopted codes.⁶³

Goodfellow argues that regulatory capture occurs in Australia's animal welfare regulations. He claims that politicians have raised concerns over the role of the Department of Agriculture in administering animal welfare legislation as there is a serious conflict of

⁶⁰ Animal Welfare Act, ss 10 and 11.

⁶¹ RSPCA Knowledgebase "What is the Australian legislation governing animal welfare?" <<https://kb.rspca.org.au/knowledge-base/what-is-the-australian-legislation-governing-animal-welfare/>>.

⁶² Jed Goodfellow "Animal Welfare Regulation in the Australian Agricultural Sector: A Legitimacy Maximising Analysis" (LLB/BA (Hons) Thesis, Macquarie University, 2015) at 124.

⁶³ At 125.

interest.⁶⁴ In his chapter, Goodfellow identifies three indicators of regulatory failings: inadequate animal welfare standards, the prevalence of serious animal welfare incidents within the agricultural sector and presence of regulatory process deficiencies.⁶⁵ These three indicators are useful in identifying whether New Zealand’s animal welfare laws and regulations are really as good as we think, or if regulatory capture is occurring in New Zealand’s animal welfare regime as well.

II. Indicators of regulatory failings

A. Inadequate animal welfare standards

Goodfellow argues that inadequacy of the farm animal welfare standards is the most significant indicator of regulatory capture of animal welfare in Australia. Goodfellow’s analysis uses three benchmarks to determine “adequacy”.

1. Public conceptions

First, Goodfellow looks at popular normative conceptions in assessing Australia’s farm animal welfare standards. He argues that there has been a shift in public attitudes, with people paying more attention to animal welfare and consumers willing to pay more for products coming from higher welfare practices.⁶⁶

The same has been happening with the New Zealand public and the MPI has acknowledged this shift:⁶⁷

Attitudes to animals and the way we use them are changing rapidly, and practices from even the recent past are no longer acceptable today. Most New Zealanders expect animals to be healthy, comfortable and properly fed. We expect that animals should receive a reasonable standard of humane treatment and not suffer unnecessarily. And increasingly, discerning consumers that buy our products have genuine concerns about animal welfare practices in our production systems.

⁶⁴ Jed Goodfellow “Regulatory Capture and the Welfare of Farm Animals in Australia” in D Cao and S White (ed) *Animal Law and Welfare - International Perspectives* (Springer, Switzerland, 2016) 195 at 196.

⁶⁵ At 197.

⁶⁶ At 202.

⁶⁷ Ministry for Primary Industries *Animal welfare matters: Proposals for a New Zealand Animal Welfare Strategy and amendments to the Animal Welfare Act 1999* (MPI Discussion Paper No: 2012/07, August 2012) at i.

Public awareness towards animal welfare is also driving food manufacturers and other related industries to recognise higher animal welfare standards as a selling point to consumers.⁶⁸

Public awareness and concern regarding the care of farmed animals is increasing and food manufacturers are wishing to differentiate their products and provide their customers with confidence that their food is produced ethically.

One major turning point for New Zealanders' perception of animal welfare was the 2014 video footage taken of a bobby calf being bludgeoned to death in a New Zealand owned dairy farm located in Chile.⁶⁹ A month before this video surfaced, the Chilean authorities were already investigating the farm for alleged animal abuse in killing over 6,000 calves.⁷⁰ This incident led to a change in New Zealand law, with the MPI issuing regulations for the protection of young calves,⁷¹ now incorporated in to the Animal Welfare (Care and Procedures) Regulations 2018.⁷² Another shocking footage filmed as part of an undercover investigation in New Zealand farms and a slaughterhouse was aired on a national news program, *Sunday*, in November 2015. This led to the prosecution of slaughterman Erickson, a case discussed in a later part of this dissertation. This video footage too “dismantled the rosy view of animal welfare in the dairy industry” of New Zealanders.⁷³ As Duffield puts it:⁷⁴

...the footage generated public outrage. Attracting sustained attention from leading national news outlets, the controversy placed the issue of animal welfare on New Zealand's dairy farms at the forefront of national political discussion.

The increase in public awareness became evident through their outrage and reaction to these cases. It is clear that there is a shift in public conceptions as talked about by Goodfellow and this meets the first benchmark of inadequate animal welfare standards.

⁶⁸ Ministry for Primary Industries *Welfare Pulse* (Issue 24, March 2018) at 11.

⁶⁹ Aimee Gulliver “Animal abuse claim sparks law reform change call” *Stuff* (online ed, New Zealand, 5 February 2014).

⁷⁰ Aimee Gulliver “Manuka dairy firm under investigation in Chile” *Stuff* (online ed, New Zealand, 22 January 2014).

⁷¹ Ministry for Primary Industries “Animal welfare regulations” <<https://www.mpi.govt.nz/law-and-policy/legal-overviews/animal-welfare/animal-welfare-regulations/>>.

⁷² Animal Welfare (Care and Procedures) Regulations 2018, s 8.

⁷³ Danielle Duffield “Reputation, Regulatory Capture, and Reform: The case of New Zealand's bobby calves” (2020) (forthcoming), at 10.

⁷⁴ At 12.

2. Animal welfare standards in other countries

Goodfellow then looks at the improvement of animal welfare standards in developed nations around the world. He gives the example of the European Union prohibiting the use of sow stalls by 2013, New Zealand phasing out of sow stalls by 2015 and battery cages by 2022, the United States implementing bans and restrictions to sow stalls and battery cages, and Canada banning the construction of new sow stalls from 1 July 2014 and phasing out of all sow stalls by 2024.⁷⁵

The Animal Protection Index (API) is produced by the World Animal Protection (WAP) to rank 50 countries according to their legislation and policy commitments to protecting animals.⁷⁶ New Zealand achieved a ranking of “A” in the 2014 API report,⁷⁷ but that has been downgraded to a “C” in the 2020 report.⁷⁸ The criticisms stated in the API report include how the codes of welfare are not legally binding, the codes undermine the purposes of the AWA, the MPI is likely to prioritise economic interests over animal welfare, and problematic practices such as hens still kept in cages, farrowing crates, fur farming and rodeos are still permitted.⁷⁹ According to Knight:⁸⁰

The 2020 API notes the persistence of a range of animal uses and husbandry practices that are inherently cruel and that cause pain, distress and suffering to animals, as well as deficiencies within its legislative framework. It also highlights conflicts of interest and marked funding deficits within its national inspection and enforcement system, that allow such practices to persist.”

Under the 2020 ranking, none of the countries ranked by WAP achieved an “A” ranking, but countries such as Austria, Denmark, Netherlands, Sweden, Switzerland and the United Kingdom obtained a ranking of “B”.⁸¹ WAP states that the methodology initially used in 2014 has been refined based on current scientific evidence as well as societal expectations regarding animal welfare, and scoring is stricter because of the evolved public expectations.⁸² It is evident here that public perceptions led to global change in the area of animal welfare.

⁷⁵ Goodfellow, above n 64, at 203.

⁷⁶ World Animal Protection “Animal Protection Index” <<https://api.worldanimalprotection.org/>>.

⁷⁷ World Animal Protection *New Zealand: Animal Protection Index 2014 ranking: A* (2014).

⁷⁸ World Animal Protection *Animal Protection Index (API) 2020 New Zealand: ranking C* (2020).

⁷⁹ World Animal Protection, above n 78, at 1.

⁸⁰ Andrew Knight “Should New Zealand Do More to Uphold Animal Welfare?” (2020) 9(1) *Animal Studies Journal* 114 at 136.

⁸¹ World Animal Protection, above n 76.

⁸² Animal Protection Index “Methodology” <<https://api.worldanimalprotection.org/methodology>>.

Two areas in farm animal management in which New Zealand are not up to par as compared to some other countries are the use of farrowing crates for sows and colony cages for layer hens.

Farrowing crates are still permitted practice in New Zealand, despite concerns that sows are unable to exhibit normal patterns of behaviour such as nest-building and not being able to turn around while being kept in those crates.⁸³ A farrowing crate is described as:⁸⁴

... a small metal cage in which pregnant sows are imprisoned for weeks on end, usually from a week before giving birth until their piglets are weaned three to four weeks later. The metal frame of the crate is just centimetres bigger than the sow's body and severely restricts her movements. She is completely unable to turn around, can scarcely take a step forward or backward and frequently rubs against the bars when standing up and lying down. Beside her cage is a "creep" area - usually around 50-100cm x 2m in size - for her piglets. The flooring is hard concrete and some form of heating, either mats or more commonly heatlamps, is used as a substitute for the warmth of their mother's body. The piglets are free to reach the sow's teats to suckle but she is prevented from moving close to them and cleaning them by the bars of the cage.

In the 2010 report to the Code of Welfare (Pigs), NAWAC states that there are no viable systems available, other than farrowing crates, that meet the physical, health and behavioural needs of sows and piglets.⁸⁵ There was a discussion by NAWAC in the report on other housing options such as farrowing pens, group based farrowing systems and extensive systems.⁸⁶ NAWAC acknowledges that the confinement of sows in farrowing crates for long time periods is contrary to the obligations under the Act, but there are minimum standards in place specifying how long sows can be confined pre-farrowing, during farrowing and lactation.⁸⁷ The Code of Welfare (Pigs) 2018 allows for farrowing crates to be used five days before farrowing and no more than four weeks after farrowing for lactation.⁸⁸ There is an exception for nursing sows to be retained for an additional week for fostering purposes, but on the

⁸³ SAFE "Pigs" <<https://safe.org.nz/our-work/animals-in-need/pigs/>>.

⁸⁴ Viva! *The Farrowing Crate* (2011) at 1.

⁸⁵ Ministry for Primary Industries *Animal Welfare (Pigs) Code of Welfare 2010 Report* (2010) at 18.

⁸⁶ At 13.

⁸⁷ At 18.

⁸⁸ Code of Welfare: Pigs 2018, minimum standard 10(e), at 18; minimum standard 10(f), at 18.

condition that no more than five per cent of sows in a herd are to be retained for such purposes at any one time.⁸⁹

In comparison to other countries, Sweden, Switzerland and Norway have already prohibited the use of farrowing crates. The United Kingdom already has 40 per cent of breeding herd loose farrowing in outdoor production systems and has Denmark pledged to have 10 per cent of breeding herd loose farrowing by 2021. Austria too has pledged to phase out farrowing crates by 2033.⁹⁰

On the 8th and 9th of June 2020, SAFE and the New Zealand Animal Law Association (NZALA) went to the Wellington High Court to prove that farrowing crates are illegal under the AWA.⁹¹ SAFE and the NZALA are seeking judicial review of the government decision to permit the use of farrowing crates. This is the first time a code of welfare has been legally challenged and will be the "the most significant animal welfare decision and case in a generation", according to Marcelo Rodriguez Ferrere, a senior law lecturer at the University of Otago.⁹²

In 2012, New Zealand switched from battery cages to colony cages for layer hens. Although that was seen as a step up, colony cages are really just larger versions of battery cages and still do not allow hens to express normal patterns of behaviour. The Code of Welfare (Layer Hens) permits the use of colony cages, with a stocking density requirement of a minimum of 750 cm² per hen or 13 hens per m².⁹³ The egg industry claims that colony cages offer hens "enrichments" such as perches, one nest area without nesting material and a small rubber scratch pad. Despite these "enrichments", hens are still forced to crowd together in a small cage. According to SAFE, 60-80 hens are housed per cage with space the size of an A4 paper each to live.⁹⁴

Switzerland has already banned all cage systems since 1992. "Furnished" cages will be banned in Austria by 2020, Belgium has proposed to ban colony cages by 2024.⁹⁵ Seven states

⁸⁹ Minimum standard 10(g), at 18.

⁹⁰ EM Baxter, IL Anderson and SA Edwards "Sow welfare in the farrowing crate and alternatives" in Marek Spinka (ed) *Advances in Pig Welfare* (Woodhead Publishing, Duxford, 2018) 27 at 27.

⁹¹ SAFE "Justice for all Animals" <<https://safe.org.nz/take-action/justice-for-all-animals/>>.

⁹² Zac Fleming "Farrowing crates: The most significant animal welfare court case in NZ history" *Newshub* (online ed, New Zealand, 27 June 2020).

⁹³ Code of Welfare: Layer Hens 2018, minimum standard 4, at 9; minimum standard 6, at 13.

⁹⁴ SAFE "Colony Cages" <<https://safe.org.nz/our-work/animals-in-need/hens-2/colony-battery-cage-cruelty/>>.

⁹⁵ SAFE "What's happening overseas?" <<https://safe.org.nz/our-work/animals-in-need/hens-2/whats-happening-overseas/>>.

within the United States now ban caged hens, with Colorado recently joining Washington, Oregon, Michigan, California, Massachusetts and Rhode Island in July 2020.⁹⁶ Luxembourg has prohibited colony cages and Germany will ban them from 2025, or from 2028 in exceptional cases.⁹⁷

The fact that cruel farming practices like farrowing crates and colony cages are still permitted practices under New Zealand's codes of welfare meets Goodfellow's second benchmark of inadequate animal welfare standards.

3. *Legislative mandate*

Third, Goodfellow examines the legislative mandate under which the standards are developed. One of the objectives of the Australia State and Territory animal welfare laws is to prevent animal cruelty and that is generally framed in terms of causing unnecessary harm to animals. The principle of proportionality provides that any harm caused to an animal must be for a legitimate purpose and the harm must not be disproportionate to that purpose. Goodfellow argues that if considered against that objective standard, many farming practices in Australia would be questionable.⁹⁸ The Code of Accepted Farming Practice for poultry welfare in Australia also allows for layer hens being confined to an area of about a third of an A4 sized paper and this practice would fall within one of the State's cruelty offences but for the code of practice.⁹⁹

As with New Zealand, the purpose of the AWA is to "ensure that owners of animals and persons in charge of animals attend properly to the welfare of those animals".¹⁰⁰ That is achieved by ensuring that the physical, health and behavioural needs of the animals are met, which includes the opportunity to display normal patterns of behaviour.¹⁰¹ However, as discussed above, codes of welfare still permit practices such as the use of farrowing crates and colony cages that do not allow animals to display normal patterns of behaviour. Therefore the codes are a direct contradiction to the purposes of the AWA.

⁹⁶ Kitty Block "Breaking news: Colorado becomes seventh U.S. state to ban cages for egg-laying hens" (1 July 2020) A Humane World <https://blog.humanesociety.org/2020/07/breaking-news-colorado-becomes-seventh-u-s-state-to-ban-cages-for-egg-laying-hens.html?credit=blog_post_070120_id11488>.

⁹⁷ Compassion in World Farming "End the Cage Age: Why the EU must stop caging farm animals" at 14.

⁹⁸ Goodfellow, above n 64, at 204.

⁹⁹ Graeme McEwen *Animal Law: Principles and Frontiers* (eBook ed, Barristers Animal Welfare Panel, 2011) at 17.

¹⁰⁰ Animal Welfare Act, s 9(1).

¹⁰¹ Sections 9(2)(a) and 4(d).

It is highly problematic that the codes of welfare allow for such practices. Compliance with the minimum standard of a relevant code of welfare acts as a defence in animal welfare offences where an owner or a person in charge of animals neglects their obligations and in cases of ill-treatment of animals.¹⁰² People in charge of animals are not held to a standard where the welfare of animals are being protected and are able to get away with ill practices because the codes allow them to.

The same is happening in Australia, where almost all the Acts have provisions that allow for a defence for complying with the codes of practice.¹⁰³ However, Australia has developed a new program with stakeholders – the Australian Animal Welfare Strategy (AAWS) to “harmonise relevant state and territory animal protection laws and to establish Standards and Guidelines or regulations instead of codes of practice”. Unlike the code of practice, breaching the Standards and Guidelines would be prosecutable.¹⁰⁴

The contradiction between practices allowed under the codes of welfare and the purpose of the AWA meets Goodfellow’s third benchmark of inadequate animal welfare standards, which is the first indicator of regulatory failing.

B. Prevalence of serious animal welfare incidents within the agricultural sector

The second indicator of regulatory capture in the animal welfare regime in Australia identified by Goodfellow is the prevalence of serious animal welfare incidents within the agricultural sector. Goodfellow looks at anecdotal evidence that suggests animal mistreatment cases happen quite frequently in Australia. He points out several high-profile cases that occurred over the past three years of mistreatment of animals such as pigs, broiler chickens, pigs and dairy calves within intensive production and processing facilities.¹⁰⁵ Cases of mistreatment of animals are also prominent in Australia’s extensive production environment and live export trade.¹⁰⁶

The number of complaints received by the MPI has been increasing over the years with 1050 complaints in 2016, 1052 in 2017 and 1190 in 2018.¹⁰⁷ However, there were two high profile cases that occurred in New Zealand in recent years. As mentioned above, in 2015, the

¹⁰² Sections 13(2)(c) and 30(2)(c).

¹⁰³ McEwen, above n 99, at 1.

¹⁰⁴ At 3.

¹⁰⁵ Goodfellow, above n 64, at 204.

¹⁰⁶ At 205.

¹⁰⁷ Marcelo Rodriguez Ferrere, Mike King and Levi Mros Larsen *Animal Welfare in New Zealand: Oversight, Compliance and Enforcement* (University of Otago, 2019) at 101.

New Zealand public was shocked by video footage filmed undercover by an animal advocacy group, Farmwatch, of bobby calves being thrown into trucks, bludgeoned to death, separated from their mothers hours after birth, left for hours in the sun, and kicked and thrown about at a slaughterhouse.¹⁰⁸ The dairy industry immediately distanced itself from the incident, describing the behaviour as “appalling” and that it “would not be tolerated”.¹⁰⁹ The footage sparked discussion and revealed the “dark side of the New Zealand dairy industry to consumers who might think of lush pastures and implied good health”.¹¹⁰ Save Animals from Exploitation (SAFE) then published advertisements in the *Guardian*, a news outlet in the United Kingdom, to generate more public support than there already was, stating that New Zealand dairy was “contaminated with cruelty”.¹¹¹ Industry groups then claimed that these advertisements do not represent the entire industry and could cause significant damage to New Zealand’s economy and the “livelihood of thousands of farmers”.¹¹² Farmwatch’s undercover video footage led to the prosecution of the slaughterman who handled the bobby calves. There were two charges for wilful ill-treatment, reckless ill-treatment, ill-treatment and using blunt force trauma.¹¹³ He was sentenced to 18 months imprisonment.¹¹⁴

Another incident was the case of *Ministry for Primary Industries v Erasmus*.¹¹⁵ The respondent was charged under s 28 of the AWA for wilful ill-treatment.¹¹⁶ He had deliberately broken tails of 115 dairy cows, many cows suffered broken legs, swollen hocks and compound fractures, some developed large haematomas which became infected and abscessed.¹¹⁷ He was sentenced to two years and one month imprisonment and the Judge disqualified him from owning or exercising authority in respect of animals under s 169 of the AWA.¹¹⁸

Erickson and *Erasmus* are only two high profile cases in New Zealand, there are still hundreds of other complaints made to the MPI each year. Therefore, this meets Goodfellow’s second indicator of regulatory failing.

¹⁰⁸ “Calves 'beaten to death'- shocking video exposes dairy industry cruelty” *NZ Herald* (online ed, New Zealand, 30 November 2015).

¹⁰⁹ Duffield, above n 73, at 13.

¹¹⁰ Tracy Brighten “New Zealand dairy cruelty divides opinion and loyalty” (10 December 2015) Medium <<https://medium.com/@TracyBrighten1/new-zealand-dairy-cruelty-divides-opinion-and-loyalties-2e0f71acaccf>>.

¹¹¹ Duffield, above n 73, at 13.

¹¹² At 13.

¹¹³ *Ministry for Primary Industries v Erickson* [2016] NZDC 15760.

¹¹⁴ *Erickson v Ministry for Primary Industries* [2017] NZCA 271 at [72].

¹¹⁵ *Ministry for Primary Industries v Erasmus* [2013] NZHC 281.

¹¹⁶ At [4].

¹¹⁷ At [7]-[8].

¹¹⁸ At [36]-[37].

C. Presence of regulatory process deficiencies

Lastly, Goodfellow argues that deficiencies in the regulatory process like industry influence in the process of developing standards, development of animal welfare science, and insufficient compliance monitoring and enforcement, are indicators of regulatory failure.¹¹⁹ Goodfellow analyses how these deficiencies demonstrate the Department of Agriculture's inclination to prioritise industry interests over animal welfare.

1. Industry influence in the process of developing standards

First of all, Australia has a participatory mechanism, allowing key stakeholders and the public to be involved in the process of developing animal welfare standards. This however leads to procedural unfairness as there is perceived bias of key decision-making institutions and a disproportionate representation of industry interest throughout the process. It is common for regulations to become captured when industries are involved in drafting legislation, regulations or standards. In Australia, industries have dominance in the process of drafting codes as they are involved in the drafting process and public consultation do not routinely occur.¹²⁰ Animal Health Australia (AHA) is a not-for-profit public company that consists of the Australian Meat Chicken Federation, Australian Dairy Farmers, Australian Egg Corporation, Australian Pork Limited, the Cattle Council of Australia and other industry bodies. AHA plays a major role in the decision-making process involved in developing animal welfare standards, setting priorities for standards that need to be developed, providing funding, deciding if scientific research is needed and if so, commissioning that research.¹²¹ Due to the membership of AHA, concerns have been raised that it is not, or cannot be considered to be, an independent body in the process of developing farm animal welfare standards.¹²² As mentioned previously, Australia is working towards developing Standards and Guidelines to replace the Model Codes of Practice. The Animal Welfare Task Group tasked with developing the Standards and Guidelines consists of representatives from each state and territory government departments responsible for animal welfare, the Department of Agriculture, Water and the Environment and also the New Zealand MPI. There is also a stakeholder advisory

¹¹⁹ Goodfellow, above n 64, at 206.

¹²⁰ Aimee Mundt "Australia's Need for An Independent Office of Animal Welfare" (2015) 1 GJAL 1 at 9.

¹²¹ Goodfellow, above n 64, at 217.

¹²² At 218.

group including veterinarians, animal welfare groups and industry representatives to provide advice.¹²³

In New Zealand, our legislation allows codes of welfare to be drafted by anyone, which is an invitation to industries to set standards favourable to themselves.¹²⁴ An example of a code being drafted by its respective industry is the code of welfare for dairy cattle which was drafted by “an industry writing group convened through Dairy Insight”.¹²⁵

Although NAWAC drafts majority of the codes, the consultation process also allows industries to weigh in. According to the AWA, draft codes will be publicly notified if NAWAC is satisfied that there had been adequate consultation with “people likely to be affected by the code” and that includes representatives of the respective farming industries.¹²⁶ The public may then send in submissions on the draft code.¹²⁷ However, the influence industries have over the drafting of codes appears to extend beyond being consulted and their voices overpower the opinions and input of the public.

Morris argues that the opinions of the public in regards to codes are usually ignored and that NAWAC prioritises industry groups in the consultation process.¹²⁸ This was especially evident in the consultation process for the Code of Welfare for Layer Hens 2005, where the Egg Producers Federation (EPF) weighed in heavily on the drafting of the code. According to Morris:¹²⁹

The EPF also obtained extra meetings with both the Minister of Agriculture and NAWAC in June 2004. As a result of these meetings, the Minister advised NAWAC to take EPF concerns into account. The EPF made an extra submission on the Code of Welfare on 27 May 2004. After receiving this submission, NAWAC informed the Minister that it was not its intention to state that all cages breached the Animal Welfare Act, but only those providing less than 550 cm² per bird. (citations omitted)

¹²³ Australian Government Department of Agriculture, Water and the Environment “Australian Animal Welfare Standards and Guidelines” <<https://www.agriculture.gov.au/animal/welfare/standards-guidelines>>.

¹²⁴ Animal Welfare Act, s 70(1).

¹²⁵ Ministry for Primary Industries *Animal Welfare (Dairy Cattle) Code of Welfare 2010 Report* (2010) at 2.

¹²⁶ Animal Welfare Act, s71(1)(e).

¹²⁷ Section 71(4).

¹²⁸ Michael C Morris “The Use of Animals in New Zealand: Regulation and Practice” (2011) SOC ANIM 368 at 372.

¹²⁹ Michael C Morris “The Ethics and Politics of the Caged Layer Hen Debate in New Zealand” (2006) 49 J Agric Environ Ethics 495, at 504, footnote 15.

Morris also notes how NAWAC ignored public submissions while the Poultry Industry Association New Zealand (PIANZ) strongly influenced the initial Code of Welfare for Meat Chickens 2001.¹³⁰ He states that:¹³¹

There were 170 submissions received during the consultation period plus 1,422 submissions on postcards distributed by SAFE, all of which opposed the code. Thirty-three individual submissions opposed aspects of the code (usually stocking density, provision of antibiotics, lighting, and litter), and four individuals supported the code. One of these was the head of the New Zealand Veterinary Association, and one was head of both the Egg Producers Federation and PIANZ. Four animal welfare organizations submitted, all of whom opposed the code.

Other than NAWAC playing favourites, industries themselves have committed to protecting their interests. Morris states that the EPF used the threat of judicial review against NAWAC to prevent the phasing out of battery cages. The threat was that EPF “owns” the code and the code cannot be changed without their approval.¹³² Morris also cited Perry Spiller’s examination of EPF’s accounts that deduced that it spent about NZD500,000 lobbying the government on behalf of its members to keep battery cages.¹³³

The involvement of industries in developing codes of welfare allows them to exert control and have their interest prioritised over public views. That makes it clear that industry influence is a deficiency in New Zealand’s animal welfare regulatory process.

2. Industry Influence over the development of animal welfare science

Funding of Australia’s development of animal welfare science is largely managed by livestock industry Research and Development Corporations (RDCs). There are some concerns over the level of control RDCs possess, that research might be conducted in favour of confirming that certain industry practices do not harm animals, so there is no need for change.¹³⁴ As Goodfellow argues, “public funds that are reserved for researching an issue in the public interest should not be delegated to organisations that possess priorities that conflict with that interest”.¹³⁵

¹³⁰ Michael C Morris “The Ethics and Politics of Animal Welfare in New Zealand: Broiler Chicken Production as a Case Study” (2009) 22 J Agric Environ Ethics 15 at 24.

¹³¹ At 24.

¹³² Morris, above n 128, at 376.

¹³³ P Spiller “RIP—the demise of free range eggs” (2004) 63(5) Organic New Zealand 26 as cited in Michael C Morris “The Use of Animals in New Zealand: Regulation and Practice” (2011) SOC ANIM 368 at 376.

¹³⁴ Goodfellow, above n 64, at 219.

¹³⁵ At 220.

In New Zealand's regime, when considering the contents of a code and before deciding on whether to recommend a draft code to the Minister to issue, NAWAC has to take into account scientific knowledge in relation to the management of the animals.¹³⁶ "Scientific knowledge" is not defined in the AWA, but NAWAC understands it to mean "knowledge within animal-based scientific disciplines, especially those that deal with nutritional, environmental, health, behavioural and cognitive/neural functions, which are relevant to understanding the physical, health and behavioural needs of animals".¹³⁷ Mellor and Bayvel expressed that science underpins all animal welfare decisions, hence NAWAC should exercise scientifically informed best judgment in determining what is an appropriate minimum standard.¹³⁸

Unfortunately, there have been arguments that NAWAC appeals to biased and sometimes questionable science research that goes against the best interests of animals. For example, Morris argues that in the initial code of welfare for layer hens, NAWAC gave emphasis to a behaviourist study that relied strictly on physiological indicators in reviewing welfare of layer hens, instead of focusing on behavioural indicators that indicate poor welfare.¹³⁹ This is in contrast to acknowledgements by animal welfare scientist for the European Commission that behavioural observations and experiments are appropriate indicators of animal welfare.¹⁴⁰

Morris also points out previous reliance on questionable studies by NAWAC and the former Minister of Agriculture. For example, former Minister of Agriculture Jim Sutton cited a non-peer-reviewed paper that was later reviewed and criticised by three world experts in poultry welfare for its sloppy methodology. Also, the MAF relied on a survey conducted by an industrial veterinarian who did not publish the raw results. The existence of this survey was questioned when it was later revealed in an Official Information Act request that the MAF had not even asked for the results.¹⁴¹ Another example he gave was the commissioned study by MAF on broiler production. The study conducted by Bagshaw et al led to a discovery that over 40 per cent of broiler chickens in New Zealand were visibly lame, which was a shocking

¹³⁶ Animal Welfare Act, s 73(2)(b).

¹³⁷ Ministry of Agriculture and Forestry *Guidelines for Writing Codes of Welfare* (June 2009), at 14, appendix 1.

¹³⁸ DJ Mellor and Bayvel ACD "The application of legislation, scientific guidelines and codified standards to advancing animal welfare" (paper presented to Global Conference on Animal Welfare: an OIE initiative, Paris, 23-25 February 2004) 237 at 241.

¹³⁹ Morris, above n 128, at 374.

¹⁴⁰ At 373.

¹⁴¹ At 374.

percentage in comparison to European results of 3 to 30 per cent.¹⁴² The study then discredited earlier pain studies on lameness in an attempt to cover up these results.¹⁴³

In 2016, NAWAC reviewed the use of farrowing crates in New Zealand and in their report concluded that there were no significant changes in science, technology or good practice since 2010 to warrant a formal review of the pig code of welfare.¹⁴⁴ There are, however, plenty of scientific studies about the detrimental effects farrowing crates have on sows' health and behaviour. Knight cites studies dating from 2000 to 2015 that list common injuries for sows in farrowing crates such as skin lesions, shoulder lesions, hock, foot, claw and teat lesions, as well as pressure sores, joint injuries and lameness.¹⁴⁵ Knight also notes that sows perform natural behaviours like foraging, exploring and manipulating natural materials, but the lack of manipulable material in farrowing crates causes boredom and stress which leads to restlessness, aggression, oral or nasal stereotypies like bar biting, chewing, locking and rubbing.¹⁴⁶ He cites studies dating from 1984 to 2013. It is unclear why NAWAC has ignored these studies demonstrating how farrowing crates do not allow sows to exhibit normal patterns of behaviour, and also cause health and welfare issues. An economic analysis was commissioned by NAWAC and MPI prior to releasing the 2016 review.¹⁴⁷ The analysis concluded that reducing the time period of keeping sows in farrowing crates from four weeks to one week was "financially unviable" and reducing it to three weeks would cause "steep losses on some farms and profits on others".¹⁴⁸ Thus, it is very likely that NAWAC was swayed by economic factors, despite years of scientific studies pointing out the negative effects of farrowing crates on sows.

The questionable and bias science research used in writing codes and the appeal to science that advances industry interests is a clear indicator that there is a deficiency in the regulatory process.

¹⁴² CS Bagshaw, LR Matthews and A Rogers *Key indicators of poultry welfare in New Zealand* (Wellington: Unpublished client report on MAF policy, 2006), as cited in Michael C Morris "The Use of Animals in New Zealand: Regulation and Practice" (2011) SOC ANIM 368 at 375.

¹⁴³ Morris, above n 128, at 375.

¹⁴⁴ Letter from John Hellström (Chair of NAWAC) to Hon Nathan Guy (Minister for Primary Industries) regarding NAWAC review of the use of Farrowing Crates for Pigs in New Zealand (14 March 2016) at 1.

¹⁴⁵ Andrew Knight *Uncaging New Zealand's Sows: Scrutinizing Farrowing Crates* (SAFE, June 2018) at 10.

¹⁴⁶ At 10 and 11.

¹⁴⁷ Ministry for Primary Industries *Economic analysis of farrowing systems* (MPI Information Paper No: 2016/06, April 2016).

¹⁴⁸ At 3.

3. Insufficient compliance and monitoring standards

Mundt suggests that lack of enforcement is an effect of regulatory capture. As she describes it, “captured regulators commonly perpetrate cultures of non-enforcement, fail to monitor compliance and do not support inspectors to follow through with serious investigations or prosecutions”.¹⁴⁹ In Australia, most inspection functions are delegated to the industries themselves through both formal and informal quality assurance schemes, which allows them to be subject to less routine inspections. The Royal Society for the Prevention of Cruelty to Animals (RSPCA) inspectors also have very limited jurisdictional responsibilities over farm animals and breaches of animal welfare standards are usually not taken seriously.¹⁵⁰

Lack of enforcement in the farm animal sector is also a problem in New Zealand. There are three categories of inspectors that have enforcement powers under the AWA, which are the MPI inspectors, SPCA-appointed inspectors and the police. MPI focuses on enforcing standards for farmed animals, whereas the Royal New Zealand Society for the Prevention of Cruelty to Animals Incorporated (SPCA) focuses on enforcing standards for companion animals.¹⁵¹

However, there is a severe lack of resources allocated to animal welfare enforcement. An Official Information Act request to the MPI reveals the following:¹⁵²

MPI currently employs 27 full time dedicated Animal Welfare Inspectors across New Zealand whose sole job is to investigate animal welfare issues. There are 19 additional staff members within the Compliance Investigations team who also hold Animal Welfare warrants. These warrants enable the holders to investigate under the Animal Welfare Act 1999.

Furthermore, MPI Verification Services employs 200 veterinarians who hold Animal Welfare Warrants, for the detection of animal welfare issues associated with inbound animals at meat processing facilities.

¹⁴⁹ Mundt, above n 120, at 10.

¹⁵⁰ Goodfellow, above n 64, at 220.

¹⁵¹ Memorandum of Understanding between the Ministry of Primary Industries (MPI) and The Royal New Zealand Society for the Prevention of Cruelty to Animals Incorporated (SPCA) (2019).

¹⁵² Email from Gary Orr (Director Compliance Services) to author regarding MPI inspectors for farm animals (31 August 2020) (obtained under Official Information Act 1982 Request to the Ministry for Primary Industries).

The 27 inspectors are responsible for over 150 million agricultural animals in the whole of New Zealand. In 2018, MPI received 1,190 complaints which led to only 26 prosecutions.¹⁵³

It is apparent that the MPI is understaffed. The insufficient monitoring and enforcing of animal standards also contribute to deficiencies existing in the regulatory process.

D. Legislative Deficiencies

Other than everything else noted by Goodfellow, a key reason why New Zealand industries have so much control over the animal welfare regime is deficiencies within the whole legislative process. The entire structure of New Zealand's animal welfare regime appears to be problematic and highly favours industry interests over animal welfare. It is questionable why the codes of welfare still allow for cruel practices such as farrowing crates and colony cages. Also, compliance with the minimum standard of a relevant code of welfare acts as a defence in animal welfare offences where an owner or a person in charge of animals neglects their obligations and in cases of ill-treatment of animals.¹⁵⁴ People in charge of animals are not held to a standard where the welfare of animals is being protected and are able to get away with ill practices because the codes allow them to do so.

Why do we have codes of welfare that contradict the Act? Why do breaches of minimum standards do not constitute an offence, but compliance with minimum standards is a defence? Why do the codes contain standards that do not meet the requirements of the Act?

To answer the first question, it seems that industry interests were given priority since the very beginning. According to Sankoff, codes of welfare were drafted in the early 1990s prior to the enactment of the AWA. Sankoff noted that the existing codes were believed to be drafted by industry representatives with the intention of showing progress in animal welfare reform to European markets. The codes were not enacted through a proper legislative process and had no legislative force then.¹⁵⁵ Later, when the AWA was enacted, the government stated that the existing codes will remain intact for three years. This was because the government acknowledged that industries would be against changes to the codes that were in place for a decade, hence consultation with the industries would take time.¹⁵⁶

¹⁵³ Ferrere, King and Larsen, above n 107, at 11.

¹⁵⁴ Animal Welfare Act, sections 13(2)(c) and 30(2)(c).

¹⁵⁵ Peter Sankoff "Five years of the "new" animal welfare regime: Lessons learned from New Zealand's decision to modernize its animal welfare legislation" (2005) 11 Animal L 7 at 16.

¹⁵⁶ At 17.

The reason behind the flaws within the codes of welfare and the Act appear to be industry interests and that is evident throughout the legislative process of enacting the Act. As to why a breach of minimum standards is not an offence, it is because “codes have been developed outside the Parliamentary process and the inclusion of explanatory information means that codes are likely to lack the precision expected of a legislative instrument”.¹⁵⁷ It is also noted in the reported version of the Animal Welfare Bill by the Primary Production Committee that the defence of complying with a code of welfare is “especially important for industries where current practices might not meet the requirements”.¹⁵⁸

The Explanatory Note to the Bill further explains that any person is able to draft a code of welfare to enable the “continuation of the current process which has been quite successful, whereby codes are initially drafted by stakeholders or industry”.¹⁵⁹

Furthermore, under s 183A of the AWA, the Governor-General may make regulations that do not fully meet the obligations in relation to physical, health and behavioural needs of animals and obligation to alleviate pain or distress, or the obligations that a person would need to observe in the treatment, transport, or killing of animals if that person were to avoid committing an offence.¹⁶⁰ The limitations are when recommending such regulations to the Governor-General, the Minister must be satisfied that any adverse effects of the change to new practices have been considered and there are no other available alternatives; and there would be “an unreasonable impact on a particular industry sector within New Zealand, a sector of the public, or New Zealand’s wider economy” if such regulations were not made.¹⁶¹ The welfare of any affected animals is to be considered in determining what is “unreasonable”.¹⁶² As to why minimum standards that do not fully meet the obligations under the AWA were permitted, is because this “recognises that the community may accept certain practices for religious reasons, or because it is not feasible, or would impose financial hardship to make a transition to new practices”.¹⁶³

The background of how codes of welfare came to exist shows that industries were the priority right from the very beginning. It is also apparent from the explanatory note to the Animal Welfare Bill (No.2) that the AWA which was supposedly designed to protect the

¹⁵⁷ Animal Welfare Bill (No. 2) 1998 (209-1) at ii.

¹⁵⁸ Animal Welfare Bill (No. 2) 1998 (209-2) at v.

¹⁵⁹ Animal Welfare Bill, above n 157, at iii.

¹⁶⁰ Animal Welfare Act, ss 10, 11 and 183A(2).

¹⁶¹ Section 183A(3).

¹⁶² Section 183A(4).

¹⁶³ Animal Welfare Bill, above n 157, at iii.

welfare of animals, valued the interests of industries further. Hence, these deficiencies in the legislation is a contribution to the occurrence of regulatory capture.

III. Pathways to regulatory capture

According to Goodfellow, there are many “mechanisms” that cause regulators to depart from serving the public interest, most of which involve the nature of the relationship between the regulator and the industry being regulated. He points out two key “mechanisms” to regulatory capture in his analysis. The first is poor institutional design, especially when a department is tasked with pursuing two conflicting interests. This happens when a department is responsible for promoting an industry’s growth and productivity, while regulating that same industry to serve a public good, be it environmental conservation, human safety or in our case, animal welfare.¹⁶⁴ This leads us to the second mechanism which is cultural capture. This is when the regulatory department is inclined to follow the norms of the industry while serving the relevant public interest. Some factors such as common backgrounds and experiences with the industry and identifying with the industry’s social purpose induce the capture of cultural norms. As observed by Mundt, an effect of regulatory capture is when the regulator is acting as an advocate for the industry they were supposed to be regulating.¹⁶⁵ She gives the example of the ‘ag-gag laws’ that make obtaining and then broadcasting footage on animal cruelty on farm facilities illegal and also the New South Wales Minister for Primary Industries who said she would “end activities of animal activists”.¹⁶⁶ An unconscious bias is formed, causing the regulator to then underperform responsibilities that conflict with the industry’s goals.¹⁶⁷

Mundt argues that the existing regulatory framework in Australia is the main cause of regulatory capture in animal welfare.¹⁶⁸ The primary goals of the regulator and industry are too closely aligned; hence the regulator will unavoidably favour industry interests over the public interests. Department of Primary Industries in New South Wales and Victoria sees itself as “friends” of industries.¹⁶⁹ The regulators have other aims such as promoting profitable and competitive farming industries and these goals may conflict with the protection of animal welfare.¹⁷⁰

¹⁶⁴ Goodfellow, above n 64, at 207.

¹⁶⁵ Mundt, n 120, at 12.

¹⁶⁶ At 12 and 13.

¹⁶⁷ Goodfellow, above n 64, at 209.

¹⁶⁸ Mundt, above n 120, at 5.

¹⁶⁹ Graeme, above n 113, at 5.

¹⁷⁰ Mundt, above n 120, at 6.

The government body in New Zealand responsible for animal welfare is the MPI. They also carry a wide range of other responsibilities such as “seizing export opportunities for New Zealand’s primary industries, improving sector productivity, ensuring the food produce is safe, increasing sustainable resource use and protecting New Zealand from biological risk”.¹⁷¹ New Zealand's primary industries generate about \$42 billion a year in exports of food, animals, animal products like wool, and plants and wood.¹⁷² The role the MPI plays is to “set regulatory standards for food and agricultural products, verify that standards are met and provide assurances to overseas markets”.¹⁷³ This helps maximise primary sector exports by maintaining New Zealand’s reputation of having “high-quality, safe, and suitable primary products”.¹⁷⁴ Given the MPI’s part in maximising New Zealand’s exports, there are arguments as to whether goals pertaining to productivity and animal welfare complement or contradict.

In short, the poor institutional design of the MPI is one of the main pathways allowing regulatory capture to occur. Cultural capture of the MPI then occurs when one of their responsibilities aligns with industry interests, and in this case, that responsibility is to maximise exports.

IV. Productivity vs animal welfare

In his chapter, Goodfellow also mentions the assertion made by industries that animal welfare and productivity go “hand-in-hand” and that this assertion is based on two claims. The first claim is that productivity is a good indicator of animal welfare.¹⁷⁵ However, productivity is only one of many factors that contribute to an animal’s welfare state. Other factors include physiological functioning, brain state, behaviour and feelings.¹⁷⁶ Unfortunately, animals can be productive even though they are in a poor welfare state. The second claim is that industries have sufficient economic incentives to provide good standards of welfare for their animals. Although some industries are willing to bear some cost of improving welfare

¹⁷¹ Ministry for Primary Industries “About Us” <<https://www.mpi.govt.nz/about-us/>>.

¹⁷² Ministry for Primary Industries “Exporting” <<https://www.mpi.govt.nz/exporting/>>; Ministry for Primary Industries “MPI’s role in exporting” <<https://www.mpi.govt.nz/exporting/how-exporting-works/mpis-role-in-exporting/>>.

¹⁷³ Ministry for Primary Industries “Who does what in exporting?” <<https://www.mpi.govt.nz/exporting/how-exporting-works/who-does-what-in-exporting/>>.

¹⁷⁴ Ministry for Primary Industries “Exporting”, above n 172; Ministry for Primary Industries “Who does what in exporting?”, above n 173.

¹⁷⁵ Goodfellow, above n 64, at 211.

¹⁷⁶ At 212.

standards, most productivity gains are achieved at the expense of animal welfare.¹⁷⁷ Therefore, Goodfellow's view is that productivity conflicts with animal welfare.

Mundt argues that industries push the narrative that productivity and animal welfare are complementary. She gives the example of Australian Pork stating that providing excellent care to animals produces better quality products, an idea that is echoed by a few members of the Australian Parliament.¹⁷⁸

New Zealand's MPI also makes the same claim that their goal of maximising exports goes hand in hand with animal welfare:¹⁷⁹

MPI is committed to significantly increasing the value of New Zealand's primary industry exports by 2025. The goal goes hand in hand with protecting consumers of New Zealand products, our producers, the natural resources they rely on, and our international reputation for food safety, animal welfare, and sustainable resource use.

Growth and protection are closely connected – there can be no sustainable growth without our work verifying our production systems to ensure products meet requirements.

However, Mundt argues that contrary to what industries want the public to believe, high levels of productivity and profitability will come at the cost of animal welfare. Studies have shown that animals trigger coping mechanisms, usually assisted by the use of antibiotics, like 'non-injurious pathological behaviours', to keep up their physical health.¹⁸⁰ Production-related diseases also highlight the dangers of production on animal welfare, as seen in high-yielding dairy cows, fast-growing pigs and broilers.¹⁸¹

Although the concern for Australia appears to be the conflict between productivity and animal welfare, Duffield argues that in New Zealand, the dominant policy objective is New Zealand's international reputation that leads to increased export earnings.¹⁸²

¹⁷⁷ At 213.

¹⁷⁸ Mundt, above n 120, at 6.

¹⁷⁹ Ministry for Primary Industries "MPI's role in exporting", above n 172.

¹⁸⁰ Donald Broom "Animal welfare: future knowledge, attitudes and solutions" (paper presented at the Australian Animal Welfare Strategy International Animal Welfare Conference, Gold Coast, 31 August 2008), as cited in Aimee Mundt "Australia's Need for An Independent Office of Animal Welfare" (2015) 1 GJAL 1 at 7.

¹⁸¹ Michael W Fox "Productivity and Farm Animal Welfare" (1981) 2 Int J Stud Anim Prob 283 at 283.

¹⁸² Duffield, above n 73, at 35.

V. Reputation vs animal welfare

The focus for the New Zealand government when enacting legislation or regulations for animal welfare seems to be the international reputation of New Zealand for the sake of exports. As observed by Duffield:¹⁸³

Consumers within the EU are generally regarded as placing high value on animal welfare, and New Zealand is the EU's main supplier of butter. Furthermore, the EU is an important export destination for other New Zealand animal products, namely red meat and wool.

Thus, perception by EU-based consumers of animal welfare standards in New Zealand—not just in the dairy industry, but across all animal industries—is particularly important to the New Zealand government. Furthermore, maintaining a perception of high welfare standards is regarded as important even in markets with relatively low animal welfare standards, such as the United States, as it suggests that New Zealand animal products are superior to products produced elsewhere.

When the MPI developed new animal welfare regulations regarding the treatment of bobby calves in response to the *Erickson* case,¹⁸⁴ Duffield argues that only basic reforms that were necessary to preserve New Zealand's international reputation were adopted.¹⁸⁵ The MPI's concern about protecting New Zealand's reputation instead of protecting animals was also pointed out by animal rights activists, as SAFE has said that this was one of their reasons for publishing advertisements exposing the dairy industry, after the footage of the *Erickson* case was broadcasted.¹⁸⁶

In her recent article, Duffield studied the regulatory impact statement prepared when the new bobby calves' regulations were proposed, noting the emphasis given to the New Zealand's reputation. Evidence of that include the underlying assumptions made in relation to the regulatory proposals. As explained by the MPI, it had “made some assumptions that the advertising campaign undertaken in the United Kingdom, regarding serious ill treatment of young calves in New Zealand, hurt our international reputation”.¹⁸⁷ Also, one of the criteria that the MPI used to assess the success of the intervention was when “the world leading

¹⁸³ At 26.

¹⁸⁴ Animal Welfare (Care and Procedure) Regulations 2018, reg 8, 33, 34, 37, 9, 10, 35, as cited in Duffield, above n 73, at footnote 113 -120.

¹⁸⁵ Duffield, above n 73, at 18.

¹⁸⁶ At 22.

¹⁸⁷ At 23.

reputation of New Zealand’s animal welfare regulatory system is maintained and enhanced”.¹⁸⁸ The MPI’s response to the abuse of calves was that if such treatment were to continue, “it is also likely to have negative impacts on New Zealand’s reputation in animal welfare practices both locally and internationally...If New Zealand’s reputation is harmed our access to high value markets and new markets is likely to be affected”.¹⁸⁹ The MPI also noted how isolated incidents of animal mistreatment could compromise New Zealand’s reputation. Furthermore, the MPI emphasised how “New Zealand’s well-regarded international reputation is pivotal to its export success in primary sector products and increasing the use of New Zealand’s strong and unique culture and brand” and that the regulations “would provide a potential long-term benefit based on “a strong reputation and therefore good market access”.¹⁹⁰ In concluding that the regulations should be implemented, the MPI stated that “industry stakeholders would benefit from retaining New Zealand’s strong reputation for upholding robust animal welfare practices provided for by the regulations,” as “[a] number of industry representative groups have emphasised”.¹⁹¹

These concerns for New Zealand’s international reputation were also echoed by the government. Acting Prime Minister Bill English expressed that “the revelations could embarrass the country’s farming industry and warranted urgent attention.” John Key, the prime minister at the time, also stated that the advertisements by SAFE “put New Zealand’s reputation at risk”.¹⁹²

The response to the mistreatment bobby calves demonstrates the MPI’s favouring of industry interests. The MPI justified the new regulations by saying they were in the best interests of the dairy industry and noted in the regulatory impact statement how the industry expressed that these regulations would benefit it in the long run by protecting the international reputation of the dairy industry.¹⁹³

Other than the reform of bobby calf regulations, multiple quotes in the recent Livestock Export Review also show the MPI’s focus on reputation:¹⁹⁴

¹⁸⁸ At 23.

¹⁸⁹ At 23.

¹⁹⁰ At 24.

¹⁹¹ At 24.

¹⁹² At 25.

¹⁹³ At 32.

¹⁹⁴ Ministry for Primary Industries *Livestock Export Review* (MPI Discussion Paper No: 2019/10, November 2019), at 4, 6 and 23.

Animals contribute significantly to our economic prosperity, and our commitment to their welfare enhances our global reputation as a trusted food producer.

...

New Zealand's reputation for high levels of animal welfare has helped secure access to markets internationally. Even isolated cases of poor animal welfare could have a negative effect on our reputation as a responsible producer of animals and animal products.

...

MPI leads the management of animal welfare policy and practice in New Zealand. The way people care for and manage animals contributes to New Zealand's reputation as a responsible agricultural producer.

Under section 5 of the report on “why the MPI is reviewing the current export rules”, two of the given reasons were in regards to reputation. One was “New Zealand’s reputation matters”, the other was that “some stakeholders are concerned that livestock exports may harm animals, and damage New Zealand’s reputation”.¹⁹⁵

This chapter established that New Zealand’s farm animal welfare regime not only meets Goodfellow’s three indicators of regulatory failing — inadequate animal welfare standards, prevalence of serious animal welfare incidents within the agricultural sector and presence of regulatory process deficiencies — but also there are legislative deficiencies present in the regime and those factors all contribute to the presence of regulatory capture. The pathways to regulatory capture in New Zealand are the poor institutional design of MPI, which led them to cultural capture. Lastly, although the conflict of animal welfare with productivity is an existing issue, the bigger conflict that New Zealand face is with reputation. After making the argument that regulatory capture is indeed a problem with the farm animal welfare regime in New Zealand, the next chapter will discuss some potential reform options to mitigate regulatory capture.

¹⁹⁵ At 23.

CHAPTER 4 Options for Reform

In his chapter, Goodfellow suggests some available options for reform. He focuses on the issue of poor institutional design, as the Australia Department of Agriculture is primarily motivated to achieve economic goals of improving industry productivity and profitability, which is why the public interest in farm animal welfare is neglected.¹⁹⁶ Goodfellow outlines three strategies to rebalance the regulatory approach - independent animal welfare authorities, an inspector-general or ombudsman and a regulatory tripartism. These strategies may be applicable to New Zealand as well. This chapter contains discussion on the three approaches suggested by Goodfellow in identifying what an ideal reform option would be for New Zealand.

I. Independent animal welfare authorities

Goodfellow suggests that the most apparent reform for addressing the problem of a poor institutional design is to separate out the competing responsibilities by transferring the subordinate responsibility, which in this case is the protection of farm animal welfare, to another existing agency that does not have the same conflict of interest, or to establish a new agency specifically for that responsibility. For example, the European Union transferred the responsibility for animal welfare from the Directorate-General for Agriculture to the Directorate-General for Health and Consumers. There are also examples of new agencies being created to address public interest concerns, such as the United States Consumer Financial Protection Bureau in regards to the 2007-2008 Financial Crisis.¹⁹⁷

Catriona MacLennan wrote an email to the MPI in 2016 asking the government to create a new position – Commissioner for Animal Welfare, to take on the responsibilities regarding animal welfare from the MPI. The reasons she gave in favour for this position were:¹⁹⁸

- (1) MPI has a conflict of interest between its animal welfare responsibilities and its key purposes.
- (2) The resources devoted by MPI to animal welfare are totally inadequate.
- (3) There is a huge, unacknowledged problem with cruelty on New Zealand farms – both deliberate cruelty and cruelty as a result of neglect or ignorance.
- (4) MPI very rarely prosecutes for animal cruelty.

¹⁹⁶ Goodfellow, above n 64, at 224.

¹⁹⁷ At 225.

¹⁹⁸ Email from Catriona MacLennan to Hon Nathan Guy (Minister for Primary Industries) regarding Animal Welfare (9 April 2016).

- (5) A comprehensive report on MPI's failure to enforce animal welfare was prepared in 2011. MPI has not acted on the clear recommendations in the report.
- (6) In other countries, pro-active steps are being taken to improve animal welfare.
- (7) New Zealand's aim should be to brand itself internationally as Number One in the world in terms of animal welfare.

Her further suggestions were that the position of Commissioner for Animal Welfare be written into the AWA, the Commissioner have a scientific background relating to animals, responsibility for animal welfare be removed from the MPI and transferred to the Commissioner, and the Commissioner be independent and have sufficient resources.

II. Inspector-General or Ombudsman for animal welfare

The second option for reform as suggested by Goodfellow is to establish a position tasked specifically to monitor and audit the performance of a department.¹⁹⁹ An Inspector-General or Ombudsman for animal welfare would be able to provide an independent view to issues relating to animal welfare, views that are without the influence of the Australia Department of Agriculture.

World Animal Protection suggested that an Independent Office of Animal Welfare (IOAW) would be the most efficient and effective model to achieve consistency in Australia's animal welfare legislation. This would be "a statutory independent body with a remit and timetable to review and consult on standards to progress animal welfare".²⁰⁰ The proposed structure for an IOAW includes an independent CEO and Chair who are both animal welfare experts; other members who are policy and legislation experts, investigators and administrative officers; and a standard setting committee comprising of representatives for the national, state and territory governments, industry, animal protection organisations, animal welfare academia and animal welfare law, and expert scientists and animal technicians.²⁰¹ The CEO's functions would include reviewing and monitoring livestock standards, commissioning research and preparing reports on animal welfare issues and monitoring the Department's compliance with

¹⁹⁹ Goodfellow, above n 64, at 226.

²⁰⁰ Jennifer Ford *Advance Australian animal welfare: The urgent need to re-establish national frameworks* (World Animal Protection, 29 February 2016) at 21.

²⁰¹ At 21.

animal welfare laws.²⁰² The Voice for Animals (Independent Office of Animal Welfare) Bill 2015 was introduced to Parliament in 2015, but lapsed at the end of Parliament in July 2019.²⁰³

A recently established position in Australia with the function to oversee a department is the Australian Inspector-General of Live Animal Exports. The purpose of establishing the position as put forth in the Australian Inspector-General of Live Animal Exports Act 2019 Bill is “to establish an independent Inspector-General of Live Animal Exports, responsible for oversight of the Department of Agriculture in its role as the regulator of the Australian live-stock export industry”.²⁰⁴ The Inspector-General’s role is to promote continual improvements in the regulatory practice, performance and culture of the Department; to provide an additional layer of accountability and assurance over the regulation of Australia’s live-stock exports; and to ensure that live-stock export officials, in performing functions and exercising powers, consider the welfare of animals in Australia’s live-stock exports.²⁰⁵

However, the CEO of the proposed IOAW and the Inspector-General of Live Animal Exports is still to be appointed by the Minister of Agriculture.²⁰⁶ For the inspector-general or ombudsman to be completely unbiased in overseeing the Department, it is best if the role is independent from all influences of the Department and the Minister. Currently in New Zealand we have NAWAC, but its chair and members are appointed by the Minister for Primary Industries, hence they are not completely separate from the MPI. If New Zealand were to establish a position to oversee the MPI, this entity must be completely separate from government and will monitor both the MPI and NAWAC’s decisions on animal welfare.

A. A body for animal welfare independent of the Executive

The proposed body tasked with overseeing and monitoring the MPI and NAWAC has to be completely separate from the government and preferably under the control of Parliament.

The three Officers of Parliament in New Zealand are the Ombudsman, Controller and Auditor-General and the Parliamentary Commissioner for the Environment.²⁰⁷ These Officers

²⁰² Voice for Animals (Independent Office of Animal Welfare) Bill (Aus), s 9.

²⁰³ Parliament of Australia “Voice for Animals (Independent Office of Animal Welfare) Bill 2015” <https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=s1006>.

²⁰⁴ Claire Petrie “Inspector-General of Live Animal Exports Bill 2019” (Parliament of Australia, Bills Digest No. 23, 2019-20, 6 September 2019) at 2.

²⁰⁵ Inspector-General of Live Animal Exports Act 2019 (Cth), s 3.

²⁰⁶ Voice for Animals (Independent Office of Animal Welfare) Bill (Aus), s 11; Inspector-General of Live Animal Exports Act 2019 (Cth), s 13.

²⁰⁷ New Zealand Parliament Who are the Officers of Parliament (15 August 2019) <<https://www.parliament.nz/en/visit-and-learn/how-parliament-works/fact-sheets/who-are-the-officers-of-parliament/>>.

are appointed by or removed by Parliament and are accountable to Parliament instead of the Executive branch.²⁰⁸ As Chen observes, “their independence from the Executive allows them to exercise their functions as constitutional watchdogs and to hold the government to account”.²⁰⁹

The Parliamentary Commissioner for the Environment (PCE) is an independent Officer of Parliament, wholly independent of the Ministry for the Environment, who investigates environmental concerns and reports to Parliament.²¹⁰ The Commissioner gives advice to Parliament in the form of reports on investigations and submissions to select committees.²¹¹ The PCE’s purpose “is to provide an independent check on the capability of the New Zealand system of environmental management and the performance of public authorities in maintaining and improving the quality of the environment”, and to hold the government accountable for its environmental policies and actions.²¹²

The PCE is less accessible to members of the public. Investigations usually arise out of request from a Member or Parliament, or as an emerging issue from an earlier investigation.²¹³ Members of the public may only raise a concern if they are of the opinion that a case was not dealt with appropriately, but those concerns are made to lower level agencies such as the regional council, district council or government department. Only when they are not satisfied with the response from the public agency, will they raise their concerns with the PCE.²¹⁴ The biggest point of difference between the PCE and Ombudsman is that the PCE does not have a complaints jurisdiction, which means members of the public cannot bring an individual complain against a government decision. PCE focuses on the wider systemic issues and “individual complaints are only likely to be investigated by the PCE when they point to a wider, more systemic problem” whereas the Ombudsman focus on individual complaints.²¹⁵ The model of the PCE seem insufficient to address the control industries have over New Zealand’s

²⁰⁸ Mai Chen *Public Law Toolbox* (2nd ed, LexisNexis, New Zealand, 2014) at 543.

²⁰⁹ At 543.

²¹⁰ Parliamentary Commissioner for the Environment “About us” <<https://www.pce.parliament.nz/about-us/our-role>>.

²¹¹ Parliamentary Commissioner for the Environment “Investigations” <<https://www.pce.parliament.nz/our-work/investigations>>.

²¹² Parliamentary Commissioner for the Environment *Report of the Parliamentary Commissioner for the Environment for the year ended 30 June 2005* at 6; Environmental Guide “Parliamentary Commissioner for the Environment” <<http://www.environmentguide.org.nz/overview/statutory-bodies/parliamentary-commissioner-for-the-environment/>>.

²¹³ Parliamentary Commissioner for the Environment “Investigations”, above n 211.

²¹⁴ Parliamentary Commissioner for the Environment “Public concerns” <<https://www.pce.parliament.nz/our-work/public-concerns>>.

²¹⁵ Chen, above n 208, at 633.

animal welfare regime, as there are still restrictions on raising issues with the Commissioner. For a Parliamentary body to better hold the MPI accountable, a complaints jurisdiction allowing access to the public would be ideal. This is something the Ombudsman is able to do.

The Ombudsman is a Swedish invention and has three stages in history. The Ombudsman started as an internal authority with executive power in the authoritarian monarchy era in 1809. They were public officers strengthening the executive's authority over others. The Ombudsman office then adopted a different role, leaving the control of the executive to be under parliamentary control instead. Lastly, in the 20th century, it then acquired relative autonomy from Members of Parliament and became a 'defender of civil rights', a means for citizens to control public authorities.²¹⁶ There are now different ombudsman schemes around the world. As Kirkman describes:²¹⁷

...some ombudsman schemes have at their core the goal of promoting human rights whilst for others the emphasis is placed on investigating maladministration; some operate alongside parliament, others solely within the private sector; some employ predominantly soft law methods, whilst others have powers to contest laws in court or start legal proceedings against civil servants. (citations omitted)

In New Zealand, the Office of the Ombudsman was established in 1962 by the Ombudsman Act to investigate complaints about administration by public bodies.²¹⁸ An Ombudsman is appointed by the Governor-General, on the recommendation of Parliament.²¹⁹ Under the Ombudsmen Act, any person may file a complaints about an act or decision of a government agency.²²⁰ The MPI is one of the government departments subject to the Ombudsman Act.²²¹ Previously, the Ombudsman had investigated the MPI's withholding of information in response to an Official Information Act request by Forest & Bird in 2017, also the refusal to release reports on fish-dumping when requested by University of Auckland and Oxford researches under the OIA earlier in 2017.²²²

²¹⁶ Paul Magnette "Between parliamentary control and the rule of law: the political role of the Ombudsman in the European Union" (2003) 10(5) JEPP 677 at 678.

²¹⁷ Richard Kirkman "The 21st Century Ombudsman Enterprise" (paper presented to the IOI biennial conference, November 2012, Wellington, New Zealand) at 2.

²¹⁸ Chen, above n 208, at 544.

²¹⁹ Ombudsman Act 1975, s 3.

²²⁰ Ombudsman "Who is the Ombudsman?" <<https://www.ombudsman.parliament.nz/about/who-ombudsman#toc-0>>.

²²¹ Ombudsman Act, schedule 1.

²²² Forest & Bird "Ombudsman tells MPI to apologise for withholding official info" (17 December 2017) <<https://www.forestandbird.org.nz/resources/ombudsman-tells-mpi-apologise-withholding-official-info>>; Kirsty

With the Parliamentary Ombudsman already in place to investigate the MPI, the question now is whether there could be a similar body of officers providing the same check and balance on farm animal industries. Banking and insurance are two popular industries for ombudsmen and in New Zealand we have both the Banking Ombudsman and the Insurance & Financial Services Ombudsman (IFSO).²²³ Consumers are able to file complaints about their bank or insurance and financial service provider who are part of the ombudsman participants scheme. All of New Zealand's biggest banks such as ANZ, ASB, BNZ and Westpac are all participants of the Banking Ombudsman, and the IFSO Scheme has over 4000 Participants.²²⁴ Tollemache observes the three main objectives of a private sector Ombudsman scheme. First, to address the power imbalance between large corporations and their customers when resolving disputes, ensuring that customers are not disadvantaged in that situation.²²⁵ Second is to secure a fair outcome. For example, the Banking Ombudsman may do what is 'in his or her opinion, fair in all the circumstances', without being bound by previous decisions.²²⁶ Lastly, the scheme works as a systematic audit to bring about changes to practice.²²⁷

III. Tripartism

The third option for reform is a regulatory tripartism. This means that non-governmental organisations (NGOs) are given a more prominent role in regulatory processes and is said to "create an effective third-party guardian of the public interest".²²⁸ In a definition by Ayres et al:²²⁹

Tripartism is defined as a regulatory policy that fosters the participation of NGOs in the regulatory process in three ways. First, it grants the NGO and all its members access to all the information that is available to the regulator. Second, it gives the NGO a seat at the negotiating table with the firm and the agency when deals are done. Third, the policy grants the NGO the same standing to sue or prosecute under the regulatory statute as the regulator. Tripartism means both opening to NGOS the smoke-filled

Johnson "Ombudsman investigates ministry's refusal to release alleged fish-dumping reports" *NZ Herald* (online ed, New Zealand, 4 April 2017).

²²³ Donald C Rowat "The New Private-Sector Ombudsmen" (Options Politiques, November 2003).

²²⁴ Banking Ombudsman Scheme "Our participants" <<https://bankomb.org.nz/the-complaint-process/bank-participant/>>; Insurance & Financial Services Ombudsman "About us" <<https://www.ifso.nz/about-us>>.

²²⁵ Nadja Tollemache "Taking the Ombudsman Concept into the Private Sector: Notes on the Banking Ombudsman Scheme in New Zealand" (1996) 26 VUWLR 1 at 7.

²²⁶ At 8.

²²⁷ At 8.

²²⁸ Goodfellow, above n 64, at 227.

²²⁹ Ian Ayres and John Braithwaite "Tripartism: Regulatory Capture and Empowerment" (1991) 16 Law Soc Inquiry 435 at 441.

rooms where the real business of regulation is transacted and allowing the NGO to operate as a private attorney-general.

In Australia, the RSPCA and Animals Australia are consulted when developing animal welfare standards. RSPCA inspectors appointed by the responsible minister have the right to prosecute, but these enforcement powers are still constrained by the Department of Agriculture.²³⁰ Therefore, the powers the RSPCA currently have is barely the level of control Goodfellow is suggesting NGOs be given in order to achieve accountability and transparency of the farm animal welfare regulatory environment. A regulatory tripartism would promote accountability and transparency in the animal welfare regime, however certain structural and cultural factors may not be in favour of a tripartism. Goodfellow thinks that the Australia Department of Agriculture may be unwilling to allow a “third party” involvement in the regulatory process. Therefore, he suggests that a tripartism should be a complementary feature to the independent animal welfare authority, Inspector-General or Ombudsman.²³¹

One of the biggest animal charities in New Zealand is the SPCA. The SPCA has jurisdiction in regards to complaints relating to companion animals and the MPI has jurisdiction over those of farm animals.²³² One concern with having the SPCA involved in the regulatory process is their resources and funding. The SPCA is already responsible for the 4.6 million companion animals in New Zealand.²³³ They also have other responsibilities such as rescue, rehabilitation, rehoming, providing shelter and education.²³⁴ Another possible option is SAFE. SAFE has been a strong advocate for animal rights in New Zealand. They are committed to exposing cruelty, taking legal actions educational programmes, political engagement, vegan advocacy and so on.²³⁵ Some of their current campaigns include the fight against colony cages, cruelty in the live export trade, putting a ban on rodeos and the poor breeding conditions of broiler chickens.²³⁶ Although SAFE is more involved in farm animal advocacy as compared to

²³⁰ Goodfellow, above n 64, at 228.

²³¹ At 228.

²³² Memorandum of Understanding between the Ministry of Primary Industries (MPI) and The Royal New Zealand Society for the Prevention of Cruelty to Animals Incorporated (SPCA), above n 151.

²³³ The New Zealand Companion Animal Council Inc “Companion Animals in New Zealand 2016” (June 2016) at 9.

²³⁴ SPCA “What we do” <<https://www.sPCA.nz/what-we-do>>.

²³⁵ SAFE “About us” <<https://safe.org.nz/about-us/>>.

²³⁶ SAFE “Hens” <<https://safe.org.nz/our-work/animals-in-need/hens-2/>>; SAFE “End the cruel live export trade” <<https://safe.org.nz/our-work/animals-in-need/live-export-trade/>>; SAFE “Rodeo” <<https://safe.org.nz/our-work/animals-in-need/rodeo/>>; SAFE “Chickens bred for meat” <<https://safe.org.nz/our-work/animals-in-need/chickens-bred-for-meat/>>.

the SPCA, it is likely that their resources and staffing may prevent them from taking on such a big role as well.

To sum up, the key issue with the regulatory system currently in New Zealand is the lack of oversight of the MPI and NAWAC's decision making process. For a positive change to be made, a body completely independent of the executive should be responsible for monitoring the MPI and NAWAC. A body modelled after the Parliamentary Ombudsman with the ability to receive individual complaints, coupled with an NGO with animal welfare as its priority acting as a third-party guardian in the regulatory process, would be a system that could bring about a regime that better protects the welfare of farm animals.

Conclusion

This dissertation recognised and brought up the crippling underlying issues that demonstrate how regulatory capture is an existing problem in New Zealand's farm animal welfare regime. All these issues are deeply rooted in the institutional structure and legislation, ranging from assigning conflicting responsibilities to the MPI, prioritising New Zealand's international reputation for exports over the welfare of animals, legislative provisions allowing industries to advance their interests and codes of welfare that contradicts the AWA.

In recognising that these problems exist, the best way forward is to minimise industry control over the farm animal welfare regime and have a department whose priority is the welfare of farm animals. A potential solution is to have an Ombudsman for animal welfare overseeing the MPI, with the jurisdiction to receive and investigate individual complaints by the public. Alongside the Ombudsman, a third party, such as an NGO like SAFE, with no ties to the government and whose primary concern are for the animals should play a more prominent role in the regulation of farm animal welfare standards. A more straightforward way to achieve higher welfare standards for farm animals is to amend the AWA to prohibit minimum standards that do not allow animals to express normal patterns of behaviour.

However, these are changes that cannot happen overnight. Making these solutions a reality demands a significant shift in the regulatory regime and would require willingness on the government's part. It is however, a change that needs to be made to achieve the actual purpose of the AWA and all the other advantages that comes from having higher animal welfare standards, such as benefiting society as a whole by preventing cruelty, recognising animals and sentient and deserving of legal rights, as well as improving the agricultural sector and consumer products. That means considering animal welfare interests over the reputation of New Zealand and economic interests of industries. Parliament would also need to step up to enact legislation that will properly protect farm animals.

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