

## Codifying Animal Welfare Standards – Foundations for Better Animal Protection or Merely a Façade?

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### Introduction

While modern animal welfare legislation can extend over hundreds of complex provisions, the first animal protection laws, enacted in the United Kingdom in the early 19th century, were of a very simple nature. For the most part, they focused entirely on the prohibition of ‘cruelty’, leaving the thorny determination of what actually constituted ‘cruel’ conduct entirely to the courts. An early example of court-defined ‘cruelty’ is provided by the leading English case of *Ford v Wiley*.<sup>1</sup> In this case, it was alleged the defendant had breached the law which said (relevantly) it was an offence ‘if any person shall ... cruelly beat, ill-treat, over-drive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused or tortured any animal’.

The word ‘cruelly’ – the critical modifier in this instance – was not qualified or defined in the legislation itself. As a consequence, the court interpreted the term to give it a significant qualification, which was that cruelty is not unlawful if it is ‘reasonably necessary’.<sup>2</sup> Lord Coleridge held that such necessity includes consideration of whether the act was undertaken for an ‘adequate and reasonable object’.<sup>3</sup> Judge Hawkins expanded on what was reasonable or necessary, giving examples of accepted practices such as the castration of male animals ‘intended for use or for food’. Both members of the bench said that the (allowable) cruelty should be proportional to the object.<sup>4</sup>

The decision to leave the definition of cruelty entirely to the judiciary had a number of drawbacks. The most obvious was that the law as defined operated at a high level of generality, providing little guidance about what

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1 (1889) 23 QBD 203. The decision concerned the dehorning of cows.

2 Referring with approval to *Budge v Parsons* (1863) 129 RR 367; 3 B & S 382 at 385 (‘the cruelty intended by the statute is the unnecessary abuse of the animal’).

3 *Ford v Wiley* (1889) 23 QBD 203 at 203.

4 *Ibid.* For a critique of the welfare protection regime which this approach embodies see chapter 1 (this volume).

constituted acceptable treatment of animals. With such a vague law, it was not surprising that state officials were reluctant to bring prosecutions except in extreme cases of abuse. Consequently, judges were not provided with many opportunities to expound upon the boundaries of these definitions in concrete fact scenarios. While this approach may have been sufficient in earlier times, growing public concern about animals led to these old laws being viewed as deficient. The pressure for change was especially intense in the area of the treatment of farmed animals. Through the latter half of the 20th century, animal welfare reform abroad was taking place at a rapid pace. While farmers in Europe were complying with comparatively tough standards, concerns were expressed that animals being farmed and exported from Australia and New Zealand were being treated in less than acceptable ways.<sup>5</sup>

Faced with real threats to farm export trade, regulators in both Australia and New Zealand reacted. Codes of practice or regulations concerning farming practices were first developed in the 1970s in Australia<sup>6</sup> and the 1990s in New Zealand.<sup>7</sup> For example, between 1989 and 1999, the Animal Welfare Advisory Committee (AWAC) in New Zealand – a group put together by the government and various farming industry bodies – led the development of 21 ‘Codes of Recommendations and Minimum Standards for the Welfare of Animals’. While these Codes had no legislative force, they were intended to provide guidance to farmers on acceptable practices and a transparent account of local farming conduct for overseas markets.

The need to create more detailed guidelines has only intensified in recent years, to the point that today’s Australasian animal welfare regulatory regimes look nothing like their 19th century counterparts. In particular, in both Australia and New Zealand, more recent regulatory changes have been informed, at least rhetorically, by the Farm Animal Welfare Council (FAWC) ‘Five Freedoms’.<sup>8</sup> On the surface, contemporary regulation in both jurisdictions appears to provide some of the world’s most progressive legislation

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5 Sankoff, P (2005) ‘Five years of the “new” animal welfare regime: Lessons learned from New Zealand’s decision to modernise its animal welfare legislation’ 11 *Animal Law* 7 at 11-13.

6 Geoff Neumann & Associates (2005) *Model Codes of Practice for the Welfare of Animals*, p 3 <[http://www.daff.gov.au/data/assets/pdf\\_file/0006/146751/Neumann\\_report.pdf](http://www.daff.gov.au/data/assets/pdf_file/0006/146751/Neumann_report.pdf)> (this report was commissioned by the Commonwealth Department of Agriculture, Fisheries and Forestry) (Neumann Report).

7 Sankoff, above n 5, p 16.

8 FAWC based the ‘Five Freedoms’ on the Brambell Committee Report (Brambell, FWR Chairman 1965 *Report of the Technical Committee to Enquire into the Welfare of Animals Kept Under Intensive Husbandry Systems*, Cmnd 2836, HMSO, London). The Committee was established largely as a result of the public reaction to Ruth Harrison’s seminal book *Animal Machines: The New Factory Farming Industry*, Vincent Stuart Publishers, London, 1964, an expose of industrial agriculture and the manner in which animals were being farmed. The ‘Five Freedoms’ are (a) freedom from hunger and thirst; (b) freedom from discomfort; (c) freedom from pain, injury or disease; (d) freedom to express normal behaviour; and (e) freedom from fear and distress.

in protecting the basic health and well-being of animals. Especially in New Zealand, rather than leaving definitions to the judiciary, the details of what constitutes 'acceptable' uses of animals are set out in a host of animal welfare codes that have the force of regulations.<sup>9</sup> This has ostensibly changed the manner in which cruelty against animals is assessed.

From the outset, this change was regarded by most as highly desirable. The assumption was that it would remove the details of what constitutes animal cruelty from the erratic and inconsistent hands of the judiciary, allow 'specialists' to determine what constitutes improper care and the like, and permit constant modernisation, on the premise that codes and regulations can be adapted more quickly in response to changing circumstances than cumbersome legislation. A measure of the perceived success of the use of codes in a farming context has been their extension to a range of other contexts, including where animals are used as entertainment, the farming of wild animals and the keeping and sale of companion animals.<sup>10</sup>

Nonetheless, the move to a code-based system has not been seamless. Experience with the new procedures shows there is reason to be concerned the codes are not delivering as promised, and are instead serving to entrench the common 'cruelty' associated with industrialised farming practices. This chapter examines the rise of codes and regulations in animal welfare law in Australasia and the issues that surround their use. The standards drafting process, the notion of exempting various practices through the use of 'exceptional circumstances' clauses, the uncertain legal status of codified standards and the overall effectiveness of this mode of regulation are also addressed.

## **Establishment of Codes, Standards and Guidelines, and Regulations**

### ***Australia***

Since the 1980s in Australia various States and Territories have adopted 'Codes of Practice' relating to animal welfare. These are usually based on Model Codes of Practice, developed by the Primary Industries Ministerial Council (PIMC), comprised of federal, State and Territory primary industries

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9 The situation is slightly more complicated in Australia. Citing constitutional limitations, the Commonwealth generally does not legislate in the area of animal welfare. States and Territories have adopted varying approaches to the development, content and significance of codes of practice (or, in their more recent form, 'standards and guidelines'): see below under heading, 'Establishment of Codes, Standards and Guidelines and Regulations'.

<sup>10</sup> See other chapters in this volume for discussion of relevant codes in these different contexts. The focus of this chapter will be on the use of codes in a farm animal context.

ministers.<sup>11</sup> The PIMC has produced 22 such Codes.<sup>12</sup> In addition, the National Health and Medical Research Council (NHMRC) has produced a Code of Practice relating to the use of animals in scientific research,<sup>13</sup> and the Australia New Zealand Food Regulation Ministerial Council (ANZFRMC) has approved a code of practice concerning animal slaughter, which includes reference to welfare.<sup>14</sup>

Model Codes of Practice were endorsed within the PIMC structure, with the intention that compliance with new or revised Codes of Practice would be made mandatory in the various jurisdictions by adopting their 'minimum standards' as regulations.

Apart from concerns about who controlled this process, addressed below, one of the key flaws with the code process was that in the absence of any federal legislation governing animal welfare, there had been no successful attempt to bring a rational and uniform approach to the development and adoption of Codes of Practice.<sup>15</sup> This reflects problems with animal welfare legislation in a federal setting more broadly, as this approach permits individual states and territories to legislate independently of one another. Partly in response to a lack of national consistency, the Commonwealth Government is now in the process of implementing the *Australian Animal Welfare Strategy*.<sup>16</sup> One of the goals of this strategy is to

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11 State and Territories typically either incorporate the model codes directly or adopt them in revised form: for a detailed jurisdictional breakdown, see White, S (2007) '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' 35 *Federal Law Review* 347 at 354-356, 369-370. The PIMC was superseded by the Standing Council on Primary Industries (SCoPI) on 17 September 2011 (see SCoPI, 'Standing Council on Primary Industries - About' <[http://www.mincos.gov.au/about\\_scp](http://www.mincos.gov.au/about_scp)>).

12 The codes are published by the Commonwealth Scientific and Industrial Research Organisation (CSIRO) as part of the Primary Industries Report Series <<http://publish.csiro.au/nid/22/sid/11.htm>>.

13 NHMRC (2004) *Australian Code of Practice for the Care and Use of Animals for Scientific Purposes*, Australian Government, Canberra, 7th ed. Note there is no Code of Welfare pertaining to the use of animal in laboratories in New Zealand. Instead the use of animals for research, testing and teaching is governed by the 'self-regulating' Part 6 of the AWA.

14 ANNZFRMC (2002) *Australian Standard for the Hygienic Production and Transportation of Meat and Meat Products for Human Consumption*, CSIRO Publishing, Canberra. This is adopted under Orders made pursuant to the *Export Control Act 1982* (Cth) and is relevant to animals slaughtered for preparation of meat for export. There is a 2007 version of this Code, which is yet to be adopted.

15 See Neumann Report, above n 6, p 9 for a detailed discussion. Table 2 lists the Model Codes which have been developed and indicates which of these have been directly adopted in the States and Territories, as well as showing which other codes have been developed 'locally' (often drawing heavily on the Model Codes).

16 For the latest version see Commonwealth of Australia, *Australian Animal Welfare Strategy and National Implementation Plan 2010-2014* <<http://www.daff.gov.au/animal-plant-health/welfare/aaws/australian-animal-welfare-strategy-aaws-and-national-implementation-plan-2010-14>>.

achieve greater consistency in animal welfare regulation, including in relation to the development, content and adoption of animal welfare standards.

The impetus for a changed approach was a government-sponsored 2005 review of the operation of Codes of Practice, the Neumann Report, which was highly critical of the prevailing regulatory regime.<sup>17</sup> A revised approach is now being implemented, with Codes to be recast as Australian Animal Welfare Standards and Guidelines. A consortium comprising government and industry representatives, called Animal Health Australia, is engaged in a process of converting existing Model Codes of Practice into Standards and Guidelines.<sup>18</sup> These regulatory instruments are to contain mandatory 'standards', less directive 'recommendations' and supporting 'guidelines'.

The first Animal Health Australia sponsored document, setting out standards and guidelines for land transport of farm animals, is only now being implemented.<sup>19</sup> Standards and guidelines separately addressing the welfare of cattle, sheep and horses are in preparation. It is likely to be many years before all existing Model Codes of Practice have been converted. For this reason, Model Codes of Practice, in whatever form they are adopted by state and territory jurisdictions, remain highly relevant. It is important, therefore, to note at this point two key consequences which flow from the so far unrealised goal of a nationally uniform approach: inconsistencies in content and applicability.

As to content, a number of States and Territories have developed their own codes in the same topic area, inconsistent as between themselves and with the Model Codes adopted by the remaining jurisdictions. There is large variation across the jurisdictions as to animal species and practices addressed. As Australian Animal Welfare Standards and Guidelines are implemented, it stands to reason that this variation will recede as a concern.

As to applicability, Codes operate differently by jurisdiction. In most jurisdictions (apart from New South Wales and Tasmania), compliance with

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<sup>17</sup> Neumann Report, above n 6.

<sup>18</sup> Animal Health Australia, 'Animal welfare legislation – codes of practice and standards' <<http://www.animalhealthaustralia.com.au/programs/livestock-welfare/animal-welfare-legislation-%E2%80%93-codes-of-practice-and-standards/>>. Prior to responsibility for this role being delegated to Animals Health Australia, the conversion to 'standards and guidelines' was applied to one code, with the publication in 2008 of a 3<sup>rd</sup> edition of the *Model Code of Practice for the Welfare of Pigs* (CSIRO Publications, Canberra, 3<sup>rd</sup> ed, <<http://www.publish.csiro.au/nid/22/pid/5698.htm>> and states and territories subsequently adopting the 'standards' in regulations (see, eg, *Animal Care and Protection Regulation 2012* (Qld) Sch 2; *Animal Welfare Regulations 2012* (SA) Pt 6).

<sup>19</sup> Animal Health Australia, 'Australian Animal Welfare Standards and Guidelines – Land Transport' <<http://www.animalwelfarestandards.net.au/land-transport/>>. The last step in the implementation process is the adoption by each of the states and territories of the 'standards' as mandatory requirements (see, eg, *Animal Welfare Regulations 2012* (SA) Pt 7).

a Code is a defence to prosecution under the relevant animal welfare legislation. In New South Wales, compliance with a Code is not a defence to a cruelty prosecution, although evidence of compliance or non-compliance is admissible in evidence. In Tasmania, the legal status of Codes is unclear. Finally, compliance with Codes is generally voluntary in every jurisdiction save for South Australia, where adherence is compulsory and those in charge of animals are subject to fines for breach. Again, as Australian Animal Welfare Standards and Guidelines are implemented, standards will be uniformly adopted by the States and Territories and compliance made mandatory.

### *New Zealand*

The status of Codes of Welfare is much more straightforward in New Zealand. The *Animal Welfare Act 1999* (AWA), applicable throughout the country, sets out general guidelines for the treatment of animals and provides for 'Codes of Welfare' as a form of supplemental regulation containing legally binding minimum standards relating to the care and treatment of specific animals or industries.<sup>20</sup> Codes of Welfare are deemed to be regulations for the purposes of the *Regulations (Disallowance) Act 1989* (NZ) and as such are subject to oversight by Parliament's Regulations Review Committee.<sup>21</sup>

The Code 'model' is different to the standard regulatory model. Instead of simply being drafted and enacted by the responsible Ministry – the Ministry of Primary Industries (MPI)<sup>22</sup> – Codes of Welfare are enacted

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20 See Ministry of Agriculture and Forestry (MAF) (June 2009) *Guidelines for Writing Codes of Welfare*, Animal Welfare, MAF Biosecurity New Zealand. 3 May, <<http://www.biosecurity.govt.nz/files/regs/animal-welfare/req/codes/codes-of-welfare-guidelines.pdf>>. This guide provides information about the purpose and legal status of codes, as well as to assist people writing or reviewing codes of welfare. The NAWAC state that Codes of Welfare are primarily directed at educating the owners or persons in charge of animals and encouraging their voluntary compliance with minimum standards rather than facilitating enforcement of the Act. This is despite minimum standards having legal force in that breach of a standard creates a presumption that the Act itself has been compromised. Equally, demonstration that a minimum standard has been met or exceeded may be a defence against a charge under the Act: AWA, ss 13(1A), 13(2)(c), 30(1A), 30(2)(c).

21 The extent of this oversight remains a contested issue, and is discussed in more detail below. To date, there has only been one challenge to a code of welfare through the Regulations Review Committee: Animal Rights Legal Advocacy Network (2005) 'Complaint about Animal Welfare (Layer Hens) Code of Welfare 2005'.

22 Codes were the responsibility of the Ministry of Agriculture and Forestry (MAF) until the recent merger of this Ministry with the Ministry of Fisheries and the Food Safety Authority. The Government decided to change the name of the Ministry to the Ministry of Primary Industries (MPI). The name change took effect from 30th April 2012, with the Ministry now responsible for agriculture, horticulture, fisheries and aquaculture, forestry, the food sector and biosecurity.

through a rather unique process. Initial responsibility for the Codes is delegated to a quasi-independent body, the National Animal Welfare Advisory Committee (NAWAC).<sup>23</sup> Although the Codes are ultimately issued by the Minister of Primary Industries, the NAWAC is responsible for formulating the Codes of Welfare and advising the Minister on how to proceed.<sup>24</sup>

The NAWAC was established as a way of ensuring that the creation of Codes of Welfare would not fall exclusively to the government, in particular the Ministry that is directly in charge of agriculture, as there was concern that wider consultation was required to ensure that animal interests were protected.<sup>25</sup> The NAWAC is considered to play an important role in identifying animal welfare problems and effective remedies for them.<sup>26</sup> It is regarded as an 'expert' body, primed to consider science, ethical standards and other relevant concerns.<sup>27</sup> The membership of the NAWAC consists of primary industry stakeholders, educators, veterinarians, animal welfare advocates, animal welfare and livestock scientists, lay people and others.

The body's composition is intended to represent diverse interests,<sup>28</sup> including animal welfare groups like the Royal New Zealand Society for the Prevention of Cruelty to Animals (RNZSPCA), and also a healthy contingent of members representing commercial farmers and other industry-friendly

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<sup>23</sup> *Animal Welfare Act 1999* (NZ) ss 56-57.

<sup>24</sup> The Animal Welfare Act 1999 is currently being reviewed by the MPI with one of the many proposed changes being to Codes of Welfare: see Ministry of Primary Industries (2012), *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, <http://www.mpi.govt.nz/news-resources/publications?title=Animal%20Welfare%20Matters>. The Government is proposing to replace Codes of Welfare with a mix of mandatory standards (with instant fines being attached to specific offences) and guidelines. It is proposed that these regulated standards would be written by MPI and that the NAWAC would be consulted, as opposed to the developer. 2,209 submissions were received by the Government during the consultation phase. The resultant changes to the Act are not expected to be known till the end of 2013. For further information see: Foran, H (2012) 'Proposed changes to New Zealand's animal welfare system' *Vetscript*, pp 24-26.

<sup>25</sup> This is at risk with the currently review of the Act, with Codes of Welfare being proposed to be written by the Ministry, rather than the NAWAC. If this progresses, there is risk of less independence with the code writing process.

<sup>26</sup> Mellor, DJ and Bayvel, ACD (2004) 'The application of legislation, scientific guidelines and codified standards to advancing animal welfare' in World Organisation for Animal Health, *Global Conference on Animal Welfare: An OIE Initiative – Proceedings*, OIE, Paris, p 251.

<sup>27</sup> *Animal Welfare Act 1999* (NZ) s 58.

<sup>28</sup> See Sankoff, above n 5, p 20. The membership of the NAWAC offers a group representing mixed interests, including members from farmers' groups, animal research interests but also a representative from the Royal New Zealand Society for the Prevention of Cruelty to Animals (RNZSPCA). While it is difficult to know the animal welfare orientation of all the members, animal welfare advocates are clearly not the majority of the group.

bodies.<sup>29</sup> This has allowed the government to claim an inclusive process where animal producers and animal welfare advocates reach resolution and compromise on welfare standards.<sup>30</sup>

Draft Codes of Welfare are reviewed internally by the NAWAC, but public consultation and input from stakeholders is required by law,<sup>31</sup> and is considered essential because minimum standards, once implemented, apply to all people living in New Zealand.<sup>32</sup> Wide consultation during the formulation of codes, as is said to have occurred with the previous voluntary Codes, is considered to be a major factor in securing stakeholder cooperation in implementing them.<sup>33</sup>

Once prepared, Codes of Welfare tend to be quite lengthy documents consisting of several separate parts, including information that could not be included in legislation, such as general information about the particular animals concerned and recommended best practices. For legal purposes, the most critical part of the Codes is clearly the minimum standards, as compliance with these standards is a complete defence to any charge under the Act, regardless of the condition in which an animal is found.<sup>34</sup> In other words, where a particular type of animal is covered by a Code of Welfare, all that really matters in individual cases is whether the owner or person-in-charge of the animal has complied with the Code. The wording of the Act itself, and references to 'ill-treatment' and the like become somewhat irrelevant in these cases.

Given the critical nature of the Codes, an important question arises: for all this consultation, detail and careful planning, do Codes of Welfare improve the position of animals? The first twelve or so years under the Code scheme provide reason to be concerned. Despite substantial review and deliberation by the NAWAC over a wide variety of troublesome procedures,

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29 For brief biographies of members, see MAF, 'National Animal Welfare Advisory Committee', <<http://www.biosecurity.govt.nz/regs/animal-welfare/nz/nawac>>.

30 Mellor and Bayvel, above n 26, p 255.

31 *Animal Welfare Act 1999* (NZ) s 72.

32 Mellor and Bayvel, above n 26, p 251.

33 Ibid.

34 Statutory defences exist for the strict liability offences as outlined in Part 1 and Part 2 of the *Animal Welfare Act 1999* (NZ) (eg, ss 12(a) (obligation to meet needs of an animal) and 29(a) (ill-treating an animal)). Non-compliance with a code which also incorporates a breach of the Act (note that these are not always synonymous) can be used as rebuttable evidence to assist in establishing guilt. However, non-compliance with a code is not necessarily prima facie evidence of ill-treatment or failure to perform a duty, and there would be no defence available in most cases. Thus, breach of the code does not necessarily represent an offence. While proven non-compliance with a code can be used as rebuttable evidence in a prosecution to help establish guilt, the impact on the animal of a breach of a code may be so difficult to establish or so minimal as to make it difficult for a warranted Animal Welfare Inspector to take action (eg, to issue a 'Notice to prevent or mitigate suffering', under s 130 of the Act, requiring compliance with the breached provision): this has been an issue in areas of confinement such as with layer hens and sow stalls.



in practice there have not been large leaps in animal welfare standards since the codes of welfare were introduced. Meat chickens are still allowed to be farmed at a very high stocking density<sup>35</sup>, despite the NAWAC acknowledging that high stocking densities are associated with a greater risk to meat chicken welfare.<sup>36</sup> Under these conditions it is estimated that 40% of birds having a visible lameness score.<sup>37</sup> Cattle dehorning is allowed to the age of nine months without the use of anaesthetics.<sup>38</sup> Even positive developments come with reservations. Though battery hen cages were recently banned by the New Zealand government, they remain legal until 2022.<sup>39</sup> A ten-year transition period is said to “balance the welfare of layer hens with the practicality and feasibility for farmers to move to other ways of housing their hens, as well as the ongoing affordability of eggs.”<sup>40</sup> Moreover, the new Code swaps one form of cage for another, as the Animal Welfare (Layer Hen) Code of Welfare 2012 permits “colony” cages, which house anywhere between 20 to 90 birds and contain furnishings, but keep birds inside at all times in close confinement.

These are just a few examples, and similar treatment is permitted in Australia.<sup>41</sup> Given the system of code regulation in both New Zealand and Australia is claimed to be impartial, progressive and inclusive of public consultation, why is it failing to better address the interests of animals? The answer to this question is explored in the next part.

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<sup>35</sup> The Animal Welfare (Meat Chickens) Code of Welfare 2012 currently permits the stocking density to be 38kg of live weight per square meter of floor space. The NAWAC argue that that the maximum stocking density currently practised in the industry lies within the range of other countries. This is despite the European Union having a maximum stocking density of 33 kg/m<sup>2</sup>.

<sup>36</sup> Animal Welfare (Meat Chickens) Code of Welfare Report p6.

<sup>37</sup> Morris, M (2008) ‘Reflecting on our Relationships: Animal and Agriculture; A Multidisciplinary Workshop’, workshop presentation, University of Auckland, 18 July. Lameness scoring is categorised within a range from 0 (completely normal) to 5 (unable to stand). The scoring system primarily assesses walking ability rather than exhaustion, with assessors trained to identify rolling gaits, limping, jerky and unsteady movements and problems with manoeuvrability. The scoring system is also known to correlate well with other methods of assessing leg disorders that do not involve active movement, such as the latency-to-lie test. For more information on lameness, see Knowles, TG et al (2008) ‘Leg Disorders in Broiler Chickens: Prevalence, Risk Factors and Prevention’ 3 *Public Library of Science* 1.

<sup>38</sup> Animal Welfare (Painful Husbandry Procedures) Code of Welfare 2005.

<sup>39</sup> Animal Welfare (Layer Hen) Code of Welfare 2012.

<sup>40</sup> Animal Welfare (Layer Hen) Code of Welfare 2012 media release from the National Animal Welfare Advisory Committee, 6 December 2012 <<http://www.biosecurity.govt.nz/media/06-12-2012/layer-hen-cages-phased-out>>

<sup>41</sup> See Chapter 2 (this volume).

## Shortcomings of the Standards Development Process

Having provided the broad legal and institutional context of animal welfare codes in Australia and New Zealand in the previous part of the chapter, this part explores aspects of the regulatory environment which might explain why the Codes – and now additionally in Australia, Standards and Guidelines – are failing significantly to improve the treatment of farmed animals. Some of the key obstacles include the time taken to write or update Codes (despite the promise of extra flexibility given their non-statutory nature); the institutional actors who most significantly contribute to Code content; and the factors taken into account in drafting Codes, including the extent to which relevant scientific and international developments influence Code content.

### *Introducing and updating codes and standards and guidelines – A lengthy process*

#### *Australia*

As discussed above, Model Codes of Practice have been developed in Australia since the 1970s. The Model Codes address a wide range of animal species and farming practices. While some are now into second, third or fourth editions, especially those concerning treatment of major farmed species such as chickens, pigs, cattle and sheep, some model codes, drafted as long ago as 1991, remain in place. Even where there are multiple editions, many are at least a decade old. The dated nature of many Codes means that they very likely do not represent current best practice in addressing the welfare needs of the animals concerned. Further, although Animal Health Australia is now engaged in a process of converting Model Codes to Australian Animal Welfare Standards and Guidelines, this will take considerable time. The first Animal Health Australia sponsored set of standards and guidelines addressing the welfare aspects of land transport of animals, commenced development before September 2008, and will not be finally implemented by all States and Territories until sometime in 2013.<sup>42</sup>

The process for updating standards and guidelines, after they are implemented, is entirely at the discretion of Animal Health Australia, with no automatic review after the passage of a fixed number of years. Animal Health Australia acknowledges that the 'ongoing value of the standards and guidelines requires that they be updated to reflect new research, industry

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<sup>42</sup> See Animal Health Australia, 'Australian Animal Welfare Standards and Guidelines - Land Transport' <<http://www.animalwelfarestandards.net.au/land-transport/>>. It is acknowledged that the *Land Transport Standards and Guidelines* supersede six model codes of practice addressing different aspects of land transport.

practice or accepted community values'.<sup>43</sup> And while '[a]ny party may reasonably request a review at a relevant livestock welfare forum or to AHA on the basis of the identified drivers and a well-argued, logical case', 'AHA will take the necessary steps with members to confirm the need for a review'.<sup>44</sup> The members of AHA are primary industry ministers and their departments, along with relevant industry bodies.<sup>45</sup>

### *New Zealand*

Before Codes of Welfare became a part of the New Zealand landscape, there were 'Codes of Recommendations and Minimum Standards for the Welfare of Animals'. These were voluntary, yet apparently were widely adopted by the affected industries.<sup>46</sup> The overwhelming majority of these Codes were drafted as a way of signalling to the European markets, in the absence of a major legislative initiative, that some progress in animal welfare reform had been made. They were not enacted through any type of legislative or public process and, while it appears that animal welfare organisations may have participated at some level, there was little formal input from other interested parties.<sup>47</sup>

When the AWA was enacted, it appears that the government intended new Codes of Welfare would eventually be drafted to cover every major type of animal-related activity in New Zealand<sup>48</sup> and to ensure that these Codes measured up to the principles set out in the AWA.<sup>49</sup> However, at the time of enactment in 2000, the government recognised that the animal industries would resist change to the standards that had been in place for over a decade, and it would take time for public and private consultation on these matters before new and more effective Codes of Welfare could be enacted.<sup>50</sup>

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<sup>43</sup> Australian Animal Welfare Strategy, *Development of Australian Standards and Guidelines for the Welfare of Livestock – Business Plan* (Revised February 2009) 13 <<http://www.animalwelfarestandards.net.au/files/2011/01/Animal-Welfare-Standards-and-Guidelines-Development-Business-Plan.pdf>>

<sup>44</sup> Ibid.

<sup>45</sup> For a list of the members of Animal Health Australia see Animal Health Australia, 'About Us – Members' <<http://www.animalhealthaustralia.com.au/about-us/members/>>.

<sup>46</sup> Mellor and Bayvel, above n 26, p 251.

<sup>47</sup> See Schultz, L (2002) 'Veil of Secrecy Surrounds Research on Animals in New Zealand' 1 *ARLAN Report* 1 at 6. Schultz suggests 'just a hand picked few' were allowed to participate directly, all of whom were animal industry leaders.

<sup>48</sup> There have been 15 Codes of Welfare gazetted of which three have been updated. These are the Meat Chickens, Layer Hens and Pig Codes of Welfare.

<sup>49</sup> *Animal Welfare Act 1999* (NZ) s 191.

<sup>50</sup> See Sankoff, P and Bourke, D (2002) 'Parliament to Shelf Codes of Welfare Revisions for Another Year' 1 *ARLAN Report* 8 at 9 (suggesting the delay was a result of pressure from animal industries).

In an attempt to meet both concerns, a compromise was reached. Rather than simply scrapping the existing codes, the AWA provided a temporary reprieve, stating that the existing Codes would remain in use for three years from the commencement of the AWA.<sup>51</sup> In theory, this period allowed the government ample time to review the Codes against the new imperatives of the AWA.<sup>52</sup> It also provided an opportunity for public consultation, during which time outmoded standards could be replaced, and new protections could be created by relying on modern knowledge of animal behaviour, animal welfare and farming practices.<sup>53</sup>

The process has taken a great deal longer than anyone expected, however, with the government suggesting that the complexity of the Codes has made the revision process a more time consuming exercise than originally anticipated.<sup>54</sup> So far fifteen Codes<sup>55</sup> have been approved by the Minister of Primary Industries. Several additional Codes of Welfare have been identified as needing to be written.<sup>56</sup> In response to these delays, the government was forced to enact supplementary legislation allowing it to extend the three-year transitional period indefinitely.<sup>57</sup> Needless to say, delays of this sort work to the advantage of those in animal industries, who do not have to revise and update their animal husbandry standards.<sup>58</sup> Regardless of the

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<sup>51</sup> *Animal Welfare Act 1999* (NZ) s 191.

<sup>52</sup> See Sankoff and Bourke, above n 50.

<sup>53</sup> *Ibid.*

<sup>54</sup> Sankoff, above n 5, p 18.

<sup>55</sup> The fifteen Codes of Welfare that have been gazetted by the Minister of Primary Industries are: Animal Welfare (Rodeos) Code of Welfare 2003; Animal Welfare (Layer Hens) Code of Welfare 2005 and 2012; Animal Welfare (Circuses) Code of Welfare 2005; Animal Welfare (Zoos) Code of Welfare 2005; Animal Welfare (Painful Husbandry Procedures) Code of Welfare 2005; Animal Welfare (Deer) Code of Welfare 2007; Animal Welfare (Companion Cats) Code of Welfare 2007; Animal Welfare (Commercial Slaughter) Code of Welfare 2010; Animal Welfare (Diary Cattle) Code of Welfare 2010; Animal Welfare (Dogs) Code of Welfare 2010; Animal Welfare (Pigs) Code of Welfare 2010; Animal Welfare (Sheep and Beef Cattle) Code of Welfare 2011; Animal Welfare (Transport within New Zealand) Code of Welfare 2011; Animal Welfare (Goats) Code of Welfare 2012; and the Animal Welfare (Meat Chickens) Code of Welfare 2012.

<sup>56</sup> According to the Codes of Welfare update on consultation, development and review by C. Conner, Welfare Pulse, December 2012 p4: the Animal Welfare (Llamas and Alpacas) Code of Welfare has been recommended to the Minister for approval; the Animal Welfare (Rodeo) Code of Welfare is in post-consultation process with the NAWAC; the Animal Welfare (Dairy housing) Code of Welfare, the Animal Welfare (Equines) Code of Welfare and the Animal Welfare (Temporary housing of companion animals) Code of Welfare are all with the NAWAC for consideration; and the Animal Welfare (Circuses) Code of Welfare and the Animal Welfare (Zoos) Code of Welfare are currently under review by the NAWAC.

<sup>57</sup> *Animal Welfare Amendment Act 2002* (NZ) s 14 (allowing the cabinet to extend the transitional provisions for two-year periods without requiring new legislation in Parliament).

<sup>58</sup> There have been delays with implementing change for several reasons: for example, the cited 'lack of New Zealand research' as occurred with the Layer Hen, Broiler

reasons for delay, the result is that treatment of millions of animals continues to be governed by Codes enacted before the AWA. It is likely that these Codes, being so old, would not be considered current recommended best practice,<sup>59</sup> and not in accordance with the AWA.

Things could get worse before they get better. The MPI is now proposing that future Codes of Welfare be written by the Ministry rather than the NAWAC, with the NAWAC having a consultative role. The MPI are also proposing the elimination of the mandatory ten-year review of Codes.<sup>60</sup> Whilst at the time of writing, the Government had not signalled if these two proposals are to proceed to legislation, both initiatives would potentially further reduce the ability for dialogue regarding Codes of Welfare.

### *Who Writes Animal Welfare Codes and Standards and Guidelines?*

#### *Australia*

Before the national strategy took precedence it was possible for a new edition of a Model Code of Practice to be initiated for a number of reasons, ranging from a concern about the lapse of time since the last review to a strategic decision on the part of an animal industry to address actual or anticipated criticism of farming methods. The drafting process was coordinated through a national animal welfare working committee, usually by nominating a State or Territory representative to manage the process, including the consultation process and the drafting.<sup>61</sup> This process had a number of shortcomings, including:

[C]onsiderable variation in outcome because Codes are used for different purposes in the States and Territories and the importance individuals place on expression and wording can vary along with the way a review is conducted and a Code developed. Additionally, because there are no guidelines on how to manage the current process including how to prepare a Code or manage consultation with stakeholders, often writers have based the structure and content of a new Code on a previous one, thus perpetuating any problems. Variable quality control by the animal wel-

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Chicken and Pig Code of Welfare (discussed further below). As well it has been suggested that consideration of all submissions, made during the consultation phase, is 'exceptionally time-consuming and slows completion of Codes of Welfare, which itself elicits critical comment from some members of the public': Mellor and Bayvel, above n 26, p 254.

59 Recommended best practice is not defined in the Act. The NAWAC has taken recommended best practice to mean the 'best practice agreed at a particular time, following consideration of scientific information and accumulated experience and public opinion. It is usually a higher standard of practice than the minimum standard, except where the minimum standard is the best practice. It is a practice that can be varied as new information comes to light': Animal Welfare (Deer) Code of Welfare 2007.

<sup>60</sup> Ministry of Primary Industries, above n 24.

<sup>61</sup> Neumann Report, above n 6, p 5.

fare committee as the arbiter of content, structure, style and editing has followed.<sup>62</sup>

The reformed process for converting Model Codes of Practice into Standards and Guidelines has sought to address these shortcomings through a centralised drafting process coordinated by Animal Health Australia. The process, set out in a 'Business Plan', is quite elaborate. A small writing group of between 4-8 members is established, and designed to include 'appropriate industry representation'.<sup>63</sup> Working in conjunction with Animal Health Australia and state and territory animal welfare representatives, the writing group then prepares a draft set of proposed standards and guidelines. These are considered by a reference group, which includes industry and government representatives, as well as representatives from RSPCA Australia, Animals Australia and the Australian Veterinary Association.<sup>64</sup> Once the reference group has endorsed the proposed approach, the writing group will prepare a full set of draft standards and guidelines. These are then considered by the larger reference group, and changes are made if required. A draft regulatory impact statement (RIS) is prepared to accompany the draft standards and guidelines. After further reference group guidance and approval of the RIS by the Commonwealth Government's Office of Best Practice Regulation, a process of public consultation commences. A summary of feedback is provided and made available to the public, and a further draft prepared by the writing group and referred to the reference group for approval.

As the above account of the development process for standards and guidelines implies, the membership of the writing group and the close oversight by a reference group dominated by industry and agriculture department representatives means that industry has a dominant voice in establishing the content of standards and guidelines. There is some possibility of dissenting voices complicating a simple 'rubber stamp' narrative, however. If there is disagreement among the members of the writing group about the need for amendment, the reference group acts as arbiter. If the reference group cannot reach a consensus decision, the issue is passed up the line to government representatives.<sup>65</sup>

This has important ramifications. As will be explored in more detail when discussing the use of scientific research in preparing standards and

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<sup>62</sup> Ibid, pp 5-6.

<sup>63</sup> Australian Animal Welfare Strategy, *Development of Australian Standards and Guidelines for the Welfare of Livestock – Business Plan* (Revised February 2009) 4 <<http://www.animalwelfarestandards.net.au/files/2011/01/Animal-Welfare-Standards-and-Guidelines-Development-Business-Plan.pdf>>. The full list of members is as follows: independent chair, AHA Livestock Welfare Manager and Project Officer, Australian Government representative, Animal Welfare Committee representative, industry members as relevant by sector, relevant independent science representation and invited consultants: *ibid*, p 9.

<sup>64</sup> *Ibid*, p 9.

guidelines below, consensus could not be reached on one aspect of the Standards and Guidelines for Land Transport, concerning the time for which ‘bobby calves’ – young cows between 5 and 30 days old – can be kept off feed when transported to abattoirs, with industry seeking a 30 hour limit. As a result of a lack of consensus on this point, the standard sought by industry was not included in the finalised Standards and Guidelines for Land Transport.<sup>66</sup>

### *New Zealand*

In theory, any person or organisation can write the first draft of a Code of Welfare and submit it to the NAWAC for review,<sup>67</sup> where the Codes will then be considered and refined. Although such a process is theoretically ‘neutral’, it provides significant potential for the Code-writing process to be taken over by industry, and most of the Codes have indeed been drafted by the very industries that use or produce the animals in question. For example, the layer hen Code of Welfare was drafted by the Egg Producers Federation of New Zealand,<sup>68</sup> and the deer Code of Welfare was submitted by Deer Industry New Zealand (DINZ).<sup>69</sup> Although the NAWAC does not simply accept these versions, these initial drafts have a powerful influence and set the tone for the entire process, potentially leading to a final version that is favourable towards the party that initiated the first draft. Anyone who enters the NAWAC-led consultation phase<sup>70</sup> may face a Code that contains everything the industry wanted, and usually ends up fighting a ‘rearguard action’ to stop the worst of the practices, despite the NAWAC affirming that they are a neutral independent advisory committee.<sup>71</sup>

Not all Codes of Welfare are industry based, but these will generally not have the same economic considerations raised by Codes addressing the

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<sup>65</sup> Australian Animal Welfare Strategy, *Development of Australian Standards and Guidelines for the Welfare of Livestock – Business Plan* (Revised February 2009) <<http://www.animalwelfarestandards.net.au/files/2011/01/Animal-Welfare-Standards-and-Guidelines-Development-Business-Plan.pdf>>

<sup>66</sup> Australian Government, *Animal Welfare Standards and Guidelines – Land Transport of Livestock* (Edition One, Version 1.1, 21 September 2012) vii <<http://www.animalwelfarestandards.net.au/land-transport/>>.

<sup>67</sup> *Animal Welfare Act 1999* (NZ) s 70.

<sup>68</sup> NAWAC (2004) ‘Animal Welfare (Layer Hens) Code of Welfare 2004 Report’, 21 April, <<http://www.biosecurity.govt.nz/files/regs/animal-welfare/req/codes/layer-hens/lhc-report.pdf>> (Layer Hens Code (NZ) Report).

<sup>69</sup> NAWAC (2007) ‘Animal Welfare (Deer) Code of Welfare 2007 Report’, <<http://www.biosecurity.govt.nz/files/regs/animal-welfare/req/codes/deer/deer-code-report.pdf>> (Deer Code (NZ) Report).

<sup>70</sup> *Animal Welfare Act 1999* (NZ) s 71.

<sup>71</sup> NAWAC Guideline 1: Approach to consideration of draft codes of welfare <<http://www.biosecurity.govt.nz/files/regs/animal-welfare/pubs/nawac/guideline01.pdf>> 18 July 2011.

farming of animals – for example, the companion cat Code of Welfare which was written by the New Zealand Companion Animal Council (NZCAC).<sup>72</sup> The NZCAC also wrote the Animal Welfare (Dogs) Code of Welfare 2010, as well as the Animal Welfare (Temporary housing of companion animals) Code of Welfare which is currently with the NAWAC. The NZCAC is also in the process of writing a Code of Welfare for service animals.

### *Conflicts of interest*

The potential for conflicts of interest to arise in the standards development process is a delicate topic, but one has to acknowledge the possibility that this factor is inhibiting the development of tougher animal welfare standards. There are two key inter-related problems in this area: first, the government agency generally responsible for animal welfare matters in jurisdictions in Australia and New Zealand is also concerned to see high levels of profitable agricultural production; and, second, the input of animal industries overwhelms the limited input from independent organisations committed to improved animal welfare.

### *Australia*

Industry interests and primary industry departments were dominant in the process of developing and drafting Model Codes in Australia.

The key body which worked on code development was the Animal Welfare Working Group. This body was made up of representatives from the Commonwealth Department of Agriculture, Fisheries and Forestry (DAFF) and its State and Territory counterparts, together with representatives of CSIRO, Animal Health Australia, and the Vertebrate Pest Committee (which report to the Natural Resources Planning and Policy Committee within the COAG structure).

The Animal Welfare Working Group Committee reported to the Animal Health Committee, which is in turn was part of the Primary Industries Health Committee, sitting under the PIMC umbrella. The Animal Health Committee was made up of the Chief Veterinary Officers of each jurisdiction, representatives of CSIRO and representatives of Biosecurity Australia.

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72 Animal Welfare (Companion Cats) Code of Welfare 2007 Report by NAWAC written 25 July 2006. Note that this draft Code of Welfare was submitted by NZCAC to NAWAC with the title 'Animal Welfare (Cats) Code of Welfare'. This Code was gazetted by the Minister of Agriculture and Forestry with the name changed, and all information and recommended best practices relating to stray or feral cats moved to a separate section at the end of the Code. The minimum standards were removed entirely, so that the Code only has minimum standards covering 'companion cats' and not stray or feral cats.



While animal welfare organisations were represented at various institutional levels, they were comparatively few in number. Industry representatives dominated non-government representation, were heavily relied on for their expertise and were primarily concerned to sustain and develop industry profitability. Government representatives, dominated by primary industries departmental officers, may lack the necessary expertise, increasing reliance on industry and reducing informed assessment of proposed codes:

Given the relatively low level of knowledge or expertise in animal welfare issues at the more senior levels of government, many Codes have passed through this process with minimum scrutiny.<sup>73</sup>

The new institutional arrangements put in place for the preparation of standards and guidelines are perhaps more elaborate than the former code development process, but maintain a dominant voice for industry and industry interests. There have, however, been some improvements, in particular changes made to address problems such as a lack of adequate consultation and lack of transparency that were identified by the Neumann Report as shortcomings in the former code development process.<sup>74</sup> Submissions are now invited on draft standards and made public. As discussed above, a Regulation Impact Statement is produced, which provides information on the relevant industry and a detailed cost-benefit analysis of various options. It may also include an account of the literature on relevant animal welfare science research.<sup>75</sup> The progress of the development of standards and guidelines is publicly documented. This changed process, arguably, creates the space for a public conversation about animal welfare.<sup>76</sup>

Nonetheless, significant shortcomings remain with the reformed process in Australia. One of these is that the process of developing standards and

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<sup>73</sup> Neumann Report, above n 6, p 8.

<sup>74</sup> Neumann Report, above n 6, p 11.

<sup>75</sup> However, this is not a requirement, with the then governing Primary Industries Ministerial Council (PIMC) stating that '[i]t is not the role of a [Regulation Impact Statement] to either conduct new scientific research or to audit previous scientific research': PIMC, 'Australian Animal Welfare Standards and Guidelines – Land Transport of Livestock: Proposed Amendment to the Land Transport of Livestock Standards (SB4.5) – Bobby Calves Time Off Feed Standard' (Decision Regulation Impact Statement, Edition 1, 6 July 2011), 78 <<http://www.animalwelfarestandards.net.au/files/2011/05/Bobby-Calf-ToF-Decisions-RIS-OBPR-endorsed-Final-AHA6.7.11.pdf>>.

<sup>76</sup> Sankoff develops this argument when comparing the code-based New Zealand approach, providing sites of entry for regular public discourse about animal welfare standards, and the narrow Canadian approach, largely based on judicial fiat: Peter Sankoff, 'The Animal Rights Debate and the Expansion of Public Discourse: Is it Possible for the Law Protecting Animals to Simultaneously Fail and Succeed?' (2012) 18 *Animal Law* 281.

guidelines, as discussed above, is controlled by primary industry ministers and their departments, along with relevant industry bodies. This is significant because the revised approach perpetuates the exemption of cruel practices and duty of care breaches from statutory offence provisions. In other words, it is almost exclusively those who have a stake in profiting from animals who continue to draw the line on what is necessary or unnecessary in the treatment of animals.

As well, the new institutional arrangements unsurprisingly maintain a central coordinating role for the federal DAFF. Animal welfare is just one of a great number of policy issues it addresses as part of its broader responsibilities in the area of agriculture and food production. Tellingly, DAFF states that it 'facilitates the development of self-reliant, profitable, competitive and sustainable Australian farm businesses and industries'.<sup>77</sup> The emphasis on profitability and self-reliance of farming enterprises is difficult to reconcile with a commitment to significant improvements in the welfare of farmed animals.

### *New Zealand*

Similarly to the position in Australia, it is impossible to ignore that responsibility over animal welfare standards in New Zealand remains the exclusive jurisdiction of a government ministry – the MPI – that also has primary responsibility for ensuring that the production of animal products continues in an economic manner, and that New Zealand exports continue to be highly profitable.

The AWA went some way to addressing the issue of the MPI having complete control of the Code development process by creating an independent body, the NAWAC, to advise the MPI on all legislative proposals concerning the welfare of animals.<sup>78</sup> Still, creation of the NAWAC has not eliminated conflict of interest claims. While members appointed by the Minister reflect diverse interests, many believe that animal industries

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77 DAFF 'Agriculture and Food' <<http://www.daff.gov.au/agriculture-food>>. Similarly, the AAWS stresses the economic significance of animal use, stating that '[a]nimal industries form a central part of the Australian economy and generate wealth and employment across rural, regional and urban Australia. Livestock industries have a gross annual value of approximately \$20 billion; \$6 billion is spent on the nation's 33 million pet animals; the horse sector contributes an estimated \$6 billion to the national accounts; opportunities to view and interact with our unique wildlife are high on the wish-list for visitors, contributing to the \$30-billion tourism industry; recreational fishing is one of Australia's most popular pastimes and is backed by an industry worth \$3 billion per year . . . Improving animal welfare contributes to the sustainability of industries and the overall Australian way of life': Commonwealth Government, above n 16, 15.

78 *Animal Welfare Act 1999* (NZ) ss 56-57. A Code of Welfare guideline describes NAWAC as an independent advisory committee: NAWAC (undated) NAWAC Guideline 01: *Approach to consideration of draft Codes of Welfare* <<http://www.biosecurity.govt.nz/animal-welfare/nawac/policies/guideline01.htm>> (NAWAC Guideline 01).

dominate the process.<sup>79</sup> Indeed, a past CEO of the RNZSPCA claims that 'Code writing has been largely left to livestock industries bodies, which, in the nature of things, cannot be expected to give due weight to animal welfare issues'.<sup>80</sup>

### ***What factors are considered in developing codes and standards and guidelines?***

#### *Generally*

##### *Australia*

Unlike the position in New Zealand, in Australia there is no legislative or other formal guidance as to the range of factors that should be considered in developing a code.<sup>81</sup> Some of the factors identified by an earlier version of the AAWS as important reasons for reviewing a code are, at the same time, factors which may be relevant in determining animal welfare standards, including 'advances in animal welfare science, changing community expectations and evolving industry practices and to consider the implications for Australia of overseas developments'.<sup>82</sup> As pointed out above, the shift away from Model Codes of Practice to the preparation of Standards and Guidelines has been accompanied by a more rigorous procedural approach to development. However, this has not been bolstered by formal guidance as to the range of factors that should be considered in preparing new standards and guidelines documents. The standards and guidelines model provides that a review of science literature *might* be included, as part of work undertaken by the Standards Writing Group, but this is purely at the discretion of industry.<sup>83</sup> As is the case in New Zealand, the economics of farming plays a central role. It is now standard practice for a Regulatory Impact Statement to accompany draft standards and

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<sup>79</sup> See Sankoff, above n 5, p 20.

<sup>80</sup> RNZSPCA (2003) 'SPCA Alarmed Over Animal Code Process', 3 July, <[https://www.kiwisecure.co.nz/rnzspca/news/press\\_releases/alarm-animal-code-press.doc](https://www.kiwisecure.co.nz/rnzspca/news/press_releases/alarm-animal-code-press.doc)> (indicating that more than 120,000 New Zealanders send in postcards asking for a ban on battery hens, a considerable number for a country of four million). See also Chapter XX (Kedgley), this volume. The MPI's proposed change to the NAWAC in the current review, above n 24, will further dilute the NAWAC's influence if accepted. Despite not being perfect, having the NAWAC as it stands is better than having purely a token NAWAC in terms of animal welfare in New Zealand.

<sup>81</sup> As the Neumann Report suggests there are no 'guidelines on how to manage the current process including how to prepare a Code': Neumann Report, above n 6, p 6.

<sup>82</sup> DAFF (2008) *The Australian Animal Welfare Strategy*, Commonwealth of Australia, Canberra (rev ed) (AAWS), p 29.

<sup>83</sup> Australian Animal Welfare Strategy, *Development of Australian Standards and Guidelines for the Welfare of Livestock – Business Plan* (Revised February 2009) 6 <<http://www.animalwelfarestandards.net.au/files/2011/01/Animal-Welfare-Standards-and-Guidelines-Development-Business-Plan.pdf>>.

guidelines. A Regulatory Impact Statement might assess the effect of a range of options for a particular standard, but generally only from a narrow economic cost-benefit perspective.

#### New Zealand

The AWA provides that the NAWAC must draft and/or review Codes of Welfare in such a way so as to ensure that they respect the purposes of the Act<sup>84</sup> and ensure that animal owners or persons-in-charge of animals comply with obligations imposed under ss 4 and 10 of the Act, including the need to provide animals with proper food and water, shelter, the opportunity to display normal patterns of behaviour, physical handling that minimises the likelihood of unnecessary pain and distress, and protection from, and treatment for, disease.

Notwithstanding these clear statutory directives, the NAWAC has created its own set of guidelines,<sup>85</sup> providing several additional factors to be taken into consideration, as well as anything else that the Committee sees as relevant. Currently the list of factors that NAWAC takes into consideration is:

- scientific understanding of animals' needs;
- practical experience and available technology;
- good practice;
- practicality of making changes;
- international trends;
- societal ethical concerns;
- economic implications;
- religious and cultural practises; and
- whether any adverse animal welfare outcomes are reasonable or necessary.<sup>86</sup>

While the majority of these factors are appropriate for the NAWAC to consider, some of the factors listed are problematic, since it diverts the Committee's focus from animal needs to extraneous matters like economic implications for New Zealand. If this factor is weighed too heavily, it makes

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<sup>84</sup> *Animal Welfare Act 1999* (NZ) s 73(1)(a). The purpose of Part 1 of the Act is to ensure that owners and persons in charge of animals attend properly to the welfare of those animals (s 9(1)), and Part 1 accordingly requires owners and persons in charge of animals to take all reasonable steps to ensure that the physical, health and behavioural needs of animals are met in accordance with both good practice and scientific knowledge (s 9(2)(a)).

<sup>85</sup> NAWAC Guideline 04, Process for the development of codes of welfare. < <http://www.biosecurity.govt.nz/files/regs/animal-welfare/pubs/nawac/guideline04.pdf> > 18 July 2011.

<sup>86</sup> NAWAC Guideline 01, above n 78.

changing entrenched husbandry systems and practices nearly impossible, as there will always be adverse economic consequences from changing industrialised farming systems.<sup>87</sup>

It is not hard to see why farming industries, which have invested heavily in animal production, would want to be involved with drafting Codes of Welfare. New Zealand is an agricultural nation and is home to 69 million broiler chickens,<sup>88</sup> 30 million sheep,<sup>89</sup> almost 4 million beef cattle,<sup>90</sup> over 3.3 million layer hens,<sup>91</sup> 1.7 million deer,<sup>92</sup> over 380,000 pigs,<sup>93</sup> and countless other forms of livestock. Owing to the economic impact created by their production, dairy and livestock farmers hold an enormous amount of political influence in New Zealand.<sup>94</sup> The power that Federated Farmers and the Industry Boards exert on the government is a well-accepted fact in New Zealand.<sup>95</sup> It is accepted that animal welfare is important, so long as it does not interfere too much with farming and economic concerns.<sup>96</sup> This is made explicit in one NAWAC Guideline, which states that the NAWAC should have regard to economic aspects when deciding on timeframes for change and that 'economic analysis must include the consumer as well as the producer'.<sup>97</sup> It is also stated that 'economics may constrain the speed of implementation of a change the NAWAC desire, or it may prevent it'.<sup>98</sup>

This conflict between economics and animal needs tends to benefit the status quo, even though many proponents claim that housing systems that

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<sup>87</sup> A good example of the difficulty of advancing welfare concerns can be seen from the recent changes to the Layer Hen Code, above n 39. To begin with, although the government saw the wisdom in eliminating battery cages, it permitted a ten-year transition period to phase out the practice primarily to cushion the economic impact on farmers. This is despite this move coming a long time after many countries around the world had made a similar move. For example, Switzerland banned cages altogether in 1992, Sweden in 2002, Austria in 2008 (cages of all types banned) and Germany in 2009. The European Union banned battery cages from 1 January 2012

<sup>88</sup> NAWAC (2002) 'Animal Welfare (Broiler Chickens: Fully Housed) Code of Welfare Report', 8 November, <<http://www.biosecurity.govt.nz/files/regs/animal-welfare/req/codes/broiler-chickens/broiler-chickens-report.pdf>> (Broiler Chickens Code (NZ) Report).

<sup>89</sup> Animal Welfare (Sheep and Beef Cattle) Code of Welfare 2010 Report.

<sup>90</sup> Ibid.

<sup>91</sup> Animal Welfare (Layer Hens) Code of Welfare 2012 Report.

<sup>92</sup> Ministry of Agriculture and Forestry, above n 69.

<sup>93</sup> Code of Welfare (Pigs) Code of Welfare 2010 Report.

<sup>94</sup> As described in Belich, J (2001) *Paradise Reforged: A History of New Zealanders*, University of Hawaii Press, Honolulu, pp 150-154.

<sup>95</sup> For a fuller account, see Sankoff, above n 5, p 10; and chapter x (Kedgley)(this volume).

<sup>96</sup> Sankoff, above n5, p 11.

<sup>97</sup> NAWAC, 'NAWAC Guideline 02: Dealing with practices which might be inconsistent with the spirit of the Animal Welfare Act 1999' <<http://www.biosecurity.govt.nz/animal-welfare/nawac/policies/guideline02.htm>>.

<sup>98</sup> NAWAC Guideline 01, above n 78.

are beneficial to animal welfare do not generally increase production costs.<sup>99</sup> It begs the question of why the NAWAC has even tasked itself with balancing these considerations, given this is not required by the AWA.<sup>100</sup> The remit of the NAWAC is as an animal welfare advisory committee, not an economic advisory committee, and one must question what weighting is given to the various factors the NAWAC take into consideration. Codes of Welfare released to date suggest the NAWAC is taking an overly conservative approach in implementing standards beneficial to animal welfare, where stronger standards would be detrimental to economic productivity.<sup>101</sup>

*Are public opinion and international trends taken into account?*

Australia

Neither public consultation nor responsiveness to international trends in animal welfare standards were a feature of Model Code development in Australia. In relation to public consultation, the Neumann Report states that:

Public consultation has not routinely featured in Code development nor has there been a formal process of recording the positions of dissenting parties or documenting the rationale for rejecting a proposed change to a Code. This has often resulted in considerable dissatisfaction with stakeholders unaware of whether their submissions have even been considered.<sup>102</sup>

As has been discussed, the new standards and guidelines model does provide for increased consultation, and transparency, to the extent that submissions are publicly available, a summary of feedback is prepared, and an 'action plan' for response is prepared and published.<sup>103</sup>

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<sup>99</sup> Wyss, H et al (2004) 'Animal Welfare: Between Profit and Protection' in World Organisation for Animal Health, p 218.

<sup>100</sup> As part of the MPI review of the AWA, the Government is proposing to improve the transparency of decision making by extending the list of matters that must be taken into account when developing animal welfare standards to include matters relating to "practicality" and "economic impact". While these are currently considered within the scope of "good practice", "available technology", and "any other relevant matters", there is an opportunity to make these explicit. For further information, please see the MPI, above n 24.

<sup>101</sup> The Codes of Welfare that relate to farming practices serve as ample proof of this with confinement such as battery cages, dry sow stalls and farrowing crates still being allowed, or with a extremely long transition period to phase out to alternate systems, many of which offer only marginal improvement from existing practice.

<sup>102</sup> Neumann Report, above n 6, p 7.

<sup>103</sup> For the only example available to date (concerning land transport standards and guidelines) see Animal Health Australia, 'Australian Animal Welfare Standards and Guidelines – Land Transport Consultative Process/  
<http://www.animalwelfarestandards.net.au/land-transport/consultative-process/>.

International animal welfare reforms have had only limited influence in the standards development process in Australia. Developments in the use of battery cages and sow stalls, described below in the New Zealand section and in other parts of this book, are yet to be reflected in Australian animal welfare standards.<sup>104</sup> It has been left to retailers such as Coles supermarkets to respond to international developments and public demands for change.<sup>105</sup> This is despite the fact that 'Australia's position as the largest exporter of livestock in the world and a significant producer and exporter of livestock products exposes its animal welfare processes and practices to intense scrutiny'.<sup>106</sup>

There is some indication in the AAWS of an intention to pay greater attention to international developments, even if this has not occurred yet. The AAWS states that '[t]here have been significant international developments in animal welfare, and the strategy recognises the guidance provided by agreed international principles',<sup>107</sup> and has as one objective to '[l]earn from international experience'.<sup>108</sup>

#### New Zealand

As well as the factors discussed above that are taken into consideration in drafting and/or reviewing a Code of Welfare, the NAWAC Guidelines also state that 'NAWAC is not engaged in formulating Codes of Welfare by international trends or public opinion polls'.<sup>109</sup> The rationale behind this statement is baffling and contradictory. First, the NAWAC states in its own guidelines that these are factors that are meant to be taken into consideration.<sup>110</sup> Additionally, s 73(2)(b) of the Act requires all standards to be premised on 'good practice' and 'scientific knowledge'. Without question, changes that are made to legislation internationally are predominantly based on peer-reviewed science. Likewise, what is considered 'acceptable' by the public should be of use in determining some of the boundaries of what constitutes

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<sup>104</sup> A recent revision to the Model Code addressing the treatment of pigs, approved by PMIC in April 2007, does provide for some improvements, but they lag behind international developments. For example, the period in which sow stalls may be used is to be reduced from 16 weeks to six weeks, but this will not take effect until 2017 and is subject to significant exceptions: see *Model Code of Practice for the Welfare of Pigs*, above n 18, p 5.

<sup>105</sup> Richard Willingham, 'Coles opens the cage doors for its farm animals' (Sydney Morning Herald, 23 October 2012) <<http://www.smh.com.au/environment/animals/coles-opens-the-cage-doors-for-its-farm-animals-20121022-281ie.html>>.

<sup>106</sup> Neumann Report, above n 6, p 17.

<sup>107</sup> Commonwealth Government, above n 16, p 16.

<sup>108</sup> Ibid 23.

<sup>109</sup> NAWAC Guideline 01, above n 78.

<sup>110</sup> Ibid.

‘necessary’ acts of harm against animals and taken into consideration by the NAWAC.<sup>111</sup>

The NAWAC is slow to follow international industrialised farming animal welfare trends. To take one example, Switzerland banned battery cages in 1992, Sweden in 1999, Germany in 2007 and the EU in 2012.<sup>112</sup> In New Zealand, the NAWAC refused early efforts to ban cages of any kind in spite of these developments, stating that New Zealand based research was required. Though the worst types of battery cages were ultimately the subject of a ban in 2012, the delay and need for a transition period means that hens can still be kept in these cages until 2022.<sup>113</sup>

It is clear that the New Zealand public is slowly becoming more interested in animal welfare issues<sup>114</sup> as evidenced by the huge number of submissions received for certain Codes of Welfare,<sup>115</sup> as well as for the Animal Welfare Act Review,<sup>116</sup> and by the level of attention that animal abuse receives in the media.<sup>117</sup> This follows an international trend of major public demand for improvements in animal welfare that has become apparent in many Western countries. Whilst some may argue that making regulatory changes based on public opinion is not based on scientific knowledge it is a stated consideration of the NAWAC guidelines.

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<sup>111</sup> Ibid.

<sup>112</sup> See Chapter 13 (this volume).

<sup>113</sup> Layer Hens Code (NZ) Report, above n 91.

<sup>114</sup> In a 2001 poll it was found that 86% of the 500 people questioned thought that dry sow stalls were unacceptable and 87% thought that they should be banned (the survey had a margin of error of +/-4.4%): ‘Pig Poll’, Colmar Brunton, December 2001. While polls of this nature are hardly definitive, they do indicate a level concern that seems to be ignored by the NAWAC, as dry sow stalls still exist in New Zealand. NAWAC states that ‘it is important to distinguish between background societal expectations and current public opinion on the matter, and to note that a surge of interest in a particular matter may or may not be a good measure of a change in general societal expectations’: NAWAC, *NAWAC Guideline 07: Taking account of societal expectations, technical viewpoints and public opinion* <<http://www.biosecurity.govt.nz/animal-welfare/nawac/policies/guideline07.htm>>.

<sup>115</sup> For example, public consultation on the Animal Welfare (Layer Hens) Code of Welfare 2012 resulted in a total of 210 comprehensive submissions. In addition, the NAWAC received 22,681 SAFE postcards, 10,911 SAFE e-cards and 66 SAFE standard letters, 745 Green Party E-cards, 110 SPCA form letter emails, 144 letters from the Kapiti Animal Welfare Society and 1276 signatures in a petition from Change.org: Animal Welfare (Layer Hens) Code of Welfare Report 2012. Likewise the Animal Welfare (Pigs) Code of Welfare 2010 generated a total of 310 full submissions, 14,464 SAFE postcards related to sow stalls, 4,232 emails with the same message, 321 Green Party E-cards, and another 214 form letter emails: Animal Welfare (Pigs) Code of Welfare Report 2010.

<sup>116</sup> During the recent review of the Animal Welfare Act 1999, 2,209 submissions were received. Further detail of these submissions is available in ‘Summary of submissions received on: Animal welfare matters; Proposals for a New Zealand Animal Welfare Strategy and Amendments to the Animal Welfare Act 1999. MPI Information paper 21012/08, October 2012, p 1-18.

<sup>117</sup> Sankoff, above n 5, p 38.



## *The use and misuse of science*

### *Australia*

Animal welfare science has grown in significance since the 1950s, with the development of intensive farming, increased community concern about humane treatment of farmed animals, and the rise of technocratic, corporate food production.<sup>118</sup>

Reliance on animal welfare science was usually claimed to be a significant factor in code development. For example, in relation to the revised Model Code addressing the treatment of pigs, it was stated that:

Scientific research and experience determine whether a change to an existing standard or guideline will improve the welfare of animals or not. There is a worldwide research effort to determine reasonable and practicable methods to improve welfare. Research is funded by industry and government. Government departments, CSIRO, Universities and a number of other research groups across Australia are being funded to investigate enhanced pig management options.<sup>119</sup>

Despite this respect for the careful observance of animal welfare science, in practice there had been no clear or consistent approach:

In Australia, although there is now widespread support for sound welfare science to be used to underpin Codes, there is no agreed process to manage this or to record and report on current science or international developments. Thus until recently the availability of welfare science information and its role in Code development has been largely left to the initiative of the person nominated to lead the development or review process.<sup>120</sup>

The new standards and guidelines model provides that a review of scientific literature *might* be included, as part of work undertaken by a Standards Writing Group. The problem, though, is that whether this occurs or not remains at the discretion of industry. The Business Plan for the Development of Australian Standards and Guidelines states:

The necessity for a scientific literature review will be carefully considered by the Writing Group. If considered necessary by the [Animal Welfare Committee] and industry, [Animal Health Australia] will work with the relevant R&D agency to commission a literature review. A potential side benefit of the review could be the identification of gaps/deficiencies and recommendations for further R&D.<sup>121</sup>

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<sup>118</sup> Neumann Report, above n 6, p 8.

<sup>119</sup> DAFF, 'Model Code of Practice for the Welfare of Animals – Pigs (Revised) (Pig Code) – Questions and Answers' <[http://www.daff.gov.au/\\_\\_data/assets/pdf\\_file/0003/207741/pig-code-qa.pdf](http://www.daff.gov.au/__data/assets/pdf_file/0003/207741/pig-code-qa.pdf)>.

<sup>120</sup> Neumann Report, above n 6, p 8.

<sup>121</sup> Australian Animal Welfare Strategy, *Development of Australian Standards and Guidelines for the Welfare of Livestock – Business Plan* (Revised February 2009) 6 <<http://www.animalwelfarestandards.net.au/files/2011/01/Animal-Welfare->

As well, even where a literature review or further research is undertaken, it may not occur independently. The experience with the Land Transport Standards and Guidelines is instructive.<sup>122</sup> In essence, welfare science research was commissioned to support a pre-determined standard, one which would allow for up to 30 hours time off feed (TOF) before slaughter or feeding of transported bobby calves. There was evidence that this was prevailing practice in some parts of the country. The commissioned research found 24 hours was best practice, but that '30h with good practice in other aspects of calf management and transport is defensible as an outer "legal" limit for time off feed for bobby calves'.<sup>123</sup> Ultimately, consensus on inclusion of a 30 hour limit could not be reached, as the Land Transport Standards and Guidelines make clear:

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[Standards-and-Guidelines-Development-Business-Plan.pdf](#)>. As long ago as 2005 it was observed that '[a] minority of scientists are proactive in animal welfare research, attempting to work on areas that they believe should be high priority, even though research finding from industry is directed almost exclusively to issues that industry selects': Clive Phillips, 'How Animal Welfare Science Assists in Defining Cruelty to Animals', *Cruelty to Animals: A Human Problem* (Proceedings of the 2005 RSPCA Animal Welfare Scientific Seminar, Canberra, 22 February 2005), 33 <<http://www.rspca.org.au/assets/files/Science/SciSem2005/seminars05proc.pdf>>.

<sup>122</sup> For a full account see Glenys Oogies, 'Australian Land Transport Standards and Guidelines: Is the New Review Process Providing Protection for Transported Farm Animals?' (2011) 6 *Australian Animal Protection Law Journal* 8. See also Animals Australia, 'Submission to the Proposed Standard for Time Off Feed for Bobby Calves' (3 February 2011) <<http://www.animalwelfarestandards.net.au/files/2011/05/Animals-Australia.pdf>>; and Elizabeth Ellis, 'Bobby Calves: An Example of the Standards Development Process' (2011) 5 *Australian Animal Protection Law Journal* 89.

<sup>123</sup> PIMC, 'Australian Animal Welfare Standards and Guidelines – Land Transport of Livestock: Proposed Amendment to the Land Transport of Livestock Standards (SB4.5) – Bobby Calves Time Off Feed Standard' (Decision Regulation Impact Statement, Edition 1, 6 July 2011), 78 <<http://www.animalwelfarestandards.net.au/files/2011/05/Bobby-Calf-ToF-Decison-RIS-OBPR-endorsed-Final-AHA6.7.11.pdf>> (citing the commissioned research). A summary of the research is available: Dairy Australia, 'Determining a Suitable Time Off Feed for Bobby Calf Transport Under Australian Conditions' (undated) <<http://www.animalwelfarestandards.net.au/files/2011/05/Fisher-report-a-summary.pdf>>.

[I]t is recognised that there are some contentious issues where it has not been possible to reach complete agreement at this time. In particular, the current standards for transport of calves, time off water and loading density do not represent complete agreement. The reference group has resolved that bobby calf transport issues will be reviewed within two years, with relevant government and industry parties firmly committed to improving calf welfare outcomes within that time frame. In the interim, it is recognised that some jurisdictions may adopt additional regulatory requirements for the transport of calves.<sup>124</sup>

Regardless, in an act of self-regulation, '[a]ll industries involved in the bobby calf supply chain (that is dairy farmers, livestock agents, calf buyers and transporters and calf processors) have agreed to implement a national industry standard that sets a limit of 30 hours TOF for calves aged 5 to 30 days being transported without mothers'.<sup>125</sup>

The use of animal welfare science in this way is indicative of wider concerns in an Australian context. Writing in 2011 in the aftermath of a major flare-up in what is an ongoing live animal export crisis, Professor Clive Phillips, a leading Australian animal welfare scientist, pointed out that the primary industry funding model in Australia allows for matched funding from government but with industry retaining full control over the research.<sup>126</sup> He has observed that some researchers 'may be tempted to undertake work that has the objective of confirming that the status quo does not damage animal welfare, so that the industry does not have to modify its practices to meet community expectations of high welfare standards'.<sup>127</sup>

### *New Zealand*

It is often stated that science plays a major role when minimum standards are formulated,<sup>128</sup> and this requirement for scientific research to be considered is a core part of the NAWAC Guidelines in considering minimum standards and recommendations for best practice.<sup>129</sup> To date, however, the

<sup>124</sup> Australian Government, above n 66, vii.

<sup>125</sup> Animal Health Australia, 'Australian Animal Welfare Standards and Guidelines - Bobby Calf Time Off Feed Standard' <<http://www.animalwelfarestandards.net.au/land-transport/bobby-calf-time-off-feed-standard/>>.

<sup>126</sup> Clive Phillips, 'Animal Exports: How the Industry Controls Research to Shut Down Debate', *The Conversation*, 9 June 2011 <<http://theconversation.edu.au/animal-exports-how-the-industry-controls-research-to-shut-down-debate-1750>>.

<sup>127</sup> Ibid. See also Clive Phillips, 'Animal Welfare Researchers must be Honest about Motivations', *The Conversation*, 9 January 2013 <<http://theconversation.edu.au/animal-welfare-researchers-must-be-honest-about-motivations-11479>>.

<sup>128</sup> Mellor and Bayvel, above n 26, pp 252-253.

<sup>129</sup> NAWAC 'NAWAC Guideline 05: Role of science in setting animal welfare standards' <<http://www.biosecurity.govt.nz/animal-welfare/nawac/policies/guideline05.htm>>.

use of science has been erratic. It is evident that there are times when scientific understanding is weighted heavily among the NAWAC considerations with much emphasis on international peer-reviewed research being incorporated in the decision-making process.<sup>130</sup> At the same time, it is not difficult to find gaps in many of the Codes of Welfare where science was not utilised at all. Take, for example, the Painful Procedures Code, which refers to relatively arbitrary age limits for certain painful procedures on animals:

The six month age for castration and nine months for dehorning without pain relief is arbitrary with respect to the animal experiencing pain, but is not arbitrary with respect to practical and economic aspects.<sup>131</sup>

Almost as baffling is the fact that the NAWAC often cites, as one reason for declining to import a tougher animal welfare standard, an absence of New Zealand research regarding the effects of a particular practice.<sup>132</sup> This is highly controversial, for the intensive farming conditions that layer hens, broiler chickens and pigs are often subjected to in New Zealand is highly comparable to the conditions experienced by animals examined in the international scientific research (including housing in enclosed sheds with controlled environmental parameters, such as air quality, ventilation and relative humidity). Nonetheless, the NAWAC refuses to rely on this international evidence of harm to animals. For example, in relation to the Code of Welfare for Broiler Chickens, the NAWAC stated in 2003:

There is no published information for New Zealand production on broiler behaviour, on the status of key environmental parameters (such as air and litter quality and temperature/humidity) which influence broiler welfare, or on the relationship of such measure to changes in stocking density. NAWAC recognizes the research and development, and the commercial trials that are being conducted internationally with respect to stocking densities, and that they may have relevance to the New Zealand broiler industry. However, before any changes can be introduced, there need to be independently driven research and development carried out in New Zealand conditions.<sup>133</sup>

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130 For example, the NAWAC referred to 152 refereed publications (both international and domestic) in a recent Code of Welfare Report: NAWAC (2005) 'Animal Welfare (Painful Husbandry Procedures) Code of Welfare 2005 Report', 31 October, <<http://www.biosecurity.govt.nz/files/regs/animal-welfare/req/codes/painful-husbandry/painful-husbandry-report.pdf>> (Painful Husbandry Procedures Code (NZ) Report).

131 Ibid.

132 For example, the desire for specifically tailored New Zealand research resulted in substantial delays in the review of at least three Codes of Welfare: Broiler Chickens (Meat Chickens), Pigs and Layer Hens .

133 Broiler Chickens Code (NZ) Report, above n 88. Though a new Code has now been enacted, it retains the same position on stocking density: Animal Welfare (Meat Chickens Code), above n 35. The New Zealand commissioned research provided for this Code, notwithstanding European conclusions to the contrary, concluded that broiler chicken welfare in Zealand was on par with the rest of the world: Bagshaw,

It is disappointing that when the NAWAC cites an absence of New Zealand research, rather than giving the animals the 'benefit of the doubt' or moving in line with strong public opinion and international trends, this factor is used as a justification for adopting a more industry-friendly standard in spite of proven correlations that are detrimental to the health of the animals.<sup>134</sup> This indicates that 'where there is any degree of uncertainty, the NAWAC is prepared to err on the side of productivity at the expense of animal welfare'.<sup>135</sup>

### ***Balancing differing animal needs – the good animal welfare trade off***

Even though animal welfare legislation in Australia and New Zealand is claimed to be underpinned by the 'five freedoms', it is inevitable that in some cases one animal need will be advanced at the expense of another. To take a particularly benign example, consider a very sick animal. If it requires intensive treatment, it will likely have to be confined, which will of course prevent it from exercising its natural behaviour.

It is inevitable, though, that some animal welfare 'trade-offs' prioritise the needs of animal industries, rather than the welfare needs of animals per se.

For example, in an Australian context, the continued use of sow stalls is justified as protecting the welfare of pigs in the first four weeks of pregnancy, while overlooking the point that the need for protection is a feature of the way in which pigs are intensively farmed in the first place:

Recent research indicates that protection from aggression in the first 4 weeks of pregnancy is important to ensure a pregnancy continues to full term. Reasonably short-term use of crate confinement can achieve protection from aggression and minimise any adverse effects.<sup>136</sup>

In New Zealand, a NAWAC Guideline states that NAWAC must be prepared to balance the different needs of animals (that is, the relative importance of, for example, adequate nutrition and behavioural freedom).<sup>137</sup> The NAWAC justifies animal welfare trade-offs by stating that:

In order to assess more comprehensively what the physical, health and behavioural needs of animals are and how they can be met, it is helpful to consider five domains of an animal's welfare, ie the nutritional, environmental, health, behavioural and mental requirements of animals. In order to achieve the best net welfare outcomes for animals in particular

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C.S. Matthews, L.R., and Rogers, A. 2006, *Key indicators of poultry welfare in New Zealand*, client report prepared for MAF Policy, AgResearch, Hamilton, New Zealand.

134 See, for example, RNZSPCA (2007) 'Battery Cages – Statistics' <<http://rnzspca.org.nz/battery-cages-statistics-2>> (providing statistics and descriptions of hens' conditions).

135 Gum, C (2003) 'New Codes of Welfare in Place for Broiler Chickens: It is New But is it Improved?' 2 *ARLAN Report* 4 at 6.

136 DAFF, above n 119.

137 'NAWAC Guideline 02', above n 97.

circumstances, a restriction is sometimes imposed within one of these domains in order to achieve an animal welfare benefit in another domain. NAWAC refers to this as ‘an animal welfare trade-off’.<sup>138</sup>

Not surprisingly, the obligation to allow animals ‘the ability to perform normal behaviours’ is the obligation that is usually affected the lowest priority. For example, the NAWAC justifies the existence of dry sow stalls, farrowing crates, battery cages and other routinely used systems where animals cannot display normal patterns of behaviour by stating that:

NAWAC considers that the degree of restriction which close confinement systems impose on the ability of animals to express their normal patterns of behavior can be supported ethically only when the following three conditions are all satisfied:

1. compared to other management systems, *demonstrable* and *significant* animal welfare benefits must accrue from such close confinement; and
2. such close confinement must be applied for the minimum period necessary to realize those benefits; and
3. active attempts must be made to develop and use viable alternatives, which are acceptable in animal welfare terms, to such close confinement.<sup>139</sup>

The NAWAC was criticised for not phasing out battery cages in New Zealand when the Layer Hen Code of Welfare was enacted in 2005, as well as in the Layer Hen Code of Welfare Amendment 2007, with its justification being it could not conclude that alternative systems guaranteed better overall welfare for hens.<sup>140</sup> The Layer Hen Code (NZ) Report stated that:

[A]lthough in alternative systems, hens are free to roam ... cages provide some advantages over them. For example, hens are not exposed to adverse weather conditions or predators (eg harrier hawks) and fighting, dust, disease from faecal material, ammonia levels, and the cleanliness of eggs and birds is more easily managed.<sup>141</sup>

Likewise, when originally defending the decision not to ban dry sow stalls and farrowing crates, the NAWAC stated that:

[T]he current alternatives to these systems do not guarantee better welfare for pigs and may, in fact, reduce the welfare of the sows and/or their piglets. Although pigs can be free to roam and perform normal

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138 NAWAC ‘Guideline 08: Justifying animal welfare trade-offs’ <<http://www.biosecurity.govt.nz/animal-welfare/nawac/policies/guideline08.htm>>.

139 Ibid.

140 Ministry of Agriculture and Forestry ‘FAQs related to Animal Welfare’ <[http://www.biosecurity.govt.nz/node/419/related\\_faqs](http://www.biosecurity.govt.nz/node/419/related_faqs)>. Battery cages are now banned in New Zealand from 2022: Animal Welfare (Layer Hen) Code, above n 39.

141 NAWAC ‘NAWAC Guideline 10: Phasing out one management system in favour of another’ <<http://www.biosecurity.govt.nz/animal-welfare/nawac/policies/guideline10.htm>>.

behavior in alternative systems ... aggression can be a problem ... and piglets can be crushed with sows lie down.<sup>142</sup>

While these objections may initially seem compelling, they cannot be considered in isolation, as the real factor behind these 'trade-offs' is economic. The scientific evidence indicates that with good husbandry and stock-personship practices the purported problems would be minimal.<sup>143</sup> Again, the NAWAC seems predisposed against phasing out close confinement systems, arguing that it 'can recommend the phasing out of a particular management system only if the alternatives available to replace it confer a *significant* gain in net animal welfare status'.<sup>144</sup>

It is evident with layer hens (and many of the industrialised farmed species) that Parliament's intention in enacting the Act is being frustrated. The Act required that hens be given the opportunity to display normal patterns of behaviour and this clearly does not happen. The NAWAC admits that battery cages do not allow layer hens to display normal patterns of behaviour.<sup>145</sup> There are already alternative systems available, such as barn and free-range systems, which do comply with the Act, provided they are well managed. Section 73(4) of the Act envisages a transition from current practices to new practices, yet in the Layer Hen Code, the NAWAC has not set a timeframe for any transition from the battery cage system.<sup>146</sup>

### *The incremental benefit of codes*

Two key purposes of Model Codes of Practice in Australia were to educate animal industries about their responsibilities to animals, including through training and awareness programs, and to allow for advances in animal welfare standards.<sup>147</sup> Despite this, 'the Codes appear to neither provide a suitable standard for regulation or a vehicle for communicating welfare standards to producers'.<sup>148</sup> It is still an open question as to whether the standards and guidelines approach will fare any better.

Similarly, Codes of Welfare are considered by the New Zealand Government to 'have an important role in improving animal welfare standards and facilitating success in overseas markets'.<sup>149</sup> One important claimed benefit

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142 Ibid.

143 Painful Husbandry Procedures Code (NZ) Report, above n 130.

144 'NAWAC Guideline 10', above n 141 (emphasis added). What constitutes 'significant net gain' is questionable. From the perspective of the intrinsic value of an animal's welfare, some gain would be better than no gain at all.

145 Layer Hens Code (NZ) Report, above n 68.

146 Animal Welfare (Layer Hens) Code of Welfare 2005.

147 DAFF (2008) *The Australian Animal Welfare Strategy*, Commonwealth of Australia, Canberra (rev ed), p 29.

148 Neumann Report, above n 6, p 11.

149 See above n 20.

invokes the notion of animal industries learning about better standards and improving their practices over time.

Indeed, the MPI has repeatedly proclaimed that a strength of the Codes is the 'educational value through an ability to use them to improve community awareness of animal needs'.<sup>150</sup> While commendable as a matter of theoretical practice, there is little evidence to suggest that the MPI views the highlighting of minimum standards to the affected industries as a core concern. Despite the enactment of several Codes of Welfare over the past six years, the first initiative of payment of costs towards the distribution of minimum standards by the MPI was for the Code of Welfare for companion cats, with NZ\$5000 distributed to the New Zealand Companion Animal Council to help with publication costs of a condensed booklet.<sup>151</sup> In addition, Dairy NZ has distributed Painful Husbandry Procedures minimum standard information in the form of free posters with pictorial representations, for farmers to put in their sheds to remind them of the minimum standards.<sup>152</sup> There has been no evidence to suggest that offending has decreased since Codes of Welfare have been approved, despite their claimed 'educational' value. In light of the MPI's reluctance to buttress the enactment of Codes of Welfare with implementation initiatives, this is not surprising.

## Conclusion

The effectiveness of the institutional processes underpinning codified animal welfare standards as a means of protecting the interests of animals can be challenged on a number of grounds. Animal welfare standards are meant to incorporate many considerations in their formulation. It appears though that some factors that suggest the need for improved standards, such as societal expectations, international trends and the behavioural needs of animals, are underplayed. By contrast, other considerations that militate against significant improvements in standards, such as economic considerations, are heavily overplayed. The relationship of codified standards with authorising statutes also raises concerns, especially the legal sleight of hand that allows compliance to be used as a defence to otherwise cruel practices. These shortcomings raise the question of whether codified standards are shields or swords, or perhaps neither, at best serving a limited quality assurance function? Questions of this nature warrant further detailed empirical investigation. Perhaps the overriding and immediate question that needs to be assessed is whether codified animal welfare standards, as they stand

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<sup>150</sup> Ibid.

<sup>151</sup> New Zealand Companion Animal Council Inc (2008) *A Summary of the Companion Cats Code of Welfare* <<http://nzcac.org.nz/images/stories/PDF/catbrochure.pdf>>.

<sup>152</sup> See DairyNZ (2006) 'Dairy Information Packs' <<http://www.dairynz.co.nz/page/pageid/2145836758/Dairy%20Information%20Packs#Pack3:AnimalWelfareInformation>>.



today in Australasia, enhance animal welfare or, in a more critical vein, should be regarded as 'the devil in disguise', preventing significant animal welfare improvements from being realised.