

The Federal Regulatory Framework for Animal Welfare Legislation in Australia

This submission assesses the present federal regulatory framework for animal welfare, focusing in particular on the appropriateness of the balance it has struck between protecting animal welfare and supporting the practical and commercial interest of the broader community in farmed animal industries. We take as given that any practicable reform must accept ‘the current institutional use of animals’.¹ However, we submit that, as it stands, the law excessively favours the interests of the human community in a way that is irreconcilable with a commitment to animal welfare and inconsistent with current social attitudes.

This submission provides, first, a description of the current problems with the regulatory framework for animal welfare, and a proposed methodology for assessing the status quo and model alternatives. Secondly, we critique the existing regulatory framework and enforcement mechanisms. Thirdly, we discuss various proposals for reform, and recommend a licensing system that requires commercial users of animals to meet certain criteria in order to acquire and maintain a licence to keep animals. Finally, having presented our own model for animal welfare reform, we discuss strategies for its implementation.

Problem description

A. Imperative for the protection of animal welfare

Animal welfare has become a concern of the Australian community, indeed, ‘a commitment to animal welfare is seen as the hallmark of a ‘civilised society’’.² This concern for animal welfare cuts across all social sectors—even the farming industry, which is based on the use of animal products, explicitly recognises ‘the natural moral,

¹ David Glasgow, ‘The Law of the Jungle: Advocating for Animals in Australia’ (2008) 13 *Deakin Law Review* 181, 186.

² Steven White, ‘Legislating for Animal Welfare: Making the interests of animals count’ (2003) 28 *Alternative Law Journal* 277, 277.

ethical and professional obligation we have as farmers to care for our animals'.³ Animal welfare issues are also receiving increasing international recognition, with 27 European Union states having voted in favour of the provisional draft Universal Declaration on Animal Welfare 2007 ('UDAW'). The draft UDAW calls on signatories to '[recognise] that animals are living, sentient beings and therefore deserve due consideration and respect'.⁴ In other words, promoting animal well-being is now recognised as being an end in itself rather than an aspect of property protection,⁵ prompting the description of the animal welfare movement as 'perhaps the next great social justice movement'.⁶

However, although the importance of animal welfare is socially recognised, and Australians generally treat *companion* animals very well, there exists a significant discrepancy between Australian attitudes towards animal welfare and the way the vast majority of animals are actually being treated in Australia.⁷

B. The existing law

There is no accepted head of power under which the Commonwealth may legislate with respect to animal welfare. Thus, the State and Territories each have their own laws on this subject.⁸ The typical model of animal welfare law enforcement imposes a negative duty on owners to refrain from inflicting cruelty on animals (we note, however, that some recent laws, such as s 17 of the *Animal Care and Protection Act 2001* (Qld), impose a *positive* duty on a person to require them to take reasonable steps to meet an animal's needs).⁹

³ National Farmers' Federation, *Caring for animals is our business* (Press Release, February 2008), 1.

⁴ World Society for the Protection of Animals ('WSPA'), *Universal Declaration on Animal Welfare* (2005) <http://www.udaw.org/gov/pdf/en/en_draft.pdf> at 1 May 2009.

⁵ Steven White, 'Legislating for Animal Welfare: Making the interests of animals count' (2003) 28 *Alternative Law Journal* 277, 278-9.

⁶ See David Weisbrot, 'Comment', *Animals*, Australian Law Reform Commission ('ALRC') [Reform Issue 91 2008, 2](#).

⁷ Steven White, 'Regulation of Animal Welfare in Australia and the emergent Commonwealth: Entrenching the traditional approach of the States and Territories or laying the ground for reform?' (2008) 35 *Federal Law Review* 347, 351-357.

⁸ See *Animal Welfare Act 2002* (WA); *Animal Care and Protection Act 2001* (Qld); *Animal Welfare Act 1993* (Tas); *Prevention of Cruelty to Animals Act 1985* (SA); *Animal Welfare Act* (NT); *Prevention of Cruelty to Animals Act 1979* (NSW).

⁹ Steven White, 'Regulation of Animal Welfare in Australia and the emergent Commonwealth: Entrenching the traditional approach of the States and Territories or laying the ground for reform?' (2008) 35 *Federal Law Review* 347, 351.

Although as a criminal offence these laws can be enforced by police, the burden of enforcing the law in relation to companion animals ‘is largely assumed by the RSPCA’.¹⁰

As for the animals upon which this submission is focused, farm animals, these laws do not protect them at all. This is because ‘the treatment of farmed animals is exempted from the overarching cruelty and duty of care standards included in animal welfare legislation’.¹¹ Instead, farm animals are supposed to be treated in compliance with Codes of Practice, which vary between States and Territories but are based broadly on the Commonwealth Scientific and Industrial Research Organisation (‘CSIRO’)’s Model Codes of Practice for the Welfare of Animals (‘Model Codes’), which are developed also by the Primary Industries Ministerial Council (‘PIMC’).¹²

The Codes are detailed and wide-ranging, and they are ‘revised on a regular basis’ to take account of changing standards.¹³ However, ‘standards’ refers to the benchmarks set by the industries and some of them ‘would not meet a general cruelty standard’.¹⁴ For example, the intensive farming of pigs has led to an industrial standard of confining pregnant sows in cramped stalls, which inflicts physical and psychological stress on the animal.¹⁵ Yet under the State and Territory legislation, it is a defence to charges of animal cruelty or breach of duty to show that the treatment was in compliance with a Model Code.¹⁶ Clearly, the issue of how the Code is determined and whether the development process adequately considers the impact on animals is a very pressing one.

¹⁰ Steven White, ‘Regulation of Animal Welfare in Australia and the emergent Commonwealth: Entrenching the traditional approach of the States and Territories or laying the ground for reform?’ (2008) 35 *Federal Law Review* 347, 352.

¹¹ Steven White, ‘Regulation of Animal Welfare in Australia and the emergent Commonwealth: Entrenching the traditional approach of the States and Territories or laying the ground for reform?’ (2008) 35 *Federal Law Review* 347, 354.

¹² Steven White, ‘Regulation of Animal Welfare in Australia and the emergent Commonwealth: Entrenching the traditional approach of the States and Territories or laying the ground for reform?’ (2008) 35 *Federal Law Review* 347, 354.

¹³ See, eg, NSW Department of Primary Industry, *National model Codes of practice for animal welfare*, <<http://www.dpi.nsw.gov.au/agriculture/livestock/animal-welfare/Codes/general/national>> on 2 May 2009.

¹⁴ Steven White, ‘Regulation of Animal Welfare in Australia and the emergent Commonwealth: Entrenching the traditional approach of the States and Territories or laying the ground for reform?’ (2008) 35 *Federal Law Review* 347, 356.

¹⁵ Brian Sherman, Ondine Sherman and Katrina Sharman, *From Paddocks to Prisons—Pigs in New South Wales, Australia: Current Practices, Future Directions* (2005), Voiceless, 14-19.

¹⁶ Steven White, ‘Regulation of Animal Welfare in Australia and the emergent Commonwealth: Entrenching the traditional approach of the States and Territories or laying the ground for reform?’ (2008) 35 *Federal Law Review* 347, 359.

C. Methodology for assessing the status quo and proposals for reform

We propose three criteria. First, we advocate using a comparative law approach, as useful lessons can be drawn from studying how other jurisdictions approach common problems.¹⁷ Here, the common problem is how to determine when and to what extent animal welfare should be given priority over human interests, the process and the personnel involved in reaching this determination, and how this should be enforced. In considering how Australia should resolve these issues, it is beneficial to examine the approaches taken in other jurisdictions.¹⁸

Secondly, competing interests must be discerned through the identification of stakeholders, and these interests should be appropriately balanced through the use of a proportionality test. This test is borrowed from human rights law and has three elements: an infringement on rights must be rationally connected to a legitimate social goal; the extent of the infringement must be necessary in order to achieve that goal; and the benefit of that social goal must not be disproportionate to the degree of detriment to the individual. Here, although we do not advocate an animal *rights* framework, we submit that the concept of ‘animal welfare’ can and should fulfil a comparable role, by reference to the internationally recognised ‘five freedoms’.¹⁹ The Model Codes should begin with a presumption that animals must be cared for in accordance with these aspirational five freedoms. This would mean that current farming practices must protect the five freedoms so far as is possible, limited only by the reasonable practicalities and necessities of the overall commercial enterprise. Such a framework would by no means impose an absolute duty on farmers; it would instead mean that they bear the onus of justifying why a cruel form of treatment is indeed ‘necessary’.²⁰

¹⁷ Mary Ann Glendon, Michael Gordon and Christopher Osakwe, *Comparative Legal Traditions* (2nd ed, 1994), 10.

¹⁸ Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd ed, 1998), 34–35.

¹⁹ These are the freedom from hunger and thirst; discomfort; pain, injury and disease; freedom to express normal behaviour; and freedom from fear and distress: see Farm Animal Welfare Council (‘FAWC’) (UK), *Five Freedoms*, <http://www.fawc.org.uk/freedoms.htm> on 3 May 2009.

²⁰ An example of a ‘cruel’ practice that may perhaps be seen as necessary is the practice of docking hundreds of thousands of lamb tails to prevent painful flyborn infection, without the use of anaesthetic. By contrast, the profit margin associated with confining sows in 0.6m x 2.0m stalls would likely be seen as unnecessary in all the circumstances, particularly given such confined stalls are already prohibited under European law.

Thirdly, a key criterion is whether the proposed or current animal welfare regulations are capable of proper enforcement. We assess this with reference to three factors: first, consistency of laws and application of laws across jurisdictions; second, the appropriateness of the nature of enforcement and enforcing body; and third, consideration of the likely consequence on the persons targeted by the regulations.

Critique of the existing law

We identify the following as the key issues arising from the current federal regulatory framework, and we submit that the existing law is failing adequately to meet each of these.

A. Standard of animal welfare compared to other jurisdictions

It is evident that intensively farmed animals in Australia suffer from living conditions far worse than those in jurisdictions of comparable development and wealth. For example, the Commonwealth Model Code permits sow stalls of a size now banned in the EU.²¹ Australia also continues to engage in live animal export, which has been found to be a ‘high-risk trade’ for animal suffering.²²

B. Identifying stakeholders and appropriately balancing interests

A proposal for animal welfare reform must work realistically with the competing interests of other stakeholders. We have identified animals as stakeholders on the basis of their sentience and capacity to feel pain. Recognising that animals have an interest in their own welfare is relatively uncontroversial; the real issue is the extent to which the interests of animals, as stakeholders, can outweigh the interests of human stakeholders.

Stakeholders

²¹ See, eg, PIMC, *Model Code of Practice for the Welfare of Animals—Pigs (revised)* (2007) Department of Agriculture, Fisheries and Forestry; critiqued by Brian Sherman, Ondine Sherman and Katrina Sharman, *From Paddocks to Prisons—Pigs in New South Wales, Australia: Current Practices, Future Directions* (2005), Voiceless, 14-19.

²² See John Keniry, *Livestock Export Review: Final Report*, a Report to the Commonwealth Minister for Agriculture, Fisheries and Forestry (2003), 35.

The key human stakeholders' group is the farmers of Australia and, by corollary, the input of agriculture into the Australian economy. Australia's economy may not 'ride on the back of the sheep' as much as it once did, but agricultural products still constituted 12% of Australia's overall GDP in 2005/6, and recognising this is important in order to remain mindful of the ramifications of swinging the current balance too far the other way.

Australian consumers of animal products also have a stake in keeping prices low, particularly during the current economic climate. It would not be practicable, in the near-future, to propose reforms that forbade the use of animal products altogether, or that mandated welfare policies so stringent that the cost of producing such products became prohibitive. We also recognise that kosher and halal consumers have a special stake in animal welfare issues.²³

Food safety and animal disease issues are also important and particularly high profile issues at present, with the outbreak of 'swine flu'. Combating these risks warrants farmers' control over animal movement and consumption, but also requires animals to be kept reasonably healthy if they are better to resist these kinds of diseases.

Finally, we recognise also that broader issues about the environment and the efficient use of land are intertwined with the ethics of intensive farming.

Inappropriate balance – the exception overwhelms the rule

Although we recognise the validity of these interests, we nevertheless consider the current regulatory framework to be weighted too far in favour of human and economic interests. Under the status quo, the rule against animal cruelty is subject to an overwhelming exception: that of 'necessary' cruelty against farm animals.

²³ However, their interests can be reconciled with animal welfare, as recent years have seen the development of electric stun guns that comply with religious law yet prevent the slaughtered animal from feeling pain. See discussion of these practices in Temple Grandin and Joe M. Regenstein, 'Religious slaughter and animal welfare: a discussion for meat scientists' (1994) Focus International - CAB International <<http://www.grandin.com/ritual/kosher.slaugh.html>>, 3 May 2009.

We submit that the Model Codes of Practice are insufficient to remedy this gap in the law: First, because the process by which the content of the Model Codes is developed does not permit a proper consideration of animal welfare as a primary goal. The Codes are created and endorsed by the PIMC, whose stated objective is ‘to develop and promote sustainable, innovative and profitable agriculture, fisheries/aquaculture, food and forestry industries’.²⁴ In other words, the PIMC gives disproportionate representation to the agricultural stakeholders. Further, there are no animal welfare representatives on the PIMC; ‘rather the RSPCA and Animals Australia are merely “consulted” during the process.’²⁵

Secondly, the PIMC has demonstrably produced unbalanced results that gave insufficient weight and priority to animal welfare. For example, while the revised Pig Code does increase sow stall size from 2.0 metres to 2.2 metres, with a width of 0.6 metres, this Code has application only to new stalls. There is no phasing-out policy for the existing stalls that do not comply with the new dimensions—despite being banned as unnecessarily cruel, existing stalls may continue to be used until they become defunct.²⁶ There is a clear need for a new process by which the continuation of practices acknowledged to be cruel must be either justified or prohibited.

C. Whether animal welfare framework is capable of being adequately enforced

The third fundamental issue with the current framework is the inadequacy of the enforcement mechanisms. This is for three reasons.

Lack of consistency

First, there is a lack of consistency and application of laws across States and Territories. This is particularly the case with the extent to which each jurisdiction has incorporated or adapted the Model Code, and the degree of enforceability of the Code. For example, South Australia is the only jurisdiction to make compliance with industry Codes mandatory

²⁴ Primary Industries Ministerial Council, *About PIMC*, < http://www.mincos.gov.au/about_pimc > at 3 May 2009.

²⁵ David Glasgow, ‘The Law of the Jungle: Advocating for Animals in Australia’ (2008) 13 *Deakin Law Review* 181, 196.

²⁶ Primary Industries Ministerial Council, *Revised Model Code of Practice for the Welfare of Animals- Pigs* (2007), [4.1] < <http://www.daff.gov.au/media/documents/animal-plant/animal-welfare/mcpractice/pig-Code.pdf> > at 3 May 2009.

rather than optional.²⁷ Additionally, because animal cruelty offences are dealt with summarily, very little jurisprudence has developed in higher courts. This means that there is a high risk of uneven application of standards across different jurisdictions. Inconsistencies are a problem because they add to the complexity of the law and detract from the principled position that animal welfare is a concern of the entire Australian community.

Differences between welfare practices also distort the economics of production in a way that is detrimental to animal welfare. It is cheaper, for example, to keep battery hens than to farm using free range or barn practices, and so the farmer in a State or Territory with lax laws will be able to undercut farmers in States and Territories that have more stringent ethical requirements. As section 92 of the Australian Constitution provides that interstate trade ‘shall be absolutely free’, a State or Territory that tried to prevent the importation of animal products on public policy grounds would likely violate this provision.²⁸ This would create political pressure on governments to keep welfare regulations at the lowest common denominator.

Appropriateness of nature of enforcement and enforcement bodies

The use of the criminal law is an ineffective means of enforcement. Compounding the problem that observance of the Codes is generally a defence to animal cruelty charges, Australia’s lax enforcement regime means that the likelihood of such charges being brought is remote. While State Departments of Primary Industries have the power to enforce the Anti-Cruelty Acts,²⁹ their stated mission is ‘the maximisation of animal industry economic performance’.³⁰ These conflicting duties ensure that, in practice, the most meaningful enforcement in Australia is performed by the RSPCA. In effect, this is ‘to delegate enforcement of a criminal statute to an unaccountable...private society.’³¹

²⁷ *Prevention of Cruelty to Animals Act 1985 (SA)*, s 42A-44.

²⁸ See *Betfair Pty Limited v Western Australia* (2008) 234 CLR 418 (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

²⁹ See, for example, *Prevention of Cruelty to Animals Act 1979 (NSW)* Part 2A

³⁰ David Glasgow, ‘The Law of the Jungle: Advocating for Animals in Australia’ (2008) 13 *Deakin Law Review* 181, 197.

³¹ Malcolm Caulfield, ‘The Law and Pig Farming’ (2007/2008) 91 *Reform* 22, 24.

Criminal law has always been the purview of the state and yet the current arrangement undermines traditional notions of government responsibility and accountability. It is simply inappropriate to place the onus of enforcing criminal sanctions on an NGO. This is particularly the case given that the RSPCA lacks the resources to pursue all but the most extreme or clear-cut of cases, and so many persons in breach of the criminal provisions escape prosecution.

How best to impact the behaviour of commercial animal users

The fundamental problem with the ability of current laws to shape the behaviour of commercial animal users is that the regulatory framework does not deal appropriately with farmers and corporate farming enterprises in their guise as commercial entities. The criminal law, with its higher standard of proof and need to attribute conduct, is not the most effective means of changing corporate behaviour. A far better enforcement approach would use commercial enforcement mechanisms, such as licensing, forced disclosure and consumer education techniques, for example, trustmarks. If the reason for infringing upon animal welfare is commercial, then a commercial incentive to provide adequate protection is called for.

Proposed model for reform

A. Dismissing inappropriate models

It is clear from the foregoing that we consider the status quo to be an inadequate means of protecting animal welfare.

We dismiss as unrealistic any suggestion of an Animal Bill of Rights. Some international bodies, such as the US Animal Legal Defense Fund, are petitioning their domestic governments to enact legislation to protect basic rights of animals such as ‘the right of animals to be free from exploitation, cruelty, neglect and abuse’³² and ‘the right of farm

³² Animal Legal Defense Fund, ‘Winning the Case Against Cruelty’ *Animal Bill of Rights* (2007) <http://www.aldf.org/article.php?list=type&type=148> at 3 May 2009.

animals to an environment that satisfies their basic physical and psychological needs'.³³ However, given that Australia is the only liberal democracy in the Western world without even a statutory Bill of *Human Rights*, the discourse of rights is unsuitable for our current political and legal framework.

We also dismiss suggestions that animals can be adequately protected through common law remedies. Common law or equitable doctrines of habeas corpus³⁴ and guardianship³⁵ are unworkable models for wide-scale reform. Even if the controversial extension of the writ of habeas corpus to animals were accepted, the grant of the writ would always turn on the specific characteristics and circumstances of each individual animal. The continual lodging of writs of habeas corpus would be a most inefficient method of protecting animal rights. Similarly, Pollard's guardianship model is primarily directed towards individual companion animals. Notions of habeas corpus and guardianship may provide relief to individual animals but they cannot be relied upon to produce widespread regulatory reform, especially for animals involved in industry and agriculture.

B. Our proposed model

We propose a reform that recognises the importance of protecting animal welfare and considers how best to balance human and economic interests with animal welfare, that furthermore considers how to develop institutions that can achieve that balance, and finally that incorporates an appropriate means of enforcement. For the purpose of this section, we assume the validity of a national Animal Welfare Act under the external affairs or state referral power. However, if the constitutionality of a federal Act were in doubt, a similar scheme could be implemented using uniform legislation and state institutions.

Licensing as a condition for commercial dealings with animals

³³ Animal Legal Defense Fund, 'Winning the Case Against Cruelty' *Animal Bill of Rights* (2007) <http://www.aldf.org/article.php?list=type&type=148> at 3 May 2009.

³⁴ Steven M. Wise, 'The Basic Rights of Some Non-Human Animals Under the Common Law' (2007/2008) 91 *Reform* 11-13.

³⁵ Ruth Pollard, 'Animals, Guardianship and the Local Courts: Towards a Practical Model for Advocacy' (2007/2008) 91 *Reform* 48, 49.

The cornerstone of our reforms is the implementation of a mandatory regulatory scheme for animal welfare that links adequate protection to agricultural licensing. A principal Animal Welfare Act would provide that any person, natural or body corporate, using animals for commercial purposes must hold a licence. It will also state that, under the Act, regulations may be made setting out Codes of Conduct and providing for breaches of the Code. Pursuant to the Act, to obtain a licence, a person must comply with the regulations and Codes of Conduct. The Codes of Conduct for various animals would appear as schedules to the Act. A person suspected of failing to comply with the Codes may be issued with a 'notice to show cause' why their licence should not be revoked. Decision-makers would also have the authority to cancel, suspend, vary or impose conditions on licences. As an administrative decision, this would be reviewable by a relevant body such as the Administrative Appeals Tribunal under a federal Act, or Administrative Decisions Tribunals under a State or Territory Act.

Greater procedural fairness in development of proportionate Model Codes

Our proposal recognises that the content of the Model Codes and their ability to reconcile animal welfare with the interests of the broader community is critical. The composition and conduct of the body creating these Codes is thus extremely significant. As discussed above, the PIMC is so entrenched within industry that it is an inadequate forum for creating balanced Codes. The issue is: what kind of institution or body would be the most appropriate vehicle for developing such a Code, in a way that will adequately take into account the interests of human and other animal stakeholders?

One approach is to urge government to establish a department, distinct from agriculture and fisheries, with a special minister for animals.³⁶ This is viable given the significant and overlapping role of animals in issues of bio-security, quarantine, food safety and environmental protection. Such a department would provide a unified and streamlined approach to issues involving animals. It would be politically accountable and, of necessity, attuned to the interests of its portfolio. A Committee within this department would be

³⁶ Ruth Pollard, 'Animals, Guardianship and the Local Courts: Towards a Practical Model for Advocacy' (2007/2008) 91 *Reform* 48, 49.

obliged to seek and hear submissions from all relevant stakeholders and create a proportionate animal welfare policy. An alternative approach would be to create an independent statutory authority – an Australian Commission for Animals – that was tasked with these same duties and enforcement of the licensing scheme.

A third approach, and that taken in the United Kingdom, is to establish an independent advisory council to investigate, advocate and report on behalf of animals.³⁷ This approach is weaker, as there is no enforcement mechanism involved, but it does emphasise the importance of having an independent body reviewing animal welfare. Therefore, at minimum, an independent animal welfare body should be established in Australia, with the power to investigate, report and educate the community about animal welfare. We also strongly support the inclusion of animal welfare representatives on the PIMC.

Better enforcement of regulatory norms

By making compliance with Codes of Conduct a necessary requirement for using animals for commercial purposes, these regulatory norms would be better enforced as compliance would become a precondition for doing business.

Additionally, our proposed licensing scheme would exist harmoniously alongside the criminal offence of cruelty to animals. As it stands, the provisions in all Australian jurisdictions provide that it is an exemption to cruelty to animal charges to be acting in accordance with industry Codes. This would remain under our system.

Our proposed Animal Welfare Act would also impose a disclosure regime on corporations who use animals for commercial purposes. Australians, particularly those living in cities, often have limited knowledge of standard farming practices. Leslie and Sunstein suggest that ‘if those practices were highly visible, they would change because many people already believe they are morally unacceptable’.³⁸ While this is a speculative argument,

³⁷ See the Farm Animal Welfare Council, <<http://www.fawc.org.uk/default.htm>> at 3 May 2009.

³⁸ Steven White, ‘Regulation of Animal Welfare in Australia and the emergent Commonwealth: Entrenching the traditional approach of the States and Territories or laying the ground for reform?’ (2008) 35 *Federal Law Review* 347, 362.

governments are increasingly requiring companies to disclose information to the public.³⁹ This information allows people to make properly informed decisions about which companies they invest in and buy from. It is reasonable that companies should bear the political or economic cost of their unethical practices. As a ‘soft’ reform, the threat of negative publicity and the benefits of being seen to engage in corporate social responsibility may encourage profit-cutting in favour of better treatment of animals.

Requiring disclosure would also aid in other methods of ‘soft’ reform such as education and ‘trustmarks’. These approaches attempt to influence consumer behaviour and provide economic incentives for companies to act in a particular manner. Trustmarks, such as the ‘certified organic’ logo of the National Association for Sustainable Agriculture Australia allow consumers to choose to support companies that produce organic products. A similar logo marking high ethical conduct could be created for companies that treat their animals humanely.

Strategies for Implementation

Were the substance of our proposed reforms to be accepted, the Animal Welfare Act should ideally be federal legislation passed by the Commonwealth. This is because animal welfare is a national concern and should be addressed in national legislation. However, given our constitutional structure, a federal Animal Welfare Act may face legal challenge.

Constitutional issues

The Australian Constitution preserves a federal balance of power, in which the federal Parliament can only pass laws with respect to the heads of power set out in the Constitution itself. There is no explicit constitutional head of power over ‘animals’ or their welfare. While the federal government has legitimately regulated aspects of animal welfare indirectly, such as live animal export and the regulation of the import and export of native and endangered species, an Animal Welfare Act would arguably be insufficiently connected to the quarantine or trade heads of power.

³⁹ See, for example, the requirements of public companies to disclose executive remuneration in *Corporations Act 2001* (Cth) s300A(1)(a).

However, the external affairs power may provide a viable alternative. There are regional agreements on animal welfare,⁴⁰ and although at present there is no international convention, Australia has been ‘working with other international bodies such as the World Society for the Protection of Animals on issues such as the development of a *Universal Declaration on Animal Welfare*’.⁴¹ If this declaration were to be adopted by the United Nations and given support by Australia, this may be an issue of ‘international concern’ sufficient to bring federal animal welfare regulation within the external affairs power.⁴² Alternatively, if the Australian states were amenable, a referral of state powers to the Commonwealth under section 51(xxxvii) of the Constitution would provide a legal basis for federal legislation.

Alternatively again, in the absence of federal power to pass such an Act, uniform legislation across all states and territories would be desirable. Mirror legislation has been enacted in Australia for issues where a national approach is warranted, such as the Consumer Credit Code and defamation law. Although a federal Act which benefits from section 109 of the Constitution is preferred, uniform legislation would also improve the current, inconsistent state-based approach. The implementation of a Commonwealth regulatory framework would depend, ultimately, on whether it could be brought within a constitutional head of power. If so, a federal government department would be responsible for its management and administration. However, if a constitutional challenge were upheld, a similar scheme could be implemented using uniform legislation and separate state enforcement institutions.

⁴⁰ See, for example, the *Protocol on Protection and Welfare of Animals*, adopted in Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Other Related Treaties, opened for signature 2 October 1997, [1997] OJ C 340/01 (entered into force 1 May 1999), 110 as amending Treaty Establishing the European Community, opened for signature 25 March 1957, 298 UNTS 11 (entered into force 1 January 1958).

⁴¹ Steven White, ‘Regulation of Animal Welfare in Australia and the Emergent Commonwealth: Entrenching the Traditional Approach of the States and Territories or Laying the Ground for Reform?’ (2007) 35 *Federal Law Review* 347, 372.

⁴² See, eg, *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1; *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416.

Implementation of monitoring body

Our preferred model is to have a Ministry or independent Commission for animals be tasked with the development and administration of new Model Codes of Practice that appropriately balance animal welfare with human interests. The codes would therefore be pieces of delegated legislation, and so would have to be tabled in Parliament.

Alternatively, if these suggestions were rejected, our proposed reforms are heavily dependent on an independent code-setting and advisory body whose composition and interests are more reflective of the relevant stakeholders. This could be achieved through terms of reference and composition guidelines.

Educating the community and harnessing political will

A hurdle that has confronted successive generations of animal welfare reformers has been the lack of political will to initiate change. The agricultural lobby wields considerable political clout in Australia and, in these drought-stricken times, legislation capable of being portrayed as “anti-farmer” is viewed as politically inexpedient. As recently as 2005, Australian Democrat Senator Andrew Bartlett introduced a National Animal Welfare Bill which aimed to create a uniform, national approach to animal welfare. It was sent to the Senate Rural and Regional Affairs and Transport Committee which, according to White, produced a ‘report notable for a complete lack of serious analytical consideration of the issues raised by the Bill’⁴³ and recommended that the Bill not proceed. Any strategy for implementing the proposed reforms must therefore recognise the need for community education and the gathering of enough public support to influence reluctant politicians. The additional proposals of required disclosure and the development of an animal welfare trustmark should assist with this process.

Conclusion

The regulation of animal welfare in Australia requires the intricate balancing of interests. As living, sentient beings, animals have a legitimate interest in avoiding pain and

⁴³ Steven White, ‘Regulation of Animal Welfare in Australia and the emergent Commonwealth: Entrenching the traditional approach of the States and Territories or laying the ground for reform?’ (2008) 35 *Federal Law Review* 347, 374.

suffering. On the other hand, the Australian economy, farmers and consumers require industry practices that allow for the production of efficient and competitive animal products. In a system that unjustifiably preferences human interests over animal welfare, reform is needed. Our proposed licensing system would reform the way in which the *substance* of the Codes of Conduct is developed, and would also provide an appropriate, consistent and effective means of enforcement.