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The Animal Rights Movement and the Law:

Engagement, Co-option and Resistance

by

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ABSTRACT

This thesis is a study of social movement engagement with law. It examines the collective challenges raised by the Animal Rights Movement in order to improve the legal protections in place for animals. Because all struggles commence on old ground, advocates who choose to work *with* law are by necessity drawn to make compromises, simply in order to engage with existing legal frameworks. This is because change must be leveraged on the basis of current standards and norms. However current frameworks are not ideologically neutral, they were put in place for specific purposes to serve specific objects and interests. In New Zealand, neoliberal ideology has played a particularly powerful role in shaping the laws, policies, structures and processes in place, ensuring economic interests are prioritised over other values and concerns. For the animal rights movement, this makes law an arena of struggle, in which to locate an argument or voice that will challenge the status quo and current balance struck.

It has been argued that law is something that is actively constituted, that is pushed and pulled by a range of actors as they vie to contest legal meaning. Yet it has also been observed that not all participants come to law as equals. How then *is* law constituted in this context? What this study of the animal rights movement's engagement with law enables, is an examination of the hegemonic processes that operate to insulate existing frameworks against reform. What it also highlights is that law is not only constituted by legislators, judges and industry groups within the confines of Parliament and official legal forum, legal meaning is also something that is constituted in the public realm. In this regard, the movement's use of undercover investigations and civil disobedience has arguably been their most effective legal strategy. These actions serve to shine a light on the gap between law on the books and law in practice and create a powerful public discourse in support of reform.

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Glossary

AAA	Auckland Animal Action
AEC	Animal Ethics Committee
ALF	Animal Liberation Front
ARLAN	Animal Rights Legal Advocacy Network
ARM	Animal Rights Movement
AWAC	Animal Welfare Advisory Committee
BUAV	British Union for the Abolition of Vivisection
CAFF	Campaign Against Factory Farming
CEC	Codes of Ethical Conduct
DoC	Department of Conservation
DSIR	Department of Scientific and Industrial Research
EDS	Environmental Defence Society
EPF	Egg Producers Federation
ERMA	Environmental Risk Management Authority
GATT	General Agreement on Tariffs and Trade
iPSEAC	Interim Psychoactive Substances Expert Advisory Committee
LD50	Lethal Dose 50%
MAF	Ministry of Agriculture and Forestry
MMP	Mixed Member Proportional
MoH	Ministry of Health
MPI	Ministry for Primary Industries (formerly MAF)
NAEAC	National Animal Ethics Advisory Committee
NAWAC	National Animal Welfare Advisory Committee
NZAVS	New Zealand Anti-Vivisection Society
PIANZ	Poultry Industry Association of New Zealand
PPC	Primary Production Committee
PSEAC	Psychoactive Substances Expert Advisory Committee
RNZSPCA	Royal New Zealand Society for the Prevention of Cruelty to Animals
RRC	Regulations Review Committee
SAFE	Save Animals From Exploitation
SCAHAW	Scientific Committee of Animal Health and Animal Welfare
SOP	Supplementary Order Paper
SPCA	Society for the Prevention of Cruelty to Animals
SVC	Scientific Veterinary Committee of the European Commission

CHAPTER 1

Introduction

*At any given moment there is an orthodoxy, a body of ideas
which it is assumed that all right-thinking people will accept without question.*

~ George Orwell, *Animal Farm*

This thesis is a study of social movement engagement with law, and in return, of law's response to new lines of argument and ideological challenge. The relationship between movement and law is explored through a detailed examination of the collective challenges raised by the Animal Rights Movement ('ARM') in progressing its cause. The ARM is of particular interest since it differs from more traditional citizenship-based movements. Animal rights activists do not simply demand basic rights for themselves but deep systemic change to the way that both society and current legal frameworks view, and treat, animals.¹ Actors within the ARM hold a range of perspectives; from those that reject entirely the instrumental use of animals,² to those calling for equal treatment of human and non-human animals.³ The movement's goals are broad: it seeks fundamental societal, political, legal and cultural change. Animal rights advocates disagree not just with specific industry practices and legal standards of care that exist in relation to animals, they contest the right of humans to exploit animals at all, the legal status of animals as property,⁴ even the very notion of "personhood".⁵ The ARM questions the assumption that the exploitation of animals is legitimate, reasonable or necessary and in doing so, mounts a challenge to long-standing notions about the place of animals in society. This means that to succeed, the movement must not just contest law on the books, but the ideological foundations and normative discourse that underpins and is used to justify that law. The movement's project is a transformative and ideological one.

¹ Jasper classifies the ARM as a "post-industrial movement" on this basis; as comprised of people already integrated into their society's political and economic system that do not demand basic rights for themselves and pursue overtly altruistic goals, in the form of protections or benefits for others. See James M. Jasper *The Art of Moral Protest: Culture, Biography and Creativity in Social Movements* (University of Chicago Press, London, 1997) at 7.

² This position was first formulated by philosopher Tom Regan in *The Case for Animal Rights* (Routledge, London, 1983) and more recently by scholars such as law professor Gary Francione. See Gary, Francione, *Rain Without Thunder: The Ideology of the Animal Rights Movement* (Temple University Press, Philadelphia, 1996).

³ This perspective was developed by Peter Singer in the 1970s; see Peter Singer *Animal Liberation* (Jonathon Cape, London, 1976).

⁴ Much has been written on the legal status of animals as property, most notably by Gary Francione. See Gary Francione *Animals, Property and the Law* (Temple University Press, Philadelphia, 1995).

⁵ For a fuller exposition of this position see Steven M. Wise *Rattling the Cage: Toward Legal Rights for Animals* (Perseus Books, Cambridge, Massachusetts, 2000) and Gary Francione "Animals – Property or Persons" in Cass R. Sunstein and Martha C. Nussbaum, Martha C. (eds) *Animal Rights: Current Debates and New Directions* (Oxford University Press, Oxford, New York, 2004).

What an examination of the movement's engagement with law demonstrates from the outset is that for the ARM, law is an arena of struggle, and a struggle not just for better animal protection laws, but for recognition, an ongoing search to locate an argument or voice that is effective. The range of tactics and arguments trialled by the movement is diverse. Activists have argued that animal tests are unreliable and must be banned in order to protect *human* life, they have opposed resource consents for factory farms on the basis of noise and effluent concerns, and in civil disobedience actions they have argued their trespass was necessary in order to protect 'property' (dolphins). They have participated on Animal Ethics Committees (AECs) (the institutional bodies that *approve* animal experiments), they have debated how much space a chicken needs, the handling of day old calves being sent to the abattoir, humane slaughter standards and techniques... but what they have invariably not done, what is almost entirely absent from this material, is argument about 'animal rights'.

Whenever advocates come to law, their rights discourse is not simply modified, it is dropped. This greatly complicates the examination of the movement's engagement with law. With their discourse rendered invisible it became necessary to track the initiatives of groups and individual activists, since it was not possible to track the discussion of 'rights'; this discussion was simply not taking place within legal forum. Existing legal frameworks do not incorporate any notion of 'animal rights' so the discourse does not sit within current terms of reference; it has no legitimacy and is invariably viewed as out of scope by decision makers and courts alike. Rights talk, in relation to animals, has no road on which to travel. This does not prevent the movement from engaging with the legal system but it does have a profound effect on the nature and effectiveness of that engagement.

This thesis attempts to identify the mechanisms that operate within the legal system to exclude and render invisible the movement's animal rights based claims. It seeks to understand law's impact on the movement, and the processes through which the ARM's campaigns and initiatives are co-opted and contained. It explores the barriers to genuine and effective engagement and how they manifest in practice. A range of theoretical perspectives and frameworks have been employed in order to examine, and help make sense of, the complex interactions and relationship between movement and law disclosed by this research.

Theoretical Frameworks

Critical Legal Scholars have long contested that law is neutral, objective and rational and sought to unmask its inherent ideological foundations. They argue that the law entrenches dominant ideological perspectives, Marx referred to these as the “ruling ideas”, in recognition of the power they have to control the means of ‘mental production’ in society.⁶ Foucault argued that the process of incorporating specific ideology and values into law served to render them coherent, valorising them so that they become material, providing an active framework going forward.⁷ In this way the winning ideology obtains law’s authoritative legitimacy, and becomes the prevailing norm.⁸

The ARM is acutely aware of the ideological biases and values that underpin current laws and frameworks and the barrier that these present to reform. In setting out his ‘case for animal rights’ Regan argues that the problem lies not ‘in the details’ but in “the system that allows us to view animals as our resources, here for us”, with “commercial animal agriculture” and the “unjust institutions” that support this view of animals.⁹ Singer accuses current frameworks of being infused with a ‘species bias’ that serves to secure the “privileges of the exploiting group” and maintain the “tyranny” of humans over nonhuman animals.¹⁰ Critiques of law abound outlining the inbuilt bias and failings of law in relation to animals. This has even given rise to a new field, ‘Critical Animal Studies’ (‘CAS’).¹¹ CAS scholars view law as reifying a mutually reinforcing blend of anthropocentric and capitalist/neoliberal values, a world-view that posits human ‘dominion’ over the natural world, that views nature as a resource to be commoditised, and prioritises economic imperatives over other social values. The ARM’s critique of law is not novel, similar arguments have long been raised by many other groups, most notably indigenous rights and environmental/green movement commentators.

This is all highly problematic for new ‘ideological projects’, since by necessity ‘all struggles commence on old ground’, and the criteria for legitimacy, the range of argument and interests

⁶ Karl Marx and Frederick Engels “The German Ideology” in *Marx & Engels Collected Works Vol. V* (ebook ed, Lawrence & Wishart, 2010) at 59. Cited and discussed by Alan Hunt (2004) “Getting Marx and Foucault into Bed Together!” (2004) 31(4) *Journal of Law & Society* 592 at 600.

⁷ This is Foucault’s concept of “discursive formation” whereby law puts in place values and valorises so normalises them, see Alan Hunt *Explorations in Law and Society* (Routledge, New York, London, 1993) at 236.

⁸ Hunt, above n 7, at 237.

⁹ Tom Regan “The Case for Animal Rights” in M.W. Fox & L.D. Mickley (eds) *Advances In Animal Welfare Science* (Humane Society of the United States, Washington, 1986) 179.

¹⁰ Singer, above n 3, at xi.

¹¹ Maneesha Deckha “Critical Animal Studies and Animal Law” (2012)18 *Animal Law* 207 at 228.

law 'sees', has already been set. It is not just specific laws made for specific purposes that pose a problem for alternate discourse; biases are built into the framework that defines who has standing, who is 'property', who makes decisions and what they are permitted to consider, who is an 'affected party' or 'stakeholder'. Ideology has an impact on the structure and processes of the law. It is in this space that Gramsci's 'hegemony' is visible, in the *processes* that operate to maintain power by generating "spontaneous consent".¹² The near complete absence of the ARM's 'rights discourse' when engaging with law is an example of how powerful law's capacity to generate this consent is.

Hunt argues that ideological projects arise in response to increasing consciousness of these hegemonic structures and that in order to progress reform they seek to integrate themselves within existing frameworks, and so to transform them from within.¹³ What a study of the legal engagement of the ARM allows is an examination of this process in action. How does a movement that must leave its own rights discourse behind in order to engage go about the process of transforming law and shifting the balance struck? How are the barriers that operate against change and to enforce the status quo overcome? Can they be overcome?

Movement Engagement With or Against Law

Ewick and Sibley have argued that in order for actors to select to work 'with law', they must view it as a "terrain for tactical encounters" where "resources can be deployed to achieve strategic goals".¹⁴ That the law must be seen as "a bounded arena in which pre-existing rules can be deployed and new rules invented to serve the widest range of interests and values".¹⁵ This is because for engagement to be worthwhile, law must be viewed as a forum for legitimate competition, there must be a real chance of prevailing, for skill and argument to be able to overcome more resourced and established players.

Of course, not all animal rights advocates attempt to work with law. Ewick and Sibley note that actors who view law as biased and closed, the product of unequal power relationships, will adopt more combative strategies in order to work 'against law'.¹⁶ Advocates that work against law

¹² Hunt, above n 7, at 124.

¹³ At 230-31.

¹⁴ Patricia Ewick and Susan Sibley "Common Knowledge and Ideological Critique: The Significance of Knowing that the "Haves" Come Out Ahead" (1999) 33(4) Law Soc. Rev 1025 at 1031.

¹⁵ At 1031.

¹⁶ At 1034.

often undertake violations of conventional and legal norms as an act of resistance or attempt to fashion solutions they would not be able to achieve within “conventionally recognised schemas”.¹⁷ Activists operating in this arena may still seek law reform and contest legal meaning, but they select avenues where there is more scope to do so on their own terms, typically through protest type actions.

In New Zealand at least, rule of law considerations appear to play a key role in advocates positioning and assessment in this regard. When canvassing the range of claims and campaigns being run by the ARM in New Zealand it became apparent that activists were making extensive use of rule of law based argument. Advocates claim that animal welfare protections lack sufficient clarity and are too subjective or vague, and that the standards in place are not consistently applied, that like cases are not treated alike. They claim that the rules, standards and protections for animals in some areas, particularly laboratory animals, are not made publicly available. They have also claimed that conflicts of interest exist within core decision-making bodies, that decision-making often appears arbitrary and that the processes in place lack transparency. But the most significant and frequent complaint of advocates has been that the protections promised to animals under the law are not provided in practice, that animal using industries openly flout the law and that the law is neither applied, monitored nor adequately enforced.

There can be little doubt that to animal rights activists (and to the animals whose interests they seek to protect), existing legal frameworks represent the quintessential example of Dyzenhaus’ “wicked legal system”.¹⁸ Yet the most commonly raised arguments focus not on the substantive immorality of the law, but its formal failings.

Lon Fuller argued that the moral legitimacy of any legal framework was dependent upon compliance with certain fundamental principles of legality. Amongst these principles is the idea that the law should be general, public, prospective, clear, consistent and non-contradictory, possible to comply with, constant and most crucially, congruent.¹⁹ That is to say there must be congruence between official action and the declared rules, the law should be coherently and

¹⁷ Patricia Ewick and Susan Silbey *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press, Chicago, London, 1998) at 48-49.

¹⁸ David Dyzenhaus *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* Clarendon Press, Oxford, 1991).

¹⁹ Fuller sets out eight principles of legality and claims that compliance with these provides an “inner morality” to law. See Lon Fuller *The Morality of Law* (Yale University Press, New Haven 1969) at 38 – 39.

correctly applied – it should do what it says it does. When animal advocates adopt these lines of argument what they are essentially attempting to do, is to extend the application of this formal notion of the rule of law to animals. And it is this conception of the rule of law that is adopted in this thesis and the analysis provided throughout.

Animal rights advocates' decision to work with law or to abandon conventional law reform avenues will in part depend on whether or not they view the legal framework in place as capable of operating in a fair and unbiased manner, or whether it is seen as too fundamentally corrupt to be capable of hearing or taking seriously, their concerns. Acknowledging that advocates work both with and against law, this study attempts to canvas the actions and initiatives of the movement in both these spheres. This not only enables the effectiveness of action in these two arena to be compared and contrasted, but the different constraints or advantages at work in each to be discussed and examined. But perhaps even more importantly, its inclusion is practically necessary, since legal meaning is something that is contested not just within Parliament or at select committee, or through the courts, but also within civil society.

A Constitutive Approach to Law

While Hunt recognises the hegemonic forces at play, law's claim to autonomy and its tendency to self referential legitimisation,²⁰ he also rejects those claims, maintaining that "law is itself the product of the play and struggle of social relations",²¹ and as such it is actively constituted, pushed and pulled by a range of actors.²² Constitutive law scholars define law culturally, reminding us that 'law' and 'legality' are themselves constructed through social interaction, as movements mobilise legal concepts and language outside of formal frameworks.²³

Silverstein argues that while legal meaning, as articulated by state-sanctioned institutions "permeates society; shapes perceptions, and structures actions" and that the intentions and words of legislators and courts carry weight, that "the articulation of written law is rarely unequivocal".²⁴ By its nature language is imprecise and malleable, and offers space for

²⁰ Hunt, above n 7, at 304 - 5.

²¹ At 3.

²² At 321.

²³ See P Ewick and S.S. Sibley "Narrating Social Structure: stories of resistance to legal authority" (2003) 108(6) *Am. J. Soc.* 1328 and P. Ewick and S. S. Sibley *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press, Chicago, 1998).

²⁴ Helena Silverstein *Unleashing Rights: Law, Meaning, and the Animal Rights Movement* (University of Michigan Press, Ann Arbor, USA, 1996) at 7.

manoeuvring. On this basis Silverstein asserts that legal meaning is actively constituted by and constitutive of society, witnessing the many battles that occur precisely over legal meaning.²⁵

In order to truly investigate the movement's struggle with law, to identify the constraints and barriers in place and potential responses to those blockages, it is necessary to consider each of the spaces where legal meaning is being contested. To this ends, this study of movement engagement with law adopts an expansive and relational conception of 'law'; as a 'manifestation of social relations',²⁶ and the range of action and strategies utilised by the ARM both within and outside of formal legal frameworks is considered.

Structure of this thesis

This thesis is divided into four parts, the first three focus on advocates' attempts to work *with* law across a range of contexts. Part I investigates the attempts of the ARM to get 'law on the books'. This is one of the most difficult tasks advocates face since it is an attempt to add something new and requires access to and representation within Parliament to succeed. Advocates must persuade decision makers of the need for reform and get animals and their interests on the legislative agenda. Chapter 2 examines the work of Labour MP Mabel Howard in the 1950s to get stand alone animal protection law in place through the introduction of a private members bill. Chapter 3 turns to discuss the wide range of arguments and initiatives run by Save Animals From Exploitation ('SAFE') and the New Zealand Anti-Vivisection Society ('NZAVS') throughout the 1980s and their attempts to deal with the regulatory gap that existed under the Animals Protection Act 1960 ('APA') in relation to animal experimentation.²⁷

In contrast Part II canvases the movement's engagement in what should, theoretically at least, be the movement's most 'friendly ground'; within existing animal protection frameworks where the core object of the law is to safeguard animals and their welfare. Chapter 4 examines the development of the Animal Welfare Act 1999 ('AWA') and the debate that took place around the standards and processes it put in place. This chapter explores the role that industry, government and animal advocates played in that process, and discusses the values and ideological influences that are reflected in the legislation as a result. Alongside a host of other

²⁵ At 8.

²⁶ Hunt, above n 7, at 321.

²⁷ Section 19(1)(d) provided that nothing in the Act would render unlawful "any research or experimental work carried out on an animal by a bona fide research worker."

reforms, one of the key changes made under the AWA when it was introduced was the requirement for a regular review of the welfare standards within industry codes. A public submissions process was put in place so that community views on these standards could be canvassed and considered when codes were reviewed and updated. Chapter 5 examines the engagement of the ARM in the code review process, the progress made as a result of that engagement, and the balance struck under the Act.

Part III turns to another arena where animal rights advocates frequently operate, but where little existing provision for animals and their interests exists, by exploring ‘collateral frameworks’. These are frameworks that have an impact on animals or their interests, but contain little or no overt reference to animals or animal welfare. Here animal rights advocates must argue the relevance of animal welfare to the determination at hand and seek to introduce or extend existing provisions so that animal interests can be considered. Chapter 6 discusses the law reform initiatives and submissions of NZAVS in relation to the Psychoactive Substances Act 2013. This legislation was introduced to regulate the development and manufacture of psychoactive substances. The safety testing provisions associated with the new regulatory regime raised concerns that animal tests would be required under the new framework and advocates sought to restrict animal testing for this purpose. Chapter 7 examines the work of advocates opposing resource consents to factory farms under Resource Management Act 1991 and their submissions on applications to genetically modify animals under the Hazardous Substances and New Organisms Act 1996.

Part IV steps outside the engagement within formal legal channels to examine the mechanisms employed by animal rights activists to resist law and challenge the way that animals are treated under existing frameworks. A relatively unique feature of the movement’s challenge to law in New Zealand is that activists support the core welfare standards set down in the AWA. The movement’s chief argument is that the requirements in the Act are undermined through the provision of exemptions from compliance and that lack of monitoring and enforcement means that animals do not receive the protection promised by law. The claim is that industry groups are operating illegally while the movement is seeking to uphold the law. In order to highlight the gap between law on the books and law in practice the movement has made extensive use of undercover investigations and video activism. Chapter 8 explores the impact and progress made as a result of these activities. Lastly, chapter 9 examines the ARM’s use of civil disobedience to call attention to issues of concern and mobilise public opinion so increase the political pressure for reform.

At its heart, this study of social movement engagement with law hopes to assist an understanding of the barriers to change that exist within current legal frameworks, and the process by which law is constituted. Given the pace of societal and environmental change taking place in the world today, and the increasingly pluralistic nature of civil society, the demands and challenges placed on the legal system have never been greater. An understanding of ‘law’ and how law reform proceeds, of how the law responds to new and competing ideological discourses, has never been more important. This thesis also hopes to deepen and inform that understanding.

CHAPTER 2

Mabel Howard and the APA

Obtaining protection for animals has never been an easy task; our economy and our wealth has been built upon their backs, and the use of animals to serve human wants and needs is entrenched in our society. The notion that animals and their suffering matters or that animal protection is a legitimate project for the law to address is a relatively recent one. Early animal advocates faced an uphill battle in attempting to persuade those in power that reform was necessary. In New Zealand, the most significant legislative turning point for animals came in 1960 with the introduction of the Animals Protection Act ('APA'). This critical piece of legislation was to remain in force for almost 40 years until the Animal Welfare Act ('AWA') was introduced in 1999.

The APA was a significant starting point for the ongoing debate concerning animals and their interests in New Zealand. Modelled on animal protection legislation that existed in the United Kingdom and Australia, the primary purpose of the Act was to bring together a raft of pre-existing anti-cruelty provisions in order to consolidate the law.¹ The definition of cruelty that was adopted under the Act remains essentially unchanged even today and is a legacy from this time.² It was also at this point that animal protection was placed firmly under the jurisdiction of the Ministry of Agriculture, rather than with police as it had been previously. The animal rights movement ('ARM') that emerged in the late seventies and early eighties can be viewed, in part, as a reaction to the perceived failings of this approach and the framework it established. Because the legal initiatives of the ARM from that point onwards represent an attempt to alter, or at least modify law's treatment of animals, it is useful to investigate the history and development of that law.

It was Mabel Howard, a self proclaimed 'animal rights' advocate, who led the push in the 1950's, for the development and adoption of a stand-alone animal protection framework in this country. Howard was the Labour Party MP for Christchurch East. She was also vegetarian and a

¹ Other commonwealth jurisdictions had already undertaken a similar consolidation of the law, this occurred as early as 1901 in New South Wales, Australia with the introduction of the Prevention of Cruelty to Animals Act 1901, and had taken place in the United Kingdom in 1911 when the Protection of Animals Act 1911 was enacted. There had also been a period of rapid growth and expansion of anti-cruelty legislation in Australia in the 1950s and this also appears to have driven the reform here. See Parliamentary Hansard on the Prevention of Cruelty to Animals Bill: (12 June 1957) 311 NZPD 10. For discussion of the legislative developments in this era see Philip Jamieson "Duty and the Beast: The Movement in Reform of Animal Welfare Law" (1991) 16(2) Queensland L.J. at 238.

² See Animal Welfare Act 1999, s2 (The term "cruelty" has however been replaced with "ill treatment").

long-time advocate for animals, having served as president of the Christchurch SPCA for many years.³ Howard's ideology had been informed in part by her travels to England to meet with campaigners there, and she spoke with enthusiasm in the House of the way advocates in the U.K. believed that animals had rights, and of the progressive laws being implemented.⁴ Throughout the fifties, Howard attempted to progress law reform on a range of animal issues, from hare coursing⁵ to the conditions at slaughterhouses and the use of steel jaw traps.⁶ In 1957, Howard submitted a private members bill, the Prevention of Cruelty to Animals Bill ('PCAB'). It was this bill and the discussion it fostered in the House that would trigger the development and introduction of the APA.

This chapter discusses Howard's PCAB, the reforms it hoped to achieve, and how it was received and responded to by the government, as well as the farming sector. It examines the discourse employed on both sides of the debate throughout this process, the arguments levied both for and against reform, and the net result of those negotiations: the APA.

Starting Points

Recognising that all reform builds upon existing legal standards and norms, it is essential to briefly canvas the law that was in place in 1960, the character of those frameworks and how they dealt with animals. Prior to the implementation of the APA, New Zealand was without any stand-alone animal welfare legislation and the rules and regulations dealing with animals were spread amongst a variety of statutory provisions. Most cruelty offences fell under the ambit of the Police Offences Act 1927 ('POA').⁷ Sections 7 through 17 dealt with a range of issues such as animal fighting ventures, 'over-riding' and over-loading of animals, beating animals, failing to provide sufficient food or water, laying of poisons and bait in public areas, and even with liability for property damage caused by animals.

The context within which animal cruelty offences was placed is indicative of how they were conceived. The focus of the POA was on 'law and order' and offences pertaining to public decency, alongside matters such as vagrancy, drunkenness, obscenity, vandalism, breach of

³ See Catherine Amey *The Compassionate Contrarians: A History of Vegetarians in Aotearoa/New Zealand* (Rebel Press, Wellington, 2014) at 130 and 136.

⁴ See (1 September 1960) 324 NZPD 2034.

⁵ (8 September 1953) 299 NZPD 1010 – 1015.

⁶ See, for example (17 August 1955) 306 NZPD 1795. In particular, question 19 where Howard discusses the cruelty of steel jawed traps.

⁷ Sections 7 – 15.

‘good order’, ‘furious driving’, false claims and representations, and general nuisance and public safety offences. The animal cruelty offences were nestled between provisions dealing with property damage and restrictions on Sunday trading. Correspondingly, the penalty for cruelty to animals was relatively minor, a fine of up to £20 or a term of imprisonment not exceeding two months.⁸

Animal law scholars have noted that early animal protection laws were concerned with upholding good manners and mores. Cruelty was viewed as anti-social, stemming from the corruption of the lower classes, and so these early laws were as much about cultivating a civilised society as about protecting the well-being of animals.⁹ The focus of these early laws was typically on restricting the most visible forms of abuse. Debate on animal issues in the House frequently led to discussions as to whether the practices in question were “indulged in by only a few” or were appropriate for “respectable persons.”¹⁰

In addition to the POA, animal cruelty provisions were located across an array of agricultural statutes. The Meat Act 1939 regulated abattoirs and meat inspection processes, and s 60 gave inspectors the power to check stock for “undue suffering” caused through overcrowding, insufficient shelter, unsanitary conditions, or lack of food, or water. Similarly, s 6 of the Poultry Act 1924 rendered cruelty caused by overcrowding or the failure to provide adequate food, drink and shelter an offence. Inspectors had powers under these Acts to order compliance, and the penalty for breach of both of these provisions was by way of a fine. Infringements in this context were not viewed as serious, but as a simple regulatory type offence.¹¹ These Acts appear to have been focused on ensuring good stockmanship and clean and sanitary conditions, as well as ensuring that any undue suffering was mitigated. Interestingly, the early origins of these provisions show they were concerned in part with ensuring that animals were in good condition so that the highest quality produce was obtained.¹² For example, the importance of butchers having access to meat of optimal quality was underlined, and it was argued that practices such as

⁸ Police Offences Act 1927, s 7.

⁹ Radford has documented the development of early animal protection legislation in England and its particular concern with prohibiting ill treatment that is visible in the public arena, and practices common amongst the lower classes that were viewed as anti-social e.g. dog fighting and bear baiting. Michael Radford. *Animal Welfare Law in Britain: Regulation and Responsibility* (Oxford University Press, Oxford, 2001) at 52.

¹⁰ See for example the debate on cock-fighting; (5 November 1884) 49 NZPD 384.

¹¹ For examples see the Poultry Act 1924, s 5 and 10, and the Meat Act 1939, s 60 and 68.

¹² See discussion of the Slaughtering and Inspection Bill (24 October 1898) 105 NZPD 352.

overdriving resulted in overheating, and that animals needed to be rested, fed and watered to prevent “great injury to the meat”.¹³

Therefore, the core drivers behind early provisions to protect animals were as concerned with protecting public morality and ensuring product quality as they were with protecting animals. This reasoning underpins the anthropocentric bias within these laws from the outset. So long as the provisions dealing with animals were spread across a range of statutes, none were primarily directed at protecting animals, and the approach varied from Act to Act, it was difficult for advocates to chart a way forward. By 1960, there had been repeated attempts to garner support for change, however, animal advocacy groups had not managed to register animals on the legislative agenda.¹⁴ Howard’s private members bill sought to change this situation and establish a central, specifically animal-orientated piece of legislation. Her hope was that once a basic framework was in place, it could slowly be reformed over time and transformed into a kind of “Animal’s Bill of Rights”.¹⁵ Indeed, Howard viewed cruelty protections to represent ‘rights’ in all but name.

Many advocates today maintain this view. Sunstein has argued that “if we understand ‘rights’ to be legal protection against harm, then many animals already do have rights” and that specific prohibitions although not formally recognised as ‘rights’ nevertheless constitute ‘actual rights’.¹⁶ Feinberg has also argued that legal duties regarding animals should be seen as effective rights where animals are the intended beneficiaries.¹⁷ On a practical level, the adoption of this perspective of rights also facilitates movement engagement with law, since it allows the more confronting and often polarising ‘rights talk’ to be avoided in contexts where that discourse would itself constitute a barrier to reform.¹⁸

¹³ (24 October 1898) 105 NZPD 352.

¹⁴ See discussion by fellow Labour MP and former SPCA president Reverend Clyde Carr speaking to the Prevention of Cruelty to Animals Bill (4 July 1957) 311 NZPD 610.

¹⁵ Animal rights advocates had been discussing this idea for some time and in 1952 Geoffrey Hodson of the Council for Combined Animal Welfare Organisations had published ‘*An Animals’ Bill of Rights*’, this was discussed in the House (1 Sept 1960) 324 NZPD 2034.

¹⁶ Sunstein’s observation also raises interesting questions about the nature and role of rights, and their legal designation. See Cass R Sunstein “Introduction: What Are Animal Rights?” in Cass R. Sunstein and Martha C. Nussbaum (eds) *Animal Rights: Current Debates and New Directions* (OUP, Oxford, New York, 2004) at 5.

¹⁷ Joel Feinberg “The Rights of Animals and Unborn Generations” in William Blackstone (ed) *Philosophy and Environmental Crisis* (University of Georgia Press, Athens, Georgia, 1974) at 43.

¹⁸ Silverstein has noted that animal rights advocates frequently avoid rights talk for the radicalising effect it has on their campaigns, see Helena Silverstein, *Unleashing Rights: Law, Meaning and the Animal Rights Movement*, (University of Michigan Press, Ann Arbor, 1996).

The Prevention of Cruelty to Animals Bill

Howard's objective in drafting the PCAB was very straightforward—she sought consolidation of the law under a single animal-focused statute. Howard argued that such consolidation was necessary both for efficiency's sake and in order to bring New Zealand law in line with legislation that existed in Australia and England.¹⁹ The framework proposed was modelled on the approach adopted by the POA and provided that police and SPCA officers would also remain the primary agencies enforcing animal cruelty offences.²⁰ Clause two of the PCAB define 'cruelty' as "unreasonable, unnecessary or unjustifiable ill-treatment", and 'ill-treatment' included a range of acts such as to "beat, kick, wound, maim, abuse, worry, torment, torture, terrify, infuriate, override, overload, drive when overloaded" or to cause by act or omission "pain, suffering or distress". This definition was ostensibly the same as the definition employed under the POA.

The PCAB did however provide for increased penalties, and the fine for animal cruelty was raised from £20 up to £100, a fivefold increase, and the potential term of imprisonment increased from 3 to 12 months.²¹ A new offence of aggravated cruelty, for cruelty causing death, deformity or severe disablement was added, and the penalty for this was imprisonment for a term of up to two years.²² Most controversially, the PCAB gave the courts the power to disqualify persons convicted of cruelty from having custody of animals for a period that was "deemed fit".²³

Governmental and Industry Response to the PCAB

The initial response to Howard's Bill was positive. No one disputed the importance of preventing cruelty to animals and the value of a more workable framework, so long as the House could ensure that it was "not carried away by emotional thinking" and the matter was considered "from the material point of view".²⁴ The Bill was referred to the Agricultural and Pastoral Committee for consideration.

¹⁹ The bill was modelled most closely on legislation that had been enacted in New South Wales: (12 June 1957) 311 NZPD 10.

²⁰ See Prevention of Cruelty to Animals Bill 1957 (14-1), cl 13. This replicated the regime that had been in place under section 14 of the Police Offences Act 1927, where SPCA officers could be designated as "special constables" for enforcement purposes.

²¹ Clause 3.

²² Clause 4.

²³ Clause 17.

²⁴ (10 July 1957) 311 NZPD at 615 and 738.

The Primacy of Economic Concerns

The referral of the PCAB to the Agricultural and Pastoral Committee was the first barrier placed in the path of reform. It reflected the government's decision to frame the subject matter from the outset as an 'agricultural' concern, rather than a matter of justice or law and order, and as such it was an overtly political call. The role of the Ministry of Agriculture, and of the Agricultural and Pastoral Committee charged with considering the bill, had always been firmly centred on the protection and promotion of the agricultural sector. Under the Department of Agriculture Act 1953 the principal function of the Department was to 'promote and encourage the development' of the agricultural and pastoral industries. The Department's primary goal included increasing the production of agricultural products, namely animals.²⁵ The legislative framework in place required that the farming sector be supported so that it could continue to operate in an efficient, productive and profitable manner; this consequently made practical and economic considerations the paramount concerns of the Committee reviewing the PCAB.

The Committee took submissions and reported back to the House in September of 1957. The Committee recommended that the bill not be taken any further, despite the strong public support that was evident from the large number of submissions received. The reasoning provided was that the bill was "impractical" and animal welfare problems had been "overstated".²⁶ They asserted that the bill had been strongly opposed by industry groups, in particular, Federated Farmers, who argued that current laws were satisfactory.²⁷ The standards set in the bill would likely have banned practices defended by the farming community as both legitimate and necessary.²⁸ Howard's bill, it was claimed, would make cruelty convictions too easy to obtain and detrimentally affect the whole farming economy.²⁹ Howard was told that the reforms she proposed, while well-meaning, demonstrated ignorance and lack of knowledge regarding the reality of farming.

It was also denied that there was any conflict between the interests of animals and those of farmers, and therefore the economy. The Committee also argued that farmers already took good care of their stock and operated in a way that prioritised animal welfare, with the rationalisation that a healthy economy depended upon good stock welfare, and sickness and injury led to

²⁵ Section 4.

²⁶ (12 September 1957) 313 NZPD 2389.

²⁷ At 2389.

²⁸ At 2392-3.

²⁹ At 2389 and 2395.

financial loss.³⁰ On this basis, no farmer would needlessly injure an animal, and whatever cruelty existed in the sector was there by necessity – in fact, prohibitions would likely do more harm than good for animals, and on that basis it was best to leave welfare determinations to farmers.³¹ Many members of Parliament were farmers themselves, and those that spoke to the bill emphasised the importance of the sector to the economy.

In this way it is evident how existing legal frameworks provide a form of structural insulation to the status quo, protecting current policies and standards against the intrusion of competing ideological discourse. The frameworks in place set the agenda, and the terms of reference for the decision makers operating under them. As a result, the range of responses possible was also limited. Discourse that runs counter to current legislative and governmental policies is by its nature ideologically incompatible, and it is invariably framed as irrational because it makes no sense within that context. Howard’s concerns were therefore framed as uneducated, as arising from her lack of understanding of the reason behind many cruel practices; she had overstated matters and created issues where there were none. No doubt it was on this same basis that the submissions of the many members of the public who had raised concerns regarding the treatment of animals were also discounted, while those of farming groups were acknowledged.

The argument that the Committee *was* capable of responding to was the practical one. They accepted that the sheer “weight of evidence” underscored an urgent need to at least consolidate the law, and on that basis they recommended that a new bill be drafted – but one that would ‘better suit New Zealand conditions’.³² In this way, government and the farming sector recaptured control of Howard’s initiative and went on to draft their own bill in response.

Hegemony’s Discursive Authority: The Reason-Emotion Binary

In opposing Howard’s bill others in the House continuously raised concern about the potential for the issues to generate emotion, reiterating the need to consider the matter “dispassionately, with minds unclouded by emotion”.³³ “(E)motional outlooks,’ they told Howard, ‘must not be allowed to obscure the need for a practical approach’³⁴ and sentiment must not be permitted to

³⁰ At 2394.

³¹ At 2393-4.

³² At 2389.

³³ (1 September 1960) 324 NZPD 2025).

³⁴ At 2193.

outweigh “common sense”.³⁵ This argument in favour of reason rather than emotion was essentially an argument for practical and economic matters to be placed before concerns for animal suffering. The assertion made is that a debate focused on economic and practical matters is inherently reasonable while argument driven by empathy or concern to prevent animal suffering is emotive and somehow unsound. The purpose of the binary is to exclude; it is part of a reification process that allows the dispute to be framed in such a way that the answer appears self-evident and only one response can be viewed as legitimate. In fact, these two themes always occur in connection with each other.

This framing was a powerful barrier to genuine engagement with the issue of animal protection since it discounted any approach that did not prioritise human and economic interests over animals. Marx labelled the dominant ideological perspectives the ruling ideas in recognition of the power they have to control the means of mental production in society.³⁶ It is clear that Howard understood the ideological boundaries of the debate well. In introducing the PCAB to the House, Howard had strategically distanced herself from animal advocacy groups, she emphasised that she had drafted the bill independently and not in conjunction with the SPCA, and noted that she had expressly modelled the bill on overseas legislation in an attempt to depoliticise the material.³⁷ The reforms she proposed were very moderate: they did not seek to break new ground, but to work with existing standards and extend law. In selecting proposals to put forward, Howard had looked to other countries to see the changes that had been possible in similar legislative environments. By taking a pragmatic and conservative approach, she hoped to avoid the bill being dismissed on the grounds of “mawkish sentimentality about animals”.³⁸ Howard *agreed* that it was vital to maintain a practical point of view and thus assured the House that throughout the submissions process that she had drilled home this message to animal advocates, directing them to keep sentiment out of their evidence.³⁹

Gramsci describes hegemony as “the ‘spontaneous’ consent given by the masses to the general direction imposed on social life by the dominant fundamental group”.⁴⁰ This spontaneous consent is seen in Howard’s unquestioning acceptance that argument from sentiment or emotion

³⁵ At 2016.

³⁶ Karl Marx and Frederick Engels “The German Ideology” in *Marx & Engels Collected Works Vol. V* (ebook ed, Lawrence & Wishart, 2010) at 59. Cited and discussed by Alan Hunt “Getting Marx and Foucault into bed together!” (2004) 31(4) *Journal of Law and Society* 592 at 600.

³⁷ (12 June 1957) 311 NZPD 591.

³⁸ At 591.

³⁹ (12 September 1957) 313 NZPD 2391.

⁴⁰ Antonio Gramsci *Selections From the Prison Notebooks* (Quintin Hoare and Geoffrey Nowell-Smith (translators and eds) Lawrence & Wishart, London, 1971) at 12.

is illegitimate and that more weight must be allotted to practical and economic considerations. It is via this process that law obtains its self-replicating, self-legitimizing capacity; it is the mechanism that insulates and protects existing frameworks (and ideologies) from challenge and against change. Advocates' strongest lines of argument are invariably those most closely aligned with current standards and norms, and those that are most compatible with the normative discourse in place. In this way, advocates that choose to work *within* the existing frameworks of law are drawn to make ideological compromises from the outset and accept the rules of engagement. For Howard, this required pragmatic acceptance that any changes made should not unduly impact or interfere with the agricultural sector. Reform could only proceed with incremental steps, through gradual extensions of the law and reform around the edges.

Advocates' acceptance of this framing also comes at a cost, since the argument for greater protection of animals and against their suffering is driven by and relies upon peoples' capacity to empathise with their plight, which is an appeal to emotion. To substantiate her argument regarding the need for reform, Howard called attention to the thousands of letters she had received from the public in support of her bill, and she brought in piles of newspaper clippings to visibly demonstrate the frequency with which animal cruelty issues arose in the press.⁴¹ This was an attempt to prove that she was not alone in her concerns, and that she was representing not only the interests of animals but also the interests of the wider community.

Despite claiming to eschew argument from emotion and sentimentality, in practice, Howard also took every opportunity to appeal to Members' empathy and emotional ties with animals. In setting out her argument on the need for reform, Howard gave detailed and often gory accounts of ill-treatment and incidents involving cruelty to animals that she encountered through her work with the SPCA.⁴² She read aloud some of the letters she had received, these were highly emotional accounts of cruelty people had witnessed. In the letters people referred to pets as 'members of the family', as 'faithful, vulnerable and irreplaceable friends', and they spoke in detail of the personal impact and trauma they experienced in witnessing animal cruelty. In reading letters from others, and drawing attention to the views of the community, Howard could place strategic distance between herself and the emotive pleas for reform they contained, maintaining an element of personal neutrality while ensuring the appeal for reform, based on compassion, was delivered.⁴³ This approach represented a deliberate push back against the

⁴¹ See for example (12 June 1957) 311 NZPD 592.

⁴² At 592 - 599.

⁴³ At 613.

constraints imposed on discourse. Tactically, it must be seen as an attempt to remind the House of the cost paid by animals where their interests are discounted, and to ensure that the discussion was grounded in reality to ensure that animals did not become invisible.

The Animals Protection Bill 1960

The government's bill was different from Howard's PCAB in several critical ways. The first significant difference was that the government's Animals Protection Bill ('APB') placed the Ministry of Agriculture in charge of administering the legislation and monitoring and enforcing animal cruelty laws. These tasks would be performed by specialised animal welfare inspectors who would be individually appointed by the Minister.⁴⁴ Checks were also placed over inspectors so that while any suitable person could be made an inspector for a term of up to three years, they would require reappointment after that time, and could be removed from their position on the basis of incapacity, neglect of duty or misconduct.⁴⁵

The Hansard shows that industry had been extremely nervous about the SPCA continuing as a primary enforcement agency now that the various cruelty provisions contained within agricultural statutes were being incorporated into a unitary legislative framework. It was argued that without checks in place, too much power could be put into the hands of SPCA officers or persons who 'knew nothing about farming'.⁴⁶ The government responded to those concerns by placing the framework under the ambit of the Ministry of Agriculture and putting checks in place so that the Ministry controlled who was appointed as an inspector. This response represented a significant change; while police constables were deemed to be inspectors under the Act,⁴⁷ animal cruelty was firmly framed as a matter for the Ministry of Agriculture, rather than a criminal matter for police. The framework within which animal interests were dealt with had been fundamentally altered. Animal protection issues were subsumed within a framework focused on agricultural and production-related concerns, where economic considerations were central, and it would be even more difficult to raise ethical issues.

The second significant change made affected the definition of cruelty and of aggravated cruelty. Federated Farmers strongly contested the language used to define cruelty and argued that the

⁴⁴ Police retained their powers under the Act but were no longer the primary enforcement agency, see Animals Protection Bill 1960 (9-1), cl 9.

⁴⁵ Clause 20(b) Animals Protection Bill 1960 (9-1).

⁴⁶ (1 September 1960) 324 NZPD 2026 (Animals Protection Bill - second reading, Mr. Carter).

⁴⁷ Animals Protection Act 1960, s9(3) .

terms “unnecessary” and “unreasonable” pain and suffering were too uncertain and subjective, and that they increased the scope for contentious litigation.⁴⁸ At first glance this line of argument is surprising since the wording employed in the APB was not novel, it had been drawn directly from the Police Offences Act 1927.⁴⁹ What must be appreciated, however, is that this terminology had not been utilised within agricultural-related legislation before. The cruelty provisions set out under the various agricultural statutes that existed, such as the Meat, the Poultry and the Stock Acts were all very specific, and referred to overcrowding, unsanitary conditions, failure to provide adequate food or shelter, or driving of stock that were in an unfit state.⁵⁰

Farmers had always been technically open to cruelty charges under the POA, but their nervousness regarding the application of the standard set under the bill suggests that it had seldom been applied in that arena. Indeed, because the cruelty provisions of the POA were enforced by the police and SPCA, usually acting in response to a complaint from a member of the public, it is likely that the POA had only been enforced and applied in urban areas.⁵¹ The process of consolidating the law meant that the offence of ‘cruelty to animals’ would now be more consistently defined. This raised the possibility that the provision would be applied to, so impact on, the farming community. In the rural context, this gave rise to uncertainty as it was unclear how a prohibition against the infliction of unreasonable and unnecessary pain or suffering would operate in that arena.

As a result of these concerns the definition of cruelty was reworked and the APB re-defined cruelty as being the ‘wilful’ infliction of pain or suffering (adding a requirement for intent), that was “in its kind or degree, or in its object, or in the circumstances in which it is inflicted” unreasonable or unnecessary.⁵² The government reassured the farming community that no farmer pursuing legitimate practices would be affected in any way.⁵³ The resounding message that was transmitted was that normal farming practice was safe, nothing would detract from farmers’

⁴⁸ (1 September 1960) 324 NZPD 2198.

⁴⁹ See Cruelty to Animals Act 1878, s 5 and its successor the Police Offences Act 1927, s 7.

⁵⁰ See Poultry Act 1924, s 6, the Meat Act 1939, s 60(1) and the Stock Amendment Act 1938, s 3.

⁵¹ Traditionally the RNZSPCA has always focused on the welfare of urban and companion animals. See Ministry of Agriculture and Forestry, Animal Welfare Directorate *Safeguarding our Animals, Safeguarding our Reputation: Improving Animal Welfare Compliance in New Zealand*.(July 2010) at 9 Even today there is a Memorandum of Understanding between the Ministry of Primary Industries and the RNZSPCA so that the RNZSPCA deals primarily with companion animals and small scale farms, see Ministry of Agriculture and Forestry *Animal Welfare Amendment Bill: Regulatory Impact Statement* (11 February 2010) at 6.

⁵² Animals Protection Bill 1960 (9-2), cl. 2.

⁵³ (1 September 1960) 324 NZPD 2041.

rights as individuals⁵⁴ and that any law changes did not intend to make life ‘unduly difficult’ for those relying on animals for their livelihood.⁵⁵ This opening of the door to explicit consideration of the *reason* that pain or suffering was being inflicted was used to legitimate suffering arising as a result of common practice. The cruelty provision was, by intention, narrowly construed so that it would apply only to pain or suffering that was inflicted needlessly, for no rational purpose. The construction of this provision reinforced the narrative that common farming practices were inherently reasonable and necessary, and the sectors’ claims that there was no conflict of interest or tension between their interests and those of animals; they were mutually compatible constructs. However, Federated Farmers did not win every battle.

The Rights of Farmers and the Rights of Animals

One of the reforms that did make it into the APB was the provision that empowered the courts to disqualify farmers convicted of more than one cruelty offence from owning animals for a period that the court saw fit.⁵⁶ Federated Farmers fought against this reform to the last, lobbying National Party MPs, now sitting in opposition, to withdraw their support of the bill. The provision was considered overly harsh since it would deprive convicted farmers of their livelihood, job and way of life.⁵⁷ Federated Farmers also complained that they were unhappy with several other provisions in the bill, and had further submissions to make on the matter.⁵⁸ Despite unanimous cross-party agreement in Committee, National Party MPs now called for the bill to be sent back for further consideration. When the Labour government refused to delay the bill further, National MPs suggested a host of amendments for consideration,⁵⁹ and sought to redefine the bill so that disqualification orders would “not apply to any animal or animals upon which the offender depends for his livelihood”.⁶⁰

Interestingly, this is the space in the debate where ‘rights talk’ emerged and where the ‘rights’ of animals and the ‘rights’ of their owners are directly considered in relation to each other. In response to the argument against the disqualification provision, Labours’ Norman Kirk noted by way of example that if somebody was drunk in charge of their car, they lost their license as a

⁵⁴ At 2044.

⁵⁵ At 2025.

⁵⁶ Clause 16.

⁵⁷ See (1 September 1960) 324 NZPD at 2020 and 2048.

⁵⁸ At 2017.

⁵⁹ (5 October 1960) 324 NZPD 2734.

⁶⁰ At 2772.

consequence. This observation underscored that the provision was in no way unusual or novel.⁶¹ Kirk argued that disqualification from owning animals would not affect the rights of the individual who was pursuing legitimate farming practices - but it would certainly establish “the rights of all creatures” to live without being subjected to ill-treatment.⁶² The juxtaposition of these two examples, of car and animal, is compelling for while it aims to highlight the similarity of legal treatment regarding these two forms of property, the employment of rights’ talk in relation to animals highlights their core point of difference: since no-one would seek to uphold the rights of the car against its owner.

The government held their ground and rejected any amendment of the APB, asserting that there needed to be a way of dealing with individuals who had no sympathy for animals and who, because of their cruelty, should not be let near them; it was a good thing that such individuals be made to take up other work.⁶³

The Dance of Law

Historically, one of the most challenging tasks animal advocates have faced is inscribing new law on the books since this requires the precursor of convincing the government that animal protection concerns deserve attention. Animal protection is seldom a political priority and must compete against a range of pressing human interests, from healthcare and education to the economy, and animal welfare issues rarely take centre stage in political debates. In this context, the presence of a sympathetic Member in the House in the form of Howard was invaluable. Howard facilitated the movement’s access to Parliament, access that would have otherwise remained closed. Through Howard, animal advocates gained a representative on the political stage. Even then, tangible progress and real dialogue only ensued with the introduction of Labour’s Private Members Bill, which effectively forced a political response and put animals on the legislative agenda.

If dialogue on the subject of animal protection was challenging to initiate, then meaningful reform was even more so. The size of New Zealand’s agricultural sector and its economic weight ensured that the needs and interests of the farming community were prioritised and well represented in the House. Dialogue in the House was opened, but on strict terms: only standards

⁶¹ Above n 58, at 2044.

⁶² (1 September 1960) 324 NZPD 2044.

⁶³ At 2015.

that were compatible with current practices were permissible, and reassurances had to be made that the provisions of the new law would be construed in favour of the status quo. However, Howard's argument that New Zealand was lagging behind other countries in the area of animal protection did gain traction. Although the primary aim of the government's bill had simply been to consolidate the law, the process of drafting and debating the bill had led parliament to examine animal protection laws from around the Commonwealth, particularly those in England and Australia.⁶⁴ This examination of foreign laws, as well as Howard's constant agitation on a number of specific issues, did in fact widen the scope of the discussion.

Throughout the debate on the bill, Howard continued to argue for more substantial reform using England's laws as leverage to call for bans on practices prohibited there on cruelty grounds, such as the dehorning of cattle or the use of gin traps.⁶⁵ On these issues, the argument was lost. However, with the discussion now open, some improvements were made; although gin traps were not banned, the bill required them to be checked daily. In addition, the spaying of cats and dogs, and tail docking of over horses over 12 months was prohibited except when performed by a veterinarian and under anaesthetic.⁶⁶

This last set of reforms is especially notable, since tail docking, castration and dehorning of other animals like cows, goats, pigs, and sheep was left entirely unregulated under the Act. The greater protection afforded to cats, dogs and horses, in contrast to livestock, demonstrates how strongly the law *is* influenced by emotion, which is ironic given how vehemently all actors openly eschewed arguments on this basis. Of course, legal realists have long disputed the claim that it is even possible for the law to proceed in a truly objective and unbiased way. Instead, they claim that normative discourses' construction of 'reason', as something that stands apart from emotion is artificial, and employed for specific purposes and to serve specific interests.⁶⁷

Feminist scholars have also long challenged the reason-emotion binary and argued that the aspiration to a stance of detachment is, in reality, a failure to take responsibility.⁶⁸ The feminist care tradition challenges the need for "detached reasoning over particular sympathies" to the

⁶⁴ At 2017.

⁶⁵ (8 September 1960) 324 NZPD 2191.

⁶⁶ Spaying cats and dogs or docking horses' tails, unless done under anaesthetic by a veterinarian, was an offence under the Animals Protection Act 1960, see section 3(g), (h), (m) and (n). While section 19 of the APA provided an exemption for dehorning and section 6 put in place a requirement to check traps at least once every 24 hours.

⁶⁷ See James Boyle "The Politics of Reason: Critical Legal Theory and Local Social Thought" (1985) 133(4) U. Pa. L. Rev. 685.

⁶⁸ See Martha Minow and Elizabeth Spelman "Passion for Justice" (1988) 10 Cardozo L. Rev. 37 at 56-59.

plight of others arguing instead that these connections have a cognitive or rational component,⁶⁹ and argue for the restoration of emotional responses to the philosophical debate and for their validation as “authentic modes of knowledge”.⁷⁰ The denigration of argument from emotion can also be seen as a tool used by elites to ignore, trivialise, and render unimportant the voices of marginalised groups.⁷¹ Just as feminist legal theory argues that laws drawn up based upon male circumstances do not incorporate the differing realities of women, feminist animal care theorists call for a similar incorporation of the voices of animals to occur when their interests are affected.⁷² This is what the reason-emotion binary seeks to prevent and what Howard sought to insert into the discourse, in this case through the reading of news articles and letters detailing examples of the cruelty and suffering of animals.

Similarly critics of the economic approach to the law have criticised the normative centrality of rationality and the ‘choice architecture’ it produces, arguing that it assists in creating systems ‘single-mindedly devoted to wealth maximisation’,⁷³ and moves human subjects closer to the behaviour of *homo economicus*”,⁷⁴ or Posner’s economic man. In this context, ‘reason’ recognises only the utility value of animals, and through the expulsion of emotion, rejects that they have any inherent or intrinsic value. Today critical animal law scholars also challenge the rationality of viewing animals as commodities, and the way that emphasis on reason traps them within prevailing anthropocentric values of what constitutes the subject.⁷⁵

What is informative in the current example is how ‘emotion’ reasserted itself in the absence of an economic imperative, as decision makers turned to consider the protections in place for non-commercial animals. Nussbaum has highlighted that emotions can be conceived of in two ways: as impulses devoid of thought or perception, or from an evaluative perspective, as an expression and embodiment of beliefs or ways of seeing, which include appraisals of the importance or significance of objects and events.⁷⁶ De Sousa argues further that reason and emotion are not

⁶⁹ See Carol Adams and Lori Gruen (eds) *Ecofeminism: Feminist intersections with other animals and the earth Bloomsbury*. (Bloomsbury, New York, 2014) at 3.

⁷⁰ See Josephine Donovan “Feminism and the Treatment of Animals: From Care to Dialogue” (2006) 31(2) *Women in Culture & Soc.* 305 at 306.

⁷¹ At 306.

⁷² At 306.

⁷³ See Posner’s discussion of the economic approach to law in Richard A. Posner *The Problems of Jurisprudence* (Harvard University Press, Cambridge, MA. 1993) at 377.

⁷⁴ Kathryn Abrams and Hilda Keren “Who’s Afraid of Law and the Emotions” (2010) 94 *Minn. L. Rev.* 1997 at 2020.

⁷⁵ Maneesha Deckha “Critical Animal Studies and Animal Law” (2012) 18 *Animal Law* 207 at 227-8.

⁷⁶ Dan M. Kahan and Martha C. Nussbaum “Two conception of Emotion in Criminal Law” (1996) 96(2) *Colum. L. Rev.* 269 at 277.

natural antagonists, rather, ‘when the calculi of reason have become sufficiently sophisticated, they would be powerless in their own terms, except for the contribution of emotion’.⁷⁷ On this basis, Nussbaum posits that formal economic models need to take compassion into account, and that assessments of ‘quality of life’, a nations ‘well-being’ and ‘welfare’ in particular, are incomplete without this core component.⁷⁸ The entry of emotion into the debate in relation to cats, dogs and horses enabled more than the utility value of these animals to be seen and ironically encouraged a more *objective* consideration of their interests to be undertaken as a result.

Hunt argues that law should be viewed as a manifestation of social relations, as something that is actively constituted, pushed and pulled by a range of actors; this, he asserts, is the ‘dance of law’.⁷⁹ However, it is also recognised that not all actors, and not all ideologies, are equal. Existing structures and processes operate to entrench the status quo so that animal interests are frequently subsumed and dominated by the prevailing anthropocentric and economic-centred bias in place.

Despite this, it must be acknowledged that some progress *was* made, albeit it on matters that did not overtly challenge those dominant ideologies. If nothing else, the law changes made in relation to cats, dogs and horses set a legal precedent in recognising the right of these animals to be provided pain relief for significant surgical procedures and even more crucially, it nudged open a door for further debate in the future. The consolidation of animal cruelty provisions into one statute also represented an extension of the law, since it involved the adoption of a single and universally-applied definition of ‘cruelty’ and ‘ill-treatment’ where variable standards had previously existed. Differential treatment of animals would become more visible because of this, and the law’s claim to rationality more contestable. The penalties in place were also increased from those set out under the POA and Poultry and Meat Acts. While they were less than what Howard proposed in her PCAB, they were nevertheless an increase.⁸⁰ These advances represented not so much a dance, but perhaps a shuffle of sorts.

⁷⁷ Ronald De Sousa *The Rationality of Emotion* (MIT Press, London, England. 1990) at xv.

⁷⁸ Martha Nussbaum *Upheavals of Thought: The Intelligence of Emotions* (Cambridge University Press, Cambridge, 2001) at 438-440. In particular see chapters 7 “Economic Thought: Welfare and Development” and chapter 8, “Legal Rationality: Equality, Criminal Sentencing”.

⁷⁹ Alan Hunt *Explorations in Law and Society* (Routledge, New York, London, 1993) at 321.

⁸⁰ The penalty for cruelty was raised from a fine of up to £20 and a term of imprisonment not exceeding 2 months to a fine of up to £100 and up to 3 months in jail. (Animals Protection Act 1960, s 3). The charge of ‘aggravated cruelty’ first proposed under the PCAB was also implemented but modified; rather than applied in relation to cruelty causing death, deformity or serious disablement, the offence was restricted to cruelty resulting in death, or such a

The Legacy of the Animals Protection Act 1960

One of the most enduring legacies of the APA has been the very general and subjective definition of cruelty that the Act put in place. This has made the application of the protection inherently unclear and inconsistent. Cruelty was defined under section 2 of the APA as the infliction of pain or suffering “that is in its kind or degree, or in its object, or in the circumstances in which it is inflicted”... “unreasonable or unnecessary”. Further, the section 19 provided a range of exemptions from protection for practices such as dehorning and branding. The variable treatment of cats and dogs in contrast to livestock also reinforced the notion that the standards were intended to be different, that differential treatment was reasonable and acceptable.

For example, when the Waikato SPCA attempted to prosecute a farmer they found tail docking his cows with a pair of dehorning shears, for cruel ill-treatment under s 3(a) of the APA, the case was successfully defended on the basis that it was done for “more efficient use of the animal”. And when the SPCA appealed the decision to the Court of Appeal in *Garrick v. Silcock*⁸¹ the judge highlighted that the Act provided express exemptions for certain practices, such as dehorning, and that the definition of cruelty required consideration not only of the degree of pain or suffering, but the object and circumstances surrounding that injury. The court found that a composite test was necessary, that each of these factors must be weighed together “so that a proper proportion” is achieved “between the object and the means”.⁸² The SPCA lost the appeal, and the case was formative in entrenching the proportionality test that remains in place today.

Although the offence of ill-treatment under the Animal Welfare Act 1999 (‘AWA’) no longer requires intention, so that it covers pain and suffering caused “by any act or omission”, it has otherwise retained the wording used in the APA.⁸³ The provision continues to undermine the fair and equitable treatment of animals under the law. The recent case of *Erikson v Ministry for Primary Industries*⁸⁴ underscores this point. The case was an appeal against sentence in relation to a prosecution for ill-treatment of calves, less than seven days old, at a slaughterhouse. The

degree of injury that it was necessary to destroy the animal to terminate its suffering. The penalty for this offence was a term of up to two years imprisonment. (See APA s 2 and 4).

⁸¹ [1968] NZLR 595.

⁸² [1968] NZLR 595 at 601.

⁸³ Animal Welfare Act 1999, s2.

⁸⁴ [2017] NZCA 271.

appellant had been caught kicking, beating and bludgeoning the young animals to the extent that their skulls, jaws, and teeth were broken and they had severe internal injuries.⁸⁵ The Ministry for Primary Industries argued this was an especially severe and violent breach of the Act perpetrated against a large number of very young and “inherently more vulnerable” animals, and that this should constitute an aggravating factor in sentencing.⁸⁶ Applying the definition of ill-treatment, however, Kós J said that although the law did not distinguish between farm, working and companion animals but that different standards were clearly “inevitable”. The Court of Appeal thus held that what was “reasonable or unreasonable in conduct towards farm herd animals would be different to domestic companion animals and the definition of ill-treatment reflects such contextual considerations”.

The court considered that it was inevitable that the appropriateness of conduct would differ between farm animals and companion animals since ‘(t)heir circumstances are quite different. The objects they are kept for are different. So too will be what is reasonable or unreasonable in conduct towards them... *Realism* (sic) is necessary and *rational* (sic) differences must be acknowledged.’⁸⁷ The judge rejected the argument that the age and vulnerability of the calves was an aggravating factor.

While the problematic test for ill-treatment remains in place under the Animal Welfare Act 1999 the new legislation did make some fundamental changes in approach. Today there is universal acknowledgement that the approach adopted by the APA, and other animal protection frameworks of that era, provided scant protection for animals.⁸⁸ Their focus was on punishing overt acts of cruelty, and it set no clear obligations or standards of care concerning animals. Even regulators would come to describe the Act as adopting an “ambulance at the bottom of the cliff” mentality.⁸⁹ The AWA would try to remedy this deficiency by introducing measures aimed at *preventing* ill-treatment and inadequate care.⁹⁰

⁸⁵ *Erikson v Ministry for Primary Industries* [2017] NZCA 271 at [5] – [6].

⁸⁶ At [21].

⁸⁷ At [34].

⁸⁸ Government and departmental publications refer to the focus of the APA as the akin to being an “ambulance at the bottom of the cliff” approach because the law in this era only punished overt acts of animal cruelty but did little to prevent ill-treatment. See Ministry of Agriculture and Forestry, *MAF Policy Information Paper No. 27: Guide to the Animal Welfare Act 1999* (December 1999) at 1. In contrast the Animal Welfare Act 1999 places positive duties of care on owners and persons in charge of animals that require them to ensure that animal’s needs are met.

⁸⁹ Ministry of Agriculture and Forestry, *MAF Policy Information Paper No. 27: Guide to the Animal Welfare Act 1999* (December 1999) at 1.

⁹⁰ At 1.

Chapters 3 and 4 will consider in more detail the current standard set under the AWA and ARM's engagement under that framework, but suffice to say systemic bias continues to undermine the protection of farm animals. Within a year of the APA being passed, Howard had begun raising questions in the House on the issue of enforcement, complaining that the Ministry of Agriculture was not policing the APA, so that the provisions were meaningless in practice and the law was being openly flouted as a result.⁹¹ The government's reassurance to the farming community that the APA would not interfere with normal farming practices led to a high threshold for intervention being adopted. A culture of tolerance as a matter of departmental policy continues to pervade modern regulatory authorities.

Law's Impact on the Animal Rights' Movement

The birth of the modern ARM was in part a response to the failure of the APA and similar regimes to provide sufficient protection for animals, especially farm animals. Animal rights advocates have highlighted that these frameworks operated to facilitate the exploitation of animals, and that under them, virtually any 'animal use' was deemed both necessary and reasonable.⁹² Law failed to protect animals from harm for even the most trivial of reasons: to increase productivity, to allow easier management, even to entertain (e.g. in rodeos or circuses) or for fashion (for their fur or for cosmetic testing).

In 1975 Peter Singer provided one of the first and most comprehensive critiques and responses to the 'animal problem' or what he called 'the tyranny of human over nonhuman animals'.⁹³ Interestingly one of the first observations that Singer makes in the preface to his formative work *Animal Liberation* is that:

The portrayal of those who protest against cruelty to animals as sentimental, emotional "animal-lovers" has had the effect of excluding the entire issue of our treatment of non-humans from serious political and moral discussion.⁹⁴

⁹¹ (6 September 1961) 328 NZPD 2084.

⁹² See for example, Steven Wise "Of Farm Animals and Justice" (1986) 2(3) *Pace Envtl. L. Rev.* 191 and Gary Francione "Animals, Property and Legal Welfarism: "Unnecessary" Suffering and the "Humane" Treatment of Animals" (1993) 46 *Rutgers U. L. Rev.* 721.

⁹³ Peter Singer *Animal Liberation* (Jonathon Cape, London, 1976) at ix.

⁹⁴ At ix.

A key concern for Singer was to develop a line of argument would not be automatically disqualified as an argument informed by emotion. His work also represents an attempt to formulate a more consistent and neutral approach to animals, one that was based on ‘reason’, and that could deal with the issues raised in an unprejudiced way.⁹⁵ Even here, the impact of the emotion-reason binary can be seen to have had a profound effect on the movement’s strategic response.

Singer’s aim was to correct the bias that operates when the interests of humans and non-human animals are considered. Singer argues that when the interests of animals are weighed, this should proceed on the basis of the individuals’ specific characteristics, not because of their species, but because they are sentient and are capable of experiencing pleasure and pain. In explicitly rejecting species as a relevant consideration, Singer went further to argue that when human interests are preferred over the interests of other animals, *simply because they are human*, this is a form of species bias or ‘speciesism’, and as unjustified as racism or sexism.⁹⁶

The case put forward in *Animal Liberation* makes extensive use of scientific studies of animal behaviour and physiology. Research is cited to prove the capacity of animals to feel pain, their cognitive abilities and intelligence, and the depth of their social relationships with others. Reference to the science is not only a mechanism used to establish the rationality of the approach; it also operates as a pathway for bringing animals back into view. Through a discussion of the science, animals are reconstructed as whole beings with wants and needs and lives, which also serves as a rebuttal against treating them as mere objects with only commercial value.

Just as Howard stood proclaiming that she would not argue from ‘sentiment’ before reading out vivid descriptions of animal suffering to the House, here Singer rejects argument guided by emotion, but documents in detail studies that establish animals’ sensitivity to pain and their emotional capacities. Although it is left unarticulated, the assertion is that a reasoned approach must consider such things, to itself be reasonable.

Singer also directly challenged the law’s claim to ‘reason’ by highlighting how inconsistent the law was concerning animals, noting that it failed to meet its own claimed standard. Societal

⁹⁵ At ix.-x.

⁹⁶ For a more in-depth and recent discussion see Peter Singer “Speciesism and Moral Status” (2009) 40(3-4) *Metaphilosophy* 567.

empathy for dogs over pigs or horses over sheep, Singer argued, had led to arbitrary systemic discrimination. Singer argued that the commodification of animals was a logical extension of the prejudices in wider society that prioritised human interests above all others, and had placed animals outside of the sphere of 'equal consideration'.⁹⁷ The call for equal consideration is, in essence, a plea for like cases to be treated alike.⁹⁸ Singer thus identifies the anthropocentric-based hegemony in place and attempts to deal in a very straightforward way with the reason-emotion binary that operates as a barrier to reform.

As a utilitarian, Singer accepted that there may be situations where human interests might trump those of animals and causing harm to animals would be justified. He agreed, for example that it is still worse to kill an adult human than a mouse, but that this is not because one is human and the other a mouse, but because one (the human) is self-aware, has plans for the future and meaningful relationships with others, and the other does not share all those characteristics.⁹⁹ Because Singer's approach does not prohibit the use of animals as a means to an end but only requires a rebalancing of interests, there is less inherent conflict between this approach and current frameworks, in comparison with rights-based discourse. Wherever subjective terminology or cost-benefit assessments can be found in the law, and both are exceedingly common within animal protection frameworks, utilitarian advocates can engage. The reforms sought do not need to be revolutionary nor does the whole framework need to be abandoned; existing standards can be modified and progressively colonised. In this way, Singer's utilitarian based argument provided a strategic pathway going forward that could be used to access law, a line of reasoning that could be usefully employed *within* current animal protection frameworks.

The first comprehensive argument for true 'animal rights' would not be put forward until nearly ten years later when American philosopher Tom Regan published *The Case for Animal Rights* in 1984.¹⁰⁰ In contrast to Singer, Regan argued that animals have inherent value by virtue of being 'subjects of a life', with their own beliefs, desires, preferences and an emotional life consistent with the capacity to feel pleasure and pain.¹⁰¹ Regan argued that animals should not be sacrificed or exploited simply because the consequences of doing so would be better for the majority.¹⁰²

⁹⁷ Singer, above n 102 at 98-99.

⁹⁸ At 3.

⁹⁹ At 21-22.

¹⁰⁰ Tom Regan *The Case for Animal Rights* (Routledge, London, 1983).

¹⁰¹ At 243.

¹⁰² At 239.

Only in the most exceptional circumstances would the taking of an animals' life be justified.¹⁰³ Regan's rights view drew on the traditional liberal conception of rights, expounded by leading theorists such as Dworkin.¹⁰⁴ This approach draws its inspiration from the abolitionist/anti-slavery movement that had come before.

Within this view, a right aims to provide special protection for specific key interests of individuals.¹⁰⁵ Rights are seen to build protective fences around the individual and establish areas where the individual is entitled to be protected against the state and the majority, even where general welfare pays a price.¹⁰⁶ Rights are intended to act as 'political trumps', ensuring that the interests of minorities and the most vulnerable, are not sacrificed for the well-being of the community.¹⁰⁷ This approach posits that the only way for animals to obtain real and robust protection is to elevate the importance of their interests. As will be made evident in later chapters, in comparison with utilitarian-based arguments, this 'rights-based' discourse struggles to engage with current frameworks. Rights discourse is inherently uncompromising and mounts a more direct challenge to hegemony, and rights discourse in relation to animals is not recognised as legitimate within existing frameworks. A point of entry is therefore difficult to locate. Both of these approaches are, however, a direct response to the law and the hegemonic processes in place that ensure dominant ideologies and the interests they serve, are protected.

¹⁰³ Regan posits that although all individual lives have equal inherent value, in situations where no matter what is done a life will be harmed and a choice must be made, then the action causing least harm must be taken. Regan argues that not all harms are equal; individuals may be harmed in different ways and the harm felt may vary from individual to individual. Because of this, if forced to choose between killing a human or a dog, the human must be chosen. See Regan, above n 109 at 303 – 306 and 324-325.

¹⁰⁴ Ronald Dworkin. *Taking Rights Seriously* (Duckworth, London, 1977).

¹⁰⁵ Jeremy Waldron, J. "A Rights Based Critique of Constitutional Rights" (1993) 13 OJLS 18 at 30.

¹⁰⁶ Bernard Rollin "The Legal and Moral Bases of Animal Rights" (1983) *Ethics and Animals* 106.

¹⁰⁷ Helen Fenwick *Civil Liberties and Human Rights* (Routledge, London, 2007) at 7. For a discussion of animal rights as 'trump cards' see Tom Regan "The Rights of Humans and Other Animals" (1997) 7(2) *Ethics and Behaviour* 103 at 105.

CHAPTER 3

Challenging the Legal Exemption for Animal Research

The professions are masters at producing the appearance of change while hanging onto the substance of power. How is this achieved? The first strategy is to keep the real power covert, restricting decision-making to silent understandings and telephone conversations... Another effective strategy of resistance is isolating and discrediting critics. People who raise questions are depicted as “extreme” or “hostile”... If this strategy does not work... rigidly enforced professional solidarity... has developed the most extraordinary degree of control over other groups in the industry... The fourth strategy... amounts to a simple restatement of the profession’s absolute right to determine what is in our best interests.¹

If the farming sector was resistant to reform and regulation, then the animal rights movement found the research community even more unyielding in their opposition to any formal oversight. The APA had long provided a general exemption from compliance with the Act to all “bona fide research workers” and the sector had been left to regulate its research and testing work on animals.² By the 1980s there was still no formal regulatory framework in place. It was argued that researchers were persons of integrity and already governed by professional and personal moral codes,³ they were the experts and surely the most suitable ones to judge what was necessary with respect to animal testing.⁴ In comparison, those calling for reform were frequently characterised as ‘fringe’ or ‘extreme’.⁵

In context, it must be remembered that in the 1980s, no formal framework or requirement for ethics committee approval was in place for research involving *human* subjects. More robust checks and balances regarding clinical research would only arrive in the aftermath of the 1988 Cartwright Inquiry, and the discovery that women had been used in cervical cancer research at National Women’s Hospital without their consent. Some participants had died as a result of having life-saving medical treatment withheld.⁶ Even then, many medical professionals

¹ Phillida Bunkle speaking to the medical profession’s continued resistance to regulatory oversight in the aftermath of the 1988 Cartwright Inquiry. See Phillida Bunkle “Women and Power: How can we change the system?” (1991) 12(4) *Health Care for Women International* 379 at 384-5.

² *Animals Protection Act 1960*, s 19(1)(d).

³ Sentiments of the Rt. Hon. D. MacIntyre, Minister of Agriculture (4th July 1980) 430 NZPD 1442.

⁴ (4th February 1987) 477 NZPD 6793 (*Animals Protection Amendment Bill – Introduction*, Lockwood-Smith).

⁵ See for example the debate at (4th February 1987) 477 NZPD 6793.

⁶ Committee of Inquiry into Allegations Concerning the treatment of Cervical Cancer at National Women’s Hospital and into Other Related Matters. *The Report of the Committee of Inquiry into allegations concerning the treatment of*

continued to defend their ‘clinical freedom’. The words of one doctor questioned during the Cartwright Inquiry echo very clearly the position of many in the animal research sector at this time, when he defended doctors’ clinical freedom on the basis that doctors were, after all, “people of standing, of integrity, who are loyal to their own consciences” who would “do the best for the individual patients. Surely that’s enough isn’t it?”⁷

In order to challenge the protections in place for laboratory animals and seek greater regulation of animal testing, the ARM must attempt to challenge the opinions of experts, specialist advisory bodies, and of highly respected scientists. Despite the inherent difficulty of this endeavour, the ARM’s campaigning on the issue of animal research throughout the 1980s was relentless. Groups lobbied the government for reform, filed numerous petitions and worked closely with opposition MPs on private members bills calling for regulatory reform and oversight – to close the regulatory gap that existed in this area.

However, significant barriers existed to thwart genuine discussion and dialogue; governmental reliance on and deference to experts created an intensely self-referential and self-validating feedback loop, that served to perpetuate existing arrangements. From 1984 onwards, the adoption of neoliberal economic policies meant that industry self-regulation was the preferred de-facto approach. This chapter examines the ARM’s attempts to gain more protection for animals used in research and to contest that status quo. It additionally explores the dynamics of the interactions that took place between the movement, state, and research sector, and the barriers to change during this era. As the barriers to reform were numerous, the impact of three of the most critical barriers will be examined here: regulatory capture, neoliberal policy, and scientization; or the control of governmental decision making by technical experts.⁸

A Rapidly Commercialising and Non-Regulated Research Sector

When the APA was enacted in 1960 the research sector was still in its infancy. The state funded and drove almost all research involving animals and coordinated the sector through internal

cervical cancer at National Women's Hospital and into other related matters. (Government Printing Office, New Zealand, 1988).

⁷ Quote from Dr. Moody at 128.

⁸ Jürgen Habermas *Toward a Rational Society: Student Protest, Science, and Politics* (Jeremy J. Shapiro (translator), Beacon Press, Boston, Massachusetts, 1970).

policies and regional animal-based ethics committees.⁹ The formal regulation of animal research was considered unnecessary as it was not widespread, what did take place was at state run institutions and the issue was seen to be under sufficient control and oversight. Indeed, researchers in this era describe the government's control as so tight as to be almost "dictatorial".¹⁰

Animal experimentation was an issue of significant concern for the ARM, but it was an issue that was extremely difficult to gain traction on at the political level. The government was directly involved in research, so significant conflicts of interest existed, and it was to the government's advantage to leave the sector unregulated. However, the nature of the sector fundamentally changed in the 1970s when the industry underwent a period of rapid expansion and commercialisation; research spread to the private sector, the number of researchers increased along with research outputs, and boundaries between research institutions became more blurred.¹¹

The ARM was acutely aware of these changes. The largest animal rights organisation in New Zealand in the 1970s was the British Union for the Abolition of Vivisection ('BUAV') so animal testing was a particular focus for campaigners here. However, BUAV was internally split over the best approach to take: whether to call for complete abolition or for greater regulation of animal experiments. The division was so significant that in 1978 it split the organisation in two, leading to the formation of the National Anti-vivisection Society ('NZAVS') and Save Animals From Experiments ('SAFE'), with NZAVS adopting an abolitionist position and SAFE pursuing a path of more moderate regulatory reform. Almost every legal initiative of these organisations throughout the 1980s was focused on the issue of animal experimentation. Their agitation on the matter was constant.

The ARM was not the only party with concerns regarding animal testing. There was also increasing debate in the House about the lack of oversight and growing need for regulation. In 1977, Labour MP Brian MacDonell put forward a private members bill calling for an independent licensing system as it became clear government could not answer basic questions

⁹ Royce Elliot "Foundations of the New Zealand Codes and Animal Ethics Committee System" in *Ethical Approaches to Animal-based Science: Proceedings of the Joint ANZCCART/NAEAC Conference, Auckland 19-20 September 1997* (ANZCCART, Wellington, 1998) 93 at 93.

¹⁰ At 93.

¹¹ At 93.

regarding what research was taking place, where, or for what purposes.¹² The government's response was that they did not want to overly restrict or limit research at a time when the sector was burgeoning and New Zealand was constructing an international reputation in the area.¹³ The paramount concern of government was to ensure that the economic and commercial interests at stake were protected, primarily because state-run research institutions were at the forefront of these developments and themselves rapidly commercialising.

Manifestations of Hegemony – Barriers to Movement Engagement

Regulatory Capture

Contrary to what public-interest theory says should motivate policy-makers (public interest) a range of commentators have noted that in practice, regulators can become 'captured', pursuing narrow and self-interested goals, so that regulation comes to reflect the influence of special interests.¹⁴ The ideological preferences of legislators, the relationships that exist between public and private sector actors and agencies, and a range of structural mechanisms, influence state action and foster this.¹⁵ In the early 1980s there was a concerning convergence of state and private research interests on the issue of animal experimentation. The majority of research that took place in New Zealand was undertaken or funded by the state, and public sector agencies dominated the industry. The earliest animal use data that could be located dates back to 1989, and shows that government departments conducted approximately 45% of the research taking place, while a further 23% took place at universities.¹⁶ In total, 68% of animal research remained in the public sector, even after more than two decades of private sector growth.¹⁷ Rather than increasing openness and accountability, however, this appears to have cultivated industry protectionism and an uncritical acceptance that the sector should remain unregulated.

By the early 1980s animal rights group SAFE had fostered a close working relationship with several Labour Party MPs and persuaded them of the urgent need for a regulatory framework to be put in place. This relationship allowed them to raise questions in the House in an attempt to

¹² See the debate on the Animals Protection and Care Amendment Bill (22 September 1977) 414 NZPD 3142 and responses to questions regarding experiments on animals by the Minister of Agriculture; (30 July 1978) 420 NZPD 3356.

¹³ (22 September 1977) 414 NZPD 3142.

¹⁴ Michael Levine and Jennifer Forrence "Regulatory Capture, Public Interest and Public Agenda" (1990) 6 J.L. Econ. & Org. 167 at 169.

¹⁵ At 170.

¹⁶ National Animal Ethics Advisory Committee, *1994 Annual Report* (Ministry of Agriculture and Forestry, August 1995) at 18.

¹⁷ At 18.

draw attention to the matter and prompt reform. However, the government was staunchly defensive on the subject. When asked whether they would consider a formal licensing scheme, the government reported that they would not.¹⁸ When the Minister was pressed as to whether he received reports on experiments taking place in New Zealand, and why no licensing regime was being considered, he admitted that the Ministry was aware of the research that was being conducted at public bodies but that no information on tests being carried out at private organisations was available.¹⁹ However the Minister argued that researchers and the institutional ethics committees were quite capable of considering projects and determining if work should proceed, and that they were, in fact, the most appropriate bodies for doing so.²⁰

In 1980, with the credibility of the industry being called increasingly into question, the Royal Society initiated an investigation into the matter and convened a meeting of key stakeholders in the research sector in order to attempt to develop an industry consensus on the best path going forward.²¹ As a statutory body, the Royal Society operated under the Royal Society of New Zealand Act 1965. The Society's core objectives were to promote and advance science, to advise the Minister of Science on research priorities, and most critically, "to administer funds for scientific research or scientific projects."²² In the absence of a formal regulatory framework or centralised licensing body, the Royal Society was the nearest approximation to an existing regulator that existed. The Society also wielded significant policy power through their role as the official scientific advisory body to ministers, investigating issues and procuring reports on request.²³

It is incredibly difficult to disentangle the complex set of relationships that existed between the state, expert advisory bodies, and public and private sector actors at this time. The circular nature of the process of developing policy, when the government was itself a key stakeholder raises several concerns, not least of which was that the meeting of stakeholders did not include the wider public, so was a closed forum. Neither NZAVS, SAFE nor the RNZSPCA were consulted

¹⁸Response to Questions for Oral Answer (4 July 1980) 430 NZPD 1452.

¹⁹ At 1442.

²⁰ At 1442.

²¹ For a detailed account of the informal developments occurring at this time and the range of pressures government was facing on the issue see Royce Elliot "Foundations of the New Zealand Codes and Animal Ethics Committee System" in *Ethical Approaches to Animal-based Science: Proceedings of the Joint ANZCCART/NAEAC Conference, Auckland 19-20 September 1997* (ANZCCART, Wellington, 1998) 93 at 94-95.

²² Section 8(d).

²³ Section 9.

or were involved in this process or the discussions that followed it.²⁴ The research sector had effectively claimed control of the issue, and at the same time government could now claim that the matter was in hand and being dealt with by an ‘expert advisory body’, who was examining the subject.

While this discourse served to depoliticise the issue, in reality, because state-run institutions were significant stakeholders and the Royal Society was charged with both promoting research and investigating research issues for the state, it is likely that the government maintained significant control throughout the process. The Royal Society’s decision to take up the matter, and the exclusion of animal welfare advocates from the discussion, had a profound impact on NZAVS and SAFE’s legal initiatives on animal testing throughout the 1980s. A meaningful debate would prove impossible since the government’s clear preference was that the sector should be left to craft its own regulatory and policy response. The reactions of the government to the legal initiatives raised by the ARM during this period demonstrate how closed discussion on the matter had become. It is therefore vital to examine some of the more prominent attempts at reform.

Animals Protection Amendment Bill 1981

In August 1981, Labour MP Brian MacDonell introduced a private members bill to the House; the Animals Protection Amendment Bill 1981 (39-1). Clause 8 of the bill asked for the APA to be amended so that painful experiments would require external approval by the Director-General of MAF in consultation with two independent veterinarians. Several Labour MPs spoke in support of the bill, arguing that more external oversight was necessary²⁵ and that so long as decisions were left in the hands of individual researchers, informed only by their personal views there did “not seem to be any obligation at all” and “very little control”.²⁶

They also called for more information on the research taking place, arguing that in light of the high level of public concern and continuing horror stories from overseas exposes, the public had

²⁴ Labour MP Mike Moore pointedly questioned whether representatives of SAFE or animal welfare organisations had been brought into this process and the answer was no, although a “former chairman of one branch of the SPCA” had been on the committee during the hearings. (6 August 1982) 445 NZPD 1825 (Questions for Oral Answer: Animal Experiments).

²⁵ Including Brian MacDonell, Labour MP for Dunedin Central; (6 August 1981) 439: NZPD 2402.

²⁶ Mary Batchelor, Labour MP for Avon: (6 August 1981) 439: NZPD 2407.

the right to know what was occurring to animals in research facilities.²⁷ One Labour MP outright queried why the government was not prepared to consider seriously the ethics and philosophy involved in the subject, specifically the rights of animals to welfare and protection.²⁸

The National Government rejected the bill saying that it was ‘impractical’ on the basis that it would require a central body to be established to oversee research projects and this would:

...necessitate a large apparatus for receiving and processing applications, and would inevitably result in increases in the number of Public Service employees, and in expenditure. In effect, it would put New Zealand in the same position as the United Kingdom, where there is a vast, complicated, time-wasting and expensive system for the screening of all animal experimentation.²⁹

This statement was a clear indication that the government’s preference was for industry self-regulation. In fact, they explicitly argued that the systems in place should be left as they were and that institutions would develop the necessary mechanisms to deal with any issues that arose on an ad hoc basis.³⁰ The government also said that “steps were already being taken” and “progress was being made by the industry” in this regard.³¹ Claiming the proposals were unreasonable or impractical, and referring those with concerns to the ongoing work of the Royal Society, became a standard response.

The Royal Society’s Report

The following month, National MP Graeme Lee asked the Minister of Science and Technology what steps were being taken on the issue of animal testing “to allay the fears of people associated with SAFE?”³² In response, the Minister tabled the Royal Society’s report. Unsurprisingly, the report recommended the continuance of the emerging system of institutional ethics committees and codes, and recommended that any formal framework that was introduced should be designed to take advantage of “existing animal ethical committees and codes of practice currently followed by institutions in New Zealand, the underlying principle being that of personal

²⁷ (6 August 1981) 439: NZPD 2407.

²⁸ At 2409.

²⁹ National MP for Wellington Central, Kenneth Comber; (6 August 1981) 439 NZPD 2406.

³⁰ (6 August 1981) 439 NZPD 2406 and 2410.

³¹ At 2406 and 2410. The vote was lost by 28 to 35 and the Bill did not proceed to the Health and Welfare Committee, see (11 August 1981) 440 NZPD 2481.

³² Questions for Oral Answer (6 August 1982) 445 NZPD 1824-5.

responsibility through approval and supervision of local peer groups”.³³ This made it clear that the sectors’ preference and the government’s position supported the status quo, and the formalisation (and legitimisation) of the emerging industry led self-regulatory framework into law.

SAFE’s Petition to Amend the APA 1982

Understanding that a self-regulatory framework was planned, SAFE began to seek the introduction of more specific standards in order to attempt to ensure the interests of animals were protected within any such regime. There was strong public support for greater protections, and in 1982 SAFE presented a 120,000 strong petition to the New Zealand Parliament, calling for five specific amendments to be made to the APA:

1. The elimination of repetitious and highly painful research;
2. A ban on non-medical animal experiments;
3. The provision for unannounced inspections by officers of the SPCA;
4. For annual reports on animal tests to be filed and made publicly available; and
5. The promotion of alternatives.

The measures were aimed at ensuring unnecessary and highly painful research was kept in check and greater openness and accountability was encouraged. The petition was referred to the Petitions’ Committee who reported back to the House in October 1982.³⁴ The Committee said they had heard the petitioners’ evidence, as well as submissions from medical and research interests, and had considered the potential impacts on health, welfare and the economy (notably omitting to refer to the impact on animals). The Committee agreed to refer the matter to the government but not for consideration of any of the five pleas on the petition. A rider would be attached limiting consideration to the recommendations made by the Royal Society in their report. SAFE’s initiative and their submissions were removed from any formal consideration, and the Royal Society’s recommendations substituted in their stead.

In response the Committee called on the government to implement and formalise into law, the existing industry crafted framework that utilised institutional based animal ethics committees

³³ (6 August 1982) 445 NZPD 1824-5.

³⁴ See Petition – Save Animals From Experiments. Report of the Petitions Committee (22 October 1982) 448 NZPD 4218.

and institutionally drafted codes of ethical conduct, a system characterised by the Committee as being “based upon the underlying principle of personal responsibility of the investigator and institutional responsibility”.³⁵

Acting on the Petition Committees’ recommendation the government subsequently passed the Animal Protection Amendment Act 1983. A new s 19A was added to the APA giving the Minister the power to make regulations requiring that research be carried out under an institutional Code of Ethical Conduct (CEC) and for the establishment of an expert advisory committee to make recommendations on code content and approval - if he so chose.³⁶ SAFE’s petition had merely served to speed up the introduction of the framework that the government had already intended to implement. While the Act gave the Minister the power to make regulations, this did not happen until 1987, and then only with significant prompting.

NZAVS Petition to Ban LD50 Testing 1984

NZAVS also launched a petition at this time. In May of 1984, NZAVS lodged a 39,000 strong petition calling for a more specific measure—a ban on the ‘LD50’ test.³⁷ LD50 stands for lethal dose 50%, a test which is used to determine how toxic a substance is by establishing the quantity or dose at which 50% of the animal subjects are killed following forced ingestion. The test was both deadly and painful since it required administering highly toxic substances to animals. NZAVS argued it was also an inherently flawed and a scientifically unreliable test method. Their petition was referred to the Petitions Committee and a hearing was held where public submissions were taken.³⁸

In their magazine *Mobilise*, NZAVS was highly critical of the way that the select committee hearing had been handled, they stated that the Petitions Committee had been extremely hostile and had refused to engage and discuss the possibility of banning the LD50 test.³⁹ For this reason, they were surprised when the Committee referred the petition to the government for “favourable

³⁵ At 4218.

³⁶ Animals Protection Amendment Act 1983 (1984 No 141) Cl 6.

³⁷ The petition was presented by Labour MP for Avon, Mary Batchelor;(10 September 1985) 465 NZPD 6652.

³⁸ Review of the Hansard shows that a further 9,000 signatures were submitted bringing the final total to 51,872; (3 July 1985) 463 NZPD 5222.

³⁹ Bette Overell “Why Anarchy Prevails – The Hypocrisy of Democracy” *Mobilise* (New Zealand, Issue 12 September 1985) at 8.

considération”.⁴⁰ The ‘favourable consideration’ however, came in the form of a letter from the Ministry of Agriculture informing NZAVS that there was no need for a ban since regulations were coming shortly.⁴¹ According to the Ministry, these regulations would address any issues that arose in relation to toxicity testing. A National Animal Ethics Advisory Committee (NAEAC) would be tasked with developing policy and setting out the circumstances where harmful substances could be administered to animals; they would “adequately control and monitor the use of acute toxicity testing”.⁴² In reality no ‘new’ protections had been drafted in response to NZAVS’ concerns, the regulations that the Ministry was referring to here, were simply those that had already been promised by the Animals Protection Amendment Act 1983; the introduction of a system of Codes of Ethical Conduct, the formalisation of the existing animal ethics committee framework, and the establishment of an expert advisory committee.⁴³

Preferential Access and Unequal Power Relations

The preceding examples demonstrate the impenetrability of the framework once policy determinations had been delegated to the Royal Society in consultation with industry. This systematically ensured other voices were excluded from participating, and that competing values and perspectives were sidelined. In essence, the matter had essentially been predetermined. Governmental consideration of the legal initiatives launched at this time was perfunctory. The response to each was that ‘regulation was coming and issues were already in hand’. There was no active engagement or response to any of the specific issues that had been raised, and at most, all these initiatives did was accelerate the introduction of a formalised self-regulatory regime that mirrored the pre-existing voluntary based one.

Select committees are prone to capture at the best of times; comprised of a majority of government members they already operate to reify state positioning. Kelsey argues that the process tends to be stacked in favour of well-organised and well-resourced lobby groups that have “an ear to the legislative machine” and which “operate primarily through informal networks

⁴⁰ See (3 July 1985) 463 NZPD 5222 and Bette Overell “Why Vivisection Exists” *Mobilise* (New Zealand, Issue 34 November 1992) at 10.

⁴¹ Letter from David Butcher, Minister of Agriculture to NZAVS reproduced in *Mobilise* (New Zealand, Issue 15, July 1986) at 5.

⁴² Letter from David Butcher, Minister of Agriculture to NZAVS reproduced in *Mobilise* (New Zealand, Issue 15, July 1986)

⁴³ For a detailed discussion of the Royal Society and research sector’s work on developing the regulatory framework governing animal use for research, testing and teaching see Royce Elliot “Foundations of the New Zealand Codes and Animal Ethics Committee System” in *Ethical Approaches to Animal-based Science: Proceedings of the Joint ANZCCART/NAEAC Conference, Auckland 19-20 September 1997* (ANZCCART, Wellington, 1998) 93.

outside the select committee”.⁴⁴ This is almost certainly the case where government and industry are already working closely on a matter, and the state is a significant, even dominant stakeholder in the negotiations so that state interests and private commercial interests are already very aligned.⁴⁵ Furthermore, the expert advisory body called in to assist, the Royal Society, itself operated under a statute that directed it to prioritise research interests. The processes in place, the decision-making bodies involved in those processes, and the relevant statutory provisions that existed all supported a continuance of the status quo.

Prudham and Morris have noted the inherent danger to democracy where forums appear open, and yet processes have already foreclosed on meaningful debate. While there may be an outward appearance of participatory and discursive democracy, it is no longer a deliberative or responsive one, especially where unequal power relations are operating in and through the state.⁴⁶ The cost to actors attempting to engage in this context is high. Organisations spend substantial time and money preparing submissions, obtaining expert evidence and advice and bringing their submissions to Wellington for committee hearings. In making submissions on their LD50 petition, NZAVS said that had spent “massive funds” to prepare to come before the Committee by bringing a host of overseas scientists and professionals in the fields of toxicology and medicine.⁴⁷ On the day and with limited time the Committee had determined not to accept those submissions as evidence, yet took substantial submissions from the Ministry of Agriculture, the Ministry of Health, and the Department of Scientific and Industrial Research (DSIR) who all argued the necessity of the tests and in support of their retention.⁴⁸ The cost is not merely the financial burden this places on non-profit advocacy groups and citizens alike, but in the way that it undermines the integrity of the system and public faith in it. The petitions presented by NZAVS and SAFE had substantial public backing, yet even this could not ensure a more substantive and considered response.

Neoliberal Policy and the Closure of Political Opportunity

⁴⁴ Jane Kelsey *Rolling Back the State: Privatisation of Power in Aotearoa/New Zealand* (Bridget Williams Books, Wellington, 1993) at 166-7.

⁴⁵ NAEAC annual reports show that by 1989 the public sector still accounted for around 68% of the animals used, and this figure remained relatively stable throughout the 1990s. This research was primarily conducted at universities, government departments and Crown Research Institutes. National Animal Ethics Advisory Committee *1994 Annual Report* (Ministry of Agriculture and Forestry, August 1995) at 18.

⁴⁶ Scott Prudham and Angela “Making the Market “SAFE” for GM Foods: The Case of the Canadian Biotechnology Advisory Committee” (2006) 78 *Studies in Political Economy* 145 at 149.

⁴⁷ NZAVS “Government Legalises LD50 Alibi” *Mobilise* (New Zealand, Issue 15, July 1986) at 4.

⁴⁸ At 4.

The period from 1984 onwards must be considered differently. Although many of the same dynamics continued to play a role, the political landscape was fundamentally altered. In 1984, the fourth Labour government came to power on a radical neo-liberal platform and an agenda of industry deregulation and privatisation. In his economic statement to the House, Roger Douglas argued that since traditional markets for New Zealand were in decline, the country needed to adjust to changing world conditions. The burden of regulation would be removed across the board, and the economy and public sector would be made more efficient.⁴⁹

Labour had been the movement's closest ally in the House, raising questions on SAFE's behalf and drafting private members' bills in an attempt to force more robust consideration of the issues around animal testing. Although the APA had been amended in 1983 to provide the Minister of Agriculture with the power to make regulations, he had not done so. This meant that the door was potentially still open to taking a different approach. Following Labour's embrace of neoliberal policies, the party's support for greater regulation and oversight had been dropped amidst the rhetoric of economic efficiency and fiscal austerity. The ideological space in Parliament narrowed and with it the movement's access to and representation within the House.

Rather than delivering what the movement hoped would be a more even-handed approach, the new Labour government's economic policies elevated the commercial interests at play and the voices of stakeholders even further. SAFE only stayed present in the discussion because of the support of Social Credit MP Gary Knapp. The Social Credit Party had just two seats in the House, but nevertheless, a final attempt was made to nudge the government's approach on the issue of animal experiments.

Animals Protection Amendment Bill 1987

Concerned that the matter would simply be left and eager to avoid the inevitability of a self-regulatory framework, Knapp worked closely with SAFE to draft a private members bill, the Animals Protection Amendment Bill 1987. The bill aimed to press the Minister to use his s 19A powers under the 1983 Amendment Act and formally implement the promised regime. Knapp's Bill also added some additional checks, for example, it called for membership on the new advisory committee, NAEAC, to draw at least half of its members from persons not involved,

⁴⁹ See the speech of the Minister of Finance, the Rt. Hon. Roger Douglas; (12 December 1985) 468 NZPD 9090 – 9092.

associated or connected with animal research.⁵⁰ This measure would increase external oversight and independence, but most importantly, it was a measure that would not elevate regulatory costs significantly. The bill also made the appointment of SPCA officers to the role of inspectors mandatory. Because the SPCA covered its own costs regarding its monitoring and enforcement functions, this was another check that could be implemented without increasing the financial burden on the government.

Knapp's Bill also sought more openness and accountability. Clause 4 of the bill would have required institutions to provide information on their use of animals and for this to be published in an annual report. It sought disclosure of the full details of the experiments and procedures approved, the effects and impacts on animals, the findings and conclusions obtained and the provisions that had been undertaken for pain relief. These details were to be made publicly available, ensuring the framework remained responsive to public opinion and politically accountable. At this time, without any access to information on the kinds of experiments that were being conducted, the ARM's ability to contest industry standards was severely undermined. There was just no departure point for debate and no possibility of constructive dialogue on animal welfare issues in the sector. Indeed, the secrecy around animal experiments was perhaps an even more significant barrier to advancing reform than any of the structural or political ones. Knapp reported that despite nearly two years of investigation, it had been impossible to access any information on research being conducted.⁵¹ He submitted that in a situation of claim and counterclaim, the only sensible path forward was to implement mechanisms that could generate greater certainty and "actual accuracy".⁵²

Knapp's Bill also required the compulsory use of anaesthetics if pain or distress was likely, a ban on experiments where non-animal alternatives existed, and a ban on the "internationally discredited" and controversial LD50 and Draize toxicity tests.⁵³ The prohibitions sought in the 1987 Bill are noticeably more conservative than those SAFE had sought earlier. There appears to have been a pragmatic acceptance that the self-regulatory model was inevitable, and this shifted the focus to ensure greater openness and accountability to achieve oversight through different mechanisms, and in particular, mechanisms that could be implemented at little to no cost. The

⁵⁰ Animals Protection Amendment Bill 1987 (103-1), cl. 6.

⁵¹ (4 Feb 1987) 477 NZPD 6784.

⁵² At 6785.

⁵³ At 6785.

strategy of the ARM had been reformulated to meet the demands of the prevailing regulatory approach.

In response, the Minister of Agriculture claimed that the changes suggested in the Bill would “not add much” and that the reporting requirements would be an “administrative nightmare”.⁵⁴ The Minister was happy to allow the bill to proceed to select committee because it was such an “emotional issue for many” and he understood that people wanted to be heard.⁵⁵ Labour Party MPs now collectively argued, in stark contrast to their positioning several years earlier, that the current regulatory track already took a ‘balanced’ approach and that the administrative and financial burden to collect information would be too great.⁵⁶ They reminded all concerned that it was an emotional issue and it was too easy for well-meaning people to get “carried away”.⁵⁷ National Party politicians agreed, articulating that the reporting requirements were excessive,⁵⁸ that the framework in place should not overly burden researchers or the industry,⁵⁹ and argued that animal scientists were the best ones to judge what was necessary and should be the group most represented on any advisory committee.⁶⁰ Several members told Knapp he would do better to consult the scientific and academic community than “fringe” special interest groups⁶¹ that were unable to view matters rationally.⁶²

Knapp in return, thanked the Members for a ‘mostly’ reasoned approach to a serious, albeit emotional subject, and assured the House that he had tried not to bring emotion to the subject.⁶³ He stated that his purpose was to draft a moderate and reasonable bill, and his goal was merely to make researchers accountable: “not banning them, not eliminating them, not making any particular statements about them, but merely making them accountable.”⁶⁴ If this happened, Knapp argued, “much of the argument and emotion surrounding the issue would cease.”⁶⁵ Knapp also disputed that the reporting requirements would add significant time or expense,

⁵⁴ At 6787 (Animals Protection Amendment Bill – Introduction, Colin Moyle, Minister of Agriculture).

⁵⁵ At 6787.

⁵⁶ At 6791 – 2.

⁵⁷ At 6791-2.

⁵⁸ At 6793.

⁵⁹ At 6788.

⁶⁰ At 6793.

⁶¹ At 6793.

⁶² At 6792.

⁶³ At 6793.

⁶⁴ At 6795.

⁶⁵ At 6795.

noting that institutions already maintained meticulous records, they were just not made available to the public.⁶⁶

Re-emergence of the Reason-Emotion Binary

In Knapp's response to the House, we see an almost verbatim repeat of the sentiments expressed by Mabel Howard 30 years earlier.⁶⁷ Knapp reassured the House that he had not succumbed to emotion and agreed that reason must prevail. The framing discourse and juxtaposition of reason and emotion have returned, along with an emphasis on the practical, expressed here as a concern for efficiency and economic prudence. The government's adoption of neoliberal policies had served to amplify their claim to rationality as a basis for justifying the position they were now adopting, and to expel argument from emotion, constructing it as inherently unreasonable and a barrier to 'good' regulation. Conversely, it also framed advocates as irrational and 'fringe'.

The hegemonic power of this discursive framing is tangible. Neoliberal values, as soon as they emerged, served to disqualify any reforms that had costs attached to them. In warning against argument inspired by emotion, the Labour government signalled that matters such as fairness, or harm to animals, would not prevail over economic and practical concerns. Neoliberal framing had shifted Labour's focus away from a consideration of what would constitute the most effective framework, to what would constitute the most economically efficient.

In order to be effective, advocates arguing for reform invariably seek arguments that will carry weight with decision makers; ones that are capable of being heard. To this ends, they attempt to conform, if possible, to the ideological requirements in place in order to ensure their argument is viewed as legitimate, and to reduce the chances of it being immediately dismissed. As a result, we see again the 'spontaneous consent' to the values underpinning the hegemonic forces at play; Knapp did not question or contest the primacy of the practical or economic concerns, instead he strives to meet these requirements and the parameters that have been set.

Knapp's Bill never had a genuine chance of being passed, but it did prompt a governmental response. Shortly afterwards, the Minister utilised his power to make regulations and the

⁶⁶ At 6794.

⁶⁷ See discussion in chapter 2.

Animals Protection (Codes of Ethical Conduct) Regulations 1987 were put in place.⁶⁸ The regulations required institutions using animals for research to draft a Code of Ethical Conduct (CEC) that set out the rules and guidelines for animal use and procedures for approving experiments at their institution. A National Animal Ethics Advisory Committee (NAEAC) was established to advise the Minister and recommend approval of codes.

The concern with reducing costs and downsizing the public sector induced a powerful regulatory chill. Supporters of the self-regulatory model argued that the framework would encourage buy-in from industry actors and personal responsibility on the part of participants, ensure that decisions were made by those with knowledge of science and sector, and would also reduce the cost to government since the regulatory burden would be borne by the industry. As a model, self-regulation had everything that the 1984 Labour Government was looking for in a regulatory framework. As one commentator observed, New Zealand had avoided “a cumbersome and expensive bureaucracy”.⁶⁹

In adopting a self-regulatory framework instead of a more public, governmentally controlled one, the channels of communication available to the movement on the issue of animal testing were significantly narrowed. It reduced the scope for dialogue. The new self-regulatory framework did allow animal advocates access at two points. The RNZSPCA was given a permanent seat on the advisory committee, NAEAC, and the regulations provided that each Animal Ethics Committee (‘AEC’) must contain a person nominated by an animal welfare organisation.⁷⁰ The role of these representatives was highly controversial within the ARM for the legitimising function they served to provide the regime. Advocates have also argued that the framework imposes inherent limitations on animal welfare members that undermine their role. For example, animal welfare members on AEC had to be appointed (so approved) by the director or chief executive of the research institution, and there were no formal limits on AEC size so members may be one on a large committee stacked with internal institutional members. In 1997, Andrew MacCaw of the Office of the Ombudsmen produced a detailed critique of the framework and uneven power balance that existed within it, calling for an opening up of the “channels of

⁶⁸ Knapp was of the opinion that the regulations were only “given the hurry along because of the possibility of legislative action”: (4 Feb 1987) 477 NZPD 6794.

⁶⁹ C.S.W. “New Zealand” (1995) 37(2) ILAR Journal 62.

⁷⁰ Animals Protection (Codes of Ethical Conduct) Regulations 1987.

communication” between the research, animal welfare and the general community to enable the ethical issues associated with animal testing to be discussed and addressed.⁷¹

The provision for animal welfare members on NAEAC and AEC is an example of what Hunt has termed incorporative hegemony.⁷² Hunt argued that “for a hegemonic project to be dominant it must address and incorporate if only partially, some aspects of the aspirations, interests, and ideology of subordinate groups”.⁷³ In this sense, the installation of subordinate interests within the dominant hegemony can be viewed as a self-conscious compromise employed to maintain power and protect it against any challenge to ensure its ongoing legitimacy. The concession, in this case, was made because the sector was keenly aware that public acceptance of animal experiments relied on a system that could generate trust.⁷⁴ While the incorporation of other interests within frameworks can sometimes operate to open a door, here, the secrecy surrounding code content and industry standards, the use of confidentiality agreements in relation to AEC members, and the lack of mechanisms to ensure accountability and openness, operated to strictly confine and insulate the regime from external inputs.

Habermas has argued that in order for democracy to be inclusive, civil society must empower citizens to participate. On this basis, the neoliberal project raises significant concerns when it seeks to move from a model of government representing the public interest, towards one of governance where significant power is delegated to a wide range of industry groups. Habermas has also argued that the politically intended self-limitation of the scope for political intervention, in favour of systemic self-regulation, robs society of the *means*... to change the approach taken.⁷⁵ It significantly closes and insulates the framework from external inputs. The switch from *political* forms of regulation to *market* mechanisms serves to buttress the continuation of such a politics, and the withdrawal of the political is a withdrawal of the democratic.⁷⁶ There is no question that the introduction of a formal self-regulatory framework marked the closure of broader public dialogue on the issue and of movement engagement for years to come.

⁷¹ Andrew McCaw “The Three Rs and How They are Promoted” in *Ethical Approaches to Animal-based Science: Proceedings of the Joint ANZCCART/NAEAC Conference, Auckland 19-20 September 1997* (ANZCCART, Wellington, 1998) 85 at 88.

⁷² Alan Hunt *Explorations in Law and Society* (Routledge, New York, London, 1993) at 320.

⁷³ At 320.

⁷⁴ See John Schofield and David Mellor “Regulating Scientific Animal Use: Centralised Control of Facilitated Self Regulation System” in *Ethical Approaches to Animal-based Science: Proceedings of the Joint ANZCCART/NAEAC Conference, Auckland 19-20 September 1997* (ANZCCART, Wellington, 1998) 99 at 99.

⁷⁵ Jürgen Habermas “A Political Constitution for the Pluralist World Society” (2007) 34(3) *Journal of Chinese Philosophy* 331 at 341.

⁷⁶ At 341.

Scientization and the Transgression of Expertise

When the ARM sought to contest the use of animals for research and testing and raise discussion and debate around this issue, it became inevitable that researchers and scientific advisors would become participants in that discussion. The research sector is a key stakeholder and as such, should be consulted when decisions affecting the industry are made. Additionally, when matters of science must be determined and competing and contrary evidence is presented, government inevitably look to experts for advice on matters that they are not qualified to answer. In the prior discussion, it is important to articulate that it was not the involvement of the Royal Society or other expert advisory bodies in the decision-making process that was problematic, but the *way* that the decision-making process was undertaken that represents a cause for concern.

Nowotny has argued that there is a kind of inherent transgressiveness about expertise and that in the absence of clear lines and boundaries or a transparent framework, it frequently oversteps its limits.⁷⁷ Habermas has also criticised the ceding of decision-making to technical experts in what he terms ‘scientization’, for the way that it marginalises lay people and reduces their influence.⁷⁸ When matters are delegated, or placed in the hands of experts, complex political determinations are frequently narrowed in scope, so that broader values-based considerations are expelled. Conversely, without clear lines, important policy and political considerations may be ceded, not simply technical and scientific ones.⁷⁹ In determining the most appropriate framework for regulating animal research, the government essentially ceded this overtly political decision to the Royal Society in consultation with the research sector. The advice provided progressed beyond the normal scope of advice envisioned under the Royal Society of New Zealand Act 1965, which states the Society’s role is simply one of initiating reports on scientific subjects.⁸⁰

The boundary between expert consultation and stakeholder consultation was also unclear. Just as problematic was the highly secretive and closed environment in which expert opinions and advice were delivered, considered and employed. This shielded the decisions being made not only from external inputs, but from external oversight, and it became unclear who was making the decisions, on what basis, and following whose advice. Liberatore and Funtowicz have argued

⁷⁷ Helga Nowotny “Democratising Expertise and Socially Robust Knowledge” (2003) 30(3) *Sci. Public Policy* 151.

⁷⁸ See Jürgen Habermas *Toward a Rational Society: Student Protest, Science, and Politics* (Jeremy J. Shapiro (translator), Beacon Press, Boston, Massachusetts, 1970) in particular, chapter 6 “Technology and Science as “Ideology”” at 81-83.

⁷⁹ Above n 77, at 151.

⁸⁰ Royal Society of New Zealand Act 1965, s 9.

that if participation is limited to a few actors “behind closed doors and without procedures for determining who is invited to the table and what is the nature of involvement... then representative institutions are pre-empted from control as well as legislative function.”⁸¹

Contesting Science: NZAVS and Scientific Anti-vivisection

The initiatives run by NZAVS in this era are particularly relevant to the examination of expertise and the processes by which government determined facts, since NZAVS chose to contest the scientific basis of animal testing directly. A dominant line of argument employed by almost all anti-vivisection groups is that animal tests must be banned for their unreliability; that differences between species make it impossible to safely apply animal test data to humans.⁸² In the 1980s, NZAVS’ argument against animal experiments was made almost entirely on this basis since it was considered the most potent line of argument. It was believed that animal rights and the ethical concerns around animal testing were too easily dismissed as well-meaning but overly emotive.⁸³ By comparison, the scientific argument against animal experiments provided a more objective, fact-based line of reasoning, and one that prioritised human health concerns.

NZAVS raised two petitions on this basis, one in 1984 calling for a ban of LD50 testing and another in 1991, which called for an immediate ban on all animal testing on the grounds that the tests were unreliable and inaccurate, and that reliance on them endangered human health. This petition attracted more than 100,000 signatures in support. Despite the size of the petition and clear public mandate that existed on the issue, in challenging the scientific consensus NZAVS had selected a particularly hard road on which to travel. The parliamentary select committee process was also an inherently difficult forum to attempt to raise such substantive and highly

⁸¹ Angela Liberatore and Silvio Funtowicz “Democratising Expertise, Expertising Democracy: What does this mean, and why bother?” (2003) 30(3) *Sci. Public Policy* 146 at 147.

⁸² “The point that animals are different from humans and that the results of the research on animals are therefore not applicable to humans is made by almost every opponent of vivisection, including the BUAV, the NAVS, PETA, Professor Vernon Coleman, Doctors and Lawyers for Responsible Medicine and many members of the public who submitted written evidence.” (House of Lords Select Committee on Animals in Scientific Procedures, *House of Lords Select Committee on Animals in Scientific Procedures Report* (2002) Vol.1, para 4.4). The modern scientific anti-vivisection movement emerged in the 1980s following the publication of several formative books by Hans Ruesch including *Slaughter of the Innocent* (New York, Bantam, 1978), *Naked Empress Or The Great Medical Fraud* (CIVIS, 1982) and *1,000 Doctors (and Many More) Against Vivisection* (CIVIS, Switzerland, 1989). Hans Ruesch is generally credited with being the father of the modern anti-vivisection movement and these works “altered the whole concept and course of the anti-vivisection movement” (see Bette Overell *Animal Research Takes Lives Humans and Animals Both Suffer* (NZAVS, Wellington, 1993) at 7 and Mary Ann Elston “Attacking the Foundations of Modern Medicine? Anti-vivisection Protest and Medical Science” in David Kelleher, Jonathon Gabe and Gareth Williams (eds) *Challenging Medicine* (Routledge, London, 2013) at 171-173.

⁸³ NZAVS *Mobilise* (New Zealand, Issue 43, November 1995) at 15. A detailed summary of NZAVS’ history, philosophy and approach is outlined in this issue.

technical issues. In this respect, it is unsurprising that the petition did not succeed, however, the way in which both the petitions were received and dealt with in select committee raises a series of issues.

NZAVS reported that the Petitions Committee that heard submissions on their LD50 petition appeared to think the matter was a joke, and that they were more interested in questioning submitters on their personal eating habits than engaging with the science.⁸⁴ NZAVS said that committee members became hostile when scientific lines of argument were raised, and would not directly discuss the possibility of a ban.⁸⁵ When the Primary Production Committee (PPC) heard the larger petition which called for a complete ban on animal testing, NZAVS reported that the Chair of the PPC simply sat making “grunts of disapproval” throughout and that despite being informed that ten submissions would be taken on the day only two were heard.⁸⁶ The Chair went on to publicly describe NZAVS’ initiative as “bizarre and extreme”.⁸⁷

NZAVS was aware of the difficulty of contesting the science and the need for expert evidence. Ahead of both select committee hearings, they prepared substantial submissions, gathered scientific studies as evidence, took statements from dozens of scientists in support, and even flew in their own experts to Wellington to speak to the petitions. On each occasion it was clear that the hearings were perfunctory and that there was no real space for debating scientific issues. The PPC considered that the science was already resolved, and the validity of animal testing was in fact, it was a necessary practice and an unquestionable public good.

NZAVS’ account of the events leading up to the PPC hearing on their petition to ban animal experiments is also important to note. This petition to ban animal testing was presented to the House in April 1989, and referred to the PPC,⁸⁸ however, it would take two years of constant pressure to finally obtain a hearing. Initially the Committee refused to open the matter up to public submissions at all, stating that they would hear NZAVS’ primary submission but that was all. This was unusually restrictive, particularly considering the size of the petition, which had

⁸⁴ NZAVS members present recounted how the Committee Chairperson Mary Batchelor could scarcely suppress her giggles and apologised for the Committee’s “naughty” behaviour. Bette Overell “Why Anarchy Prevails – The Hypocrisy of Democracy” *Mobilise* (New Zealand, Issue 12, September 1985) at 8.

⁸⁵ Bette Overell “Why Anarchy Prevails – The Hypocrisy of Democracy” *Mobilise* (New Zealand, Issue 12, September 1985) at 8.

⁸⁶ NZAVS “Death Knell of a Petition: The End of an Era” *Mobilise* (New Zealand, Issue 30, August 1991) at 3.

⁸⁷ These comments were reported in the *Dominion* (17 April 1991) and are reproduced and discussed by Bette Overell in her book *Animal Research Takes Lives Humans and Animals Both Suffer* (NZAVS, Wellington, 1993) at 10.

⁸⁸ (25 July 1991) 517 NZPD (Petition – B. Overell and 100,640 Others, Report of the Primary Production Committee, Ross Meurant).

over 100,000 signatures. Labour MP John Terris agreed to intercede on NZAVS' behalf and convinced the Chair of the PPC to accept public submissions. Within the month, however, the PPC rescinded that offer, claiming that there would not be time to read them all and they would likely be repetitive in any case.⁸⁹ NZAVS argued that the nature of the subject matter meant that professional evidence was required *on all sides*, or else the issue would be left in the hands of political factions and non-professionals.⁹⁰ NZAVS reiterated their expectation that the government would not "prejudge" the content of submissions nor provide a "token" hearing. They sought to have their substantive argument properly and fully considered and did not wish to proceed if that could not happen.⁹¹

Following further correspondence, the Committee agreed to hear ten submissions. They then rescinded this offer, then re-agreed and set a hearing date, the PPC then rescheduled that hearing date three times before notifying NZAVS that they had decided to cancel the hearing altogether.⁹² The following week, in December 1990, the Ministry of Agriculture in association with industry bodies, including the Medical Research Council, the Researched Medicines Industry Association, the Agricultural and Animal Remedies Manufacturers Association and several research charities, collectively released a new publication entitled *Animal Research Saves Lives*.⁹³ The booklet set out all the reasons why animal research was necessary and was distributed throughout the country to schoolteachers, scientists, doctors, company representatives, and newspaper publishers.⁹⁴

It became clear to NZAVS that the Ministry of Agriculture, to which the PPC was attached, had been consulting closely with industry throughout the process and had already adopted a position on the matter. NZAVS viewed the PPC's repeated attempts to prevent their expert evidence being presented and to hold off their more scientific-based submissions from being heard, as political manoeuvring to buy time so that the Ministry could compile and pre-emptively release its own competing argument. It now also appeared that their only opportunity to present their position had been unilaterally closed down. NZAVS claimed that the government was simply too

⁸⁹ NZAVS "The History, Progress and Sabotage of NZAVS Petition to Abolish Vivisection in New Zealand" *Mobilise* (New Zealand, Issue 25, August 1989) at 2.

⁹⁰ A full copy of NZAVS' letter to the PPC is printed in *Mobilise* (New Zealand, Issue 25, August 1989) at 3-7.

⁹¹ NZAVS "The History, Progress and Sabotage of NZAVS Petition to Abolish Vivisection in New Zealand" *Mobilise* (New Zealand, Issue 25, August 1989) at 3-7.

⁹² Bette Overell *Mobilise* (New Zealand, Issue 29, February 1991) at 3 – 4.

⁹³ At 3.

⁹⁴ At 3.

biased in favour of the status quo and too captured by industry to have an open ear for their argument.⁹⁵

The NZAVS' account of their attempt to contest the science demonstrates how unreceptive the government and industry was. The issue here lies not in the fact that the government did not find NZAVS' arguments convincing, but in the concerted way that the PPC sought to restrict and if possible, avoid opening up the discussion. In shutting down the debate, they also refused to hear concerns that being raised on behalf of more than 100,000 New Zealanders who had signed NZAVS' petition to ban all animal experiments on scientific and medical grounds.⁹⁶

Democratising Expertise – and “Socially Robust Knowledge”⁹⁷

McCormick has called social movements that attempt to contest science “democratizing science” movements.⁹⁸ The value of such movements lies in their ability to highlight hidden bias and ensure that science remains robust and accountable, so that it does not become captured and operate as a barrier to reform. In fact, science and experts alike lose their legitimacy when they are not seen to be objective, independent, accountable and open to challenge. The PPC's treatment of NZAVS raises concerns on all these counts. The Committee's constant vacillation points to an internal debate or conflict over how to deal with NZAVS' petition, yet because the consultation and decision-making processes in place was not transparent it becomes challenging to understand what was occurring politically.

The examination of the engagement of the ARM on the issue of animal testing during this era reveals a number of issues regarding the role of experts and the deployment of expertise. Reliance on and deferral to experts can significantly undermine democratic processes, locking out other voices and preventing meaningful engagement. As a result, the legal system loses its ability to respond to changing conditions and to social values and concerns. Nowotny notes that “(b)etween unconditional acceptance and hostile rejection, there remains space for negotiation”.⁹⁹ The solution suggested by her and others is that expertise urgently needs to be

⁹⁵ At 3.

⁹⁶ (25 July 1991) 517 NZPD (Petition – B. Overell and 100,640 Others, Report of the Primary Production Committee, Ross Meurant).

⁹⁷ Helga Nowotny “Democratising Expertise and Socially Robust Knowledge” (2003) 30(3) Sci. Public Policy 151 at 155.

⁹⁸ Sabrina McCormack “Democratizing Science Movements: A New framework for Mobilization and Contestation” (2007) 37(4) Soc. Stud. Sci. 609.

⁹⁹ Above n 99 at 155.

democratised. This requires that more explicit lines are drawn between matters of science and matters of policy, and that the processes by which decisions are made become more transparent. Engagement between policymakers and experts, it is suggested, must not be made behind closed doors. The public should have access to view the process and the deliberations taking place. Furthermore, Nowotny argues that the plurality of competing viewpoints needs to be seen, and the normative within the technical made explicit. This would, in turn, lay bare many of the hegemonic processes that operate to insulate the status quo, providing more space to question their continuing legitimacy.

The regulatory framework put in place in relation to animal experiments in the 1980s remains virtually unchanged even today. Animal use for research, testing and teaching purposes is regulated under Part 6 of the AWA, and the sector has remained relatively insulated from the welfare reforms evidenced in other industries.¹⁰⁰ Research institutions continue to draft their own Codes of Ethical Conduct. These are approved by the Director General and unlike other sectors, there is no requirement that standards and animal management practices be publicly notified or opened for submissions.¹⁰¹ This has left the industry open to ongoing criticism regarding the “veil of secrecy” under which it operates, and advocates have argued this situation continues to stifle the possibility for serious debate and discussion of the ethical issues surrounding the use of animals for research and testing.¹⁰²

Under Part 6 the AWA all code holders are required to establish an institutional AEC which is responsible for considering and approving experiments at their facilities, and for monitoring compliance with any conditions that are placed on those experiments.¹⁰³ AECs must include three external and independent members, a veterinarian, a person nominated by the regional council or territorial authority, and an animal welfare representative.¹⁰⁴ However these members are appointed by the chief executive of the research organisation and there is no statutory limit on the number of members that may sit on the committee, so nothing to prevent AEC’s from

¹⁰⁰ Section 81 of the AWA specifically states that none of the welfare protections in Parts 1 or 2 or the AWA prevent animals being used for research, testing or teaching.

¹⁰¹ The process for approving Codes of Ethical Conduct and their content is dealt with under sections 87 through 97 of the AWA.

¹⁰² For a comprehensive discussion of the movement’s claims and concerns regarding the adequacy of the regulatory framework and a comparative analysis with the regimes in place in other countries, particularly the United States and United Kingdom, see Deidre Bourke and Mark Eden *Lifting the Veil of Secrecy on Live Animal Experiments: A Report Written and Produced by the Coalition against Vivisection* (18 August 2003).

¹⁰³ See s 99.

¹⁰⁴ Section 101.

being stacked with internal institutional members.¹⁰⁵ When I conducted research into this issue for my Masters thesis it became clear that the AECs attached to large institutions, such as Auckland or Massey University, frequently had up to 12 or even 13 members on their AEC.¹⁰⁶ The AWA also permits committees to set their own rules and procedures, including voting and quorum requirements.¹⁰⁷

The National Animal Ethics Advisory Committee continues in its advisory role, and is responsible for making recommendations to the Director-General regarding code approval and content, as well as to the Minister generally, providing information and advice to AECs, and considering the reports of independent reviews of code holders.¹⁰⁸ This last component is a new development and worth further note.

Until 1999 there was no provision for independent inspections or reviews of institutions undertaking animal experiments in New Zealand. The requirement for research institutions to undergo independent reviews was the most significant change to the animal testing framework that occurred when the AWA was introduced. Although such reviews now take place, section 105 of the AWA only requires that they occur when a new code is approved or an existing one is renewed, and because codes may be approved for a period of up to five years¹⁰⁹ such reviews remain infrequent. Further, research organisations are responsible for organising their own review, code holders appoint their reviewer from a list of accredited persons,¹¹⁰ and payment for that review is negotiated privately between them.¹¹¹ There is currently no provision for unannounced inspections or random checks to take place, and no conflict of interest protections to ensure that accredited reviewers are not associated with the institutions they review.¹¹² In addition the Act expressly prohibits reviewers from passing judgment on AEC decisions, reviewers may look only at whether the correct processes are being followed, and not the balance being struck.¹¹³

In short framework continues to operate on trust.

¹⁰⁵ Section 101(2).

¹⁰⁶ Deidre Bourke *The Regulation of Animal Use for Research, Testing and Teaching purposes under Part 6 of the Animal Welfare Act 1999* (Masters thesis, University of Auckland, New Zealand, 2005) at 62.

¹⁰⁷ Section 102.

¹⁰⁸ Section 63.

¹⁰⁹ Section 94.

¹¹⁰ Section 108(1).

¹¹¹ Section 108(2).

¹¹² The AWA simply directs that reviewers take all reasonable steps to ensure that their judgment is not impaired by any such relationship or interest in the person or organisation under review, section 110(b).

¹¹³ Section 106(2).

These three issues of regulatory capture, the power of neoliberal ideology to confine debate, and the transgressive nature of ‘expertise’ are not confined to the 1980s or to the issue of animal testing, but continue to reoccur as constant themes throughout this examination of the animal rights movement’s engagement. They constitute systemic problems and are persistent mechanisms that operate as a barrier to reform by undermining a truly deliberative democracy. This is because a truly transparent, inclusive democracy must be more than the vote of the majority, and law should be more than a self-referential and self-replicating system.

CHAPTER 4

Constituting Law - the Animal Welfare Act 1999

Law is an arena in which alternative social visions compete and where actors without formal authority play a key role in constituting what the law means and how it is enforced.¹

The primary legislation that protects animals and regulates their use and treatment in New Zealand today is the Animal Welfare Act 1999 (AWA). It is this framework that the ARM must engage with in order to advance the interests of animals, and it is this framework that sets the terms of reference and the starting point from which all reform must proceed. This chapter examines some of the issues that emerged and were contested when the AWA was first being introduced. The AWA contains more than 200 individual provisions therefore a detailed discussion of the changes made would be impossible. Rather, the focus here is on examining the core ideological changes in approach, the new balance that was struck, and the debate that centred around achieving that balance.²

No regulatory framework is neutral. The standards set reflect the deal brokered, securing and facilitating some forms of action (and actors) while disadvantaging others.³ This chapter explores the dynamics at play that led to the introduction of the AWA, and the negotiations that took place during its development. Hunt has argued that law is a phenomenon that is actively constituted, that is pushed and pulled by a range of actors, and represents an arena of struggle where different discourses compete for domination.⁴ This is particularly evident in the debate that took place around the AWA, where a wide array of actors with distinct interests and agendas sought to engage and influence the character of the Act. Industry groups did not present as a united front in this respect; the needs of traditional pastoral agriculture are very different from those of the intensive farming sector, for example. The interests of free-range farmers are in

¹ Neal Milner “The Denigration of Rights and the Persistence of Rights Talk: A Cultural Portrait” (1989) 14(4) *Law & Soc. Inquiry* 631 at 633.

² A core omission as a result of this is that animal use for research, testing and teaching purposes under Part 6 of the AWA has not been examined here. Animal experiments are regulated under their own stand-alone section of the Act so that the sector was minimally impacted by the broader changes made to the framework at this time. This is a significant gap in the analysis but it was simply not possible to delve into the complexities of that regulatory framework in the space available here. For a more detailed analysis and discussion see Deidre Bourke *The regulation of animal use for research, testing and teaching purposes under Part 6 of the Animal Welfare Act 1999* (Masters thesis, University of Auckland, New Zealand, 2005).

³ Alan Hunt *Explorations in Law and Society* (Routledge, New York, London, 1993) at 325.

⁴ At 321.

many ways more aligned with the concerns of animal advocates than with factory farmers within their own industry. Neither do all actors start on an equal footing, since the economic priorities and policies of government tend to favour large export-driven industries and prioritise fiscal over ethical concerns. To fully comprehend the interactions at work, it is necessary to understand the perspectives, goals, and claims of the various players in the arena, and their relationships with each other.⁵

The origins of the AWA are complex and demonstrate how politically charged the issues were from the outset.⁶ By the late 1980s the government had become aware that there was a need for the animal protection framework to be updated, consultation processes were initiated and a formal review of the protections under the was APA undertaken. In 1990 the Ministry of Agriculture released a discussion paper: *A Review of the Animals Protection Act 1960*.⁷ In 1993 drafting instructions were even issued, however the process stalled.⁸ Frustrated at government inaction, key stakeholders from the primary production sector and the veterinary and scientific communities contacted Labour MP Pete Hodgson asking for assistance,⁹ and as a result a private members bill, the Animal Welfare Bill 1997 ('Hodgson's Bill') was drafted.¹⁰ Hodgson's Bill was picked out of the ballot box just ten minutes after it was delivered, bringing the matter firmly before the House, and it was subsequently referred to the Primary Production select committee ('PPC') for consideration.¹¹

The National Government broadly supported the bill, and one MP explained that it had not been the government's intention to step away from the matter but that it was a "particularly difficult area".¹² From the outset there had been concerns raised not just about the potential costs of implementing reforms, but also around preventing special interest group capture¹³ and the

⁵ James Jasper "Social Movement Theory Today: Toward a Theory of Action" (2010) 4(11) *Sociology Compass* 965 at 973-4.

⁶ For a more detailed discussion of the history and development of the AWA see Neil Wells and M. B. Rodriguez Ferrere *Wells on Animal Law* (Thomson Reuters, Wellington, 2018) at 66 – 76.

⁷ Ministry of Agriculture and Fisheries *A Review of the Animals Protection Act 1960: Public Discussion Paper* (December 1990).

⁸ For a discussion of events see: (10 September 1997) 563 NZPD (Animal Welfare Bill – Second Reading, Pete Hodgson) and David Bayvel "Animal Welfare in New Zealand – Concepts, Committees, Consultation and Codes of Practice" (1997) 10(4) ANZCCART News 5.

⁹ Peter Hodgson "The Next Animal Welfare Act" (Address to the joint Conference of the Australian and New Zealand Council for the Care of Animals in Research and Training and the National Animal Ethics Advisory Committee 29 June 2001).

¹⁰ Animal Welfare Bill 1997 (43-1).

¹¹ (10 September 1997) 563 NZPD (Animal Welfare Bill - Second Reading, Pete Hodgson).

¹² (10 September 1997) 563 NZPD (Animal Welfare Bill - Second Reading, Eric Roy).

¹³ The concern was raised repeatedly in the Parliamentary debates see discussion in the House on 10 September 1997, 563 NZPD (Animal Welfare Bill – Second Reading, Eric Roy) and within the Ministry's discussion paper

problem of containing the scope of the debate. It was conceded however, that although the ensuing discussion would inevitably “see debate ranging over a wide area” that this was “no reason for not attempting to put in place some policy, some legislation”.¹⁴ It was felt that the bill was likely to generate some very heated discussion and would likely be difficult to contain; it might encourage discussion regarding a range of other matters and was sure to be one of the most emotive bills to come before the House for some time.¹⁵

These comments suggest that the government’s delay in instituting new legislation was in part out of concern to avoid opening up the debate as National Party MPs warned it would “not stop there”.¹⁶ This reflects the fact that once a bill is drafted and opened for submissions, the discussion is hard to confine or to put back in the box. What this also means is that the debate around the AWA provides insights into the various interests and power dynamics that were at play when the legislation was put in place. The trade-offs and compromises that were made as the bill progressed, also allow the processes by which law proceeds and is contested, to be examined.

Failure of Neoliberal Policy and the Need for Reform

Lack of Formal Legal Standards

Unlike the APA, the AWA was an initiative of animal-related industries, and from the outset industry concerns framed the problem to be addressed by the legislation. The problem was centred not around animals’ need for greater protection, but around the agricultural sectors’ need for a legislative framework to increase the standing and legitimacy of the voluntary industry codes and standards that existed at this time.

With the adoption of neoliberal policy from 1984 onwards, the government had taken a hands-off position regarding the agricultural sector, preferring a market-led self-regulatory approach. The role of government had fundamentally changed away from support and direction, towards

Ministry of Agriculture and Fisheries *A Review of the Animals Protection Act 1960: Public Discussion Paper* (December 1990) at 31.

¹⁴ (10 September 1997) 563 NZPD (Animal Welfare Bill - Second Reading, Eric Roy).

¹⁵ Ibid.

¹⁶ Ibid.

facilitating industry, and with the retreat of the state new modes of *governance* had emerged.¹⁷ In 1989, the government established a new body, the Animal Welfare Advisory Committee (AWAC), and one of its core roles was to assist with the development of voluntary industry ‘Codes of Recommendations and Minimum Standards’ for the welfare of animals.¹⁸ It was argued that industry participation in the writing of codes of welfare would ensure industry ‘buy-in’ and therefore acceptance of any standards that were formulated. Industry groups were thus invited to develop their own codes and AWAC assisted in this process.¹⁹ The government viewed these codes as vitally important to establishing credibility in international markets.²⁰ The farming sector was also cognisant of the need to respond to the demands of overseas export markets and viewed the codes as a means of putting in place their own rules before rules were imposed upon them.²¹ Industries also took on a core monitoring and enforcement role and a number of quality assurance programmes were launched at this time.²² Many of these industry implemented programmes explicitly recognised EU animal welfare standards.²³ Collectively, the development of these codes and programmes constituted what has been referred to as a ‘re-regulation’ of farming, one in which industry was firmly at the helm.²⁴

Despite the development of codes, inherent industry conservatism and a now outdated animal protection framework meant that New Zealand increasingly lagged behind international standards, especially in comparison to the United Kingdom and Europe. Sankoff notes that by the early 1990s, legislators in Europe had implemented bans on a range of practices still prevalent here, such as cow tail docking and dehorning deer without anaesthetic, so that New Zealand had become “seriously out of kilter with European practice”.²⁵ Exporters were increasingly being asked to supply documentation to show compliance with animal welfare standards, and several large U.K. supermarket chains implemented their own welfare criteria that

¹⁷ See Alison Loveridge “Changes in Animal Welfare Views in New Zealand: Responding to Global Change” (2013) 21 *Society & Animals* 325 at 327 and also Richard Le Heron and Michael Roche Michael (1999) “Rapid Re-regulation, Agricultural Restructuring, and the Re-imaging of Agriculture in New Zealand” (1999) 64(2) *Rural Sociology* 203 at 204.

¹⁸ NE Wells, ED Fielden and ACD Bayvel “AWAC Animal Welfare Codes – the first seven years” (1997) 24(3) *Surveillance* at 9.

¹⁹ At 9.

²⁰ AWAC (1997) ‘AWAC Animal Welfare Codes – the first seven years’ *Surveillance* 24(3): 9.

²¹ Rachel Donald “Quality Vital to Food Chain” *New Zealand Farmer* (New Zealand, 12 October 1994) at 21.

²² This included large bodies such as Federated Farmers but also a range of smaller more industry specific groups and brands, for example; New Zealand Venison (See “Deer Conference Snippets” *New Zealand Farmer* (New Zealand, 10 August 1994) at 12 and “Four Wool Selling Options” *New Zealand Farmer* (New Zealand, 28 September 1995) at 15

²³ Alistair Polson “Anticipate and Set Your Own Standard” *New Zealand Farmer* (New Zealand, 7 March 1996) at 29.

²⁴ Loveridge, above n17 at 326.

²⁵ Peter Sankoff “Five Years of the “New” Animal Welfare Regime: Lessons Learned From the New Zealand Experience with Farm Animals and Animal Welfare Legislation” (2005) 11 *Animal L* 7 at 12.

had to be met before products would be stocked.²⁶ New Zealand's codes were entirely voluntary, and exporters struggled to meet the new criteria being set; an independent demonstration of quality had become necessary. Industry groups now sought a legal framework to attach their codes to, in order to elevate the status of their codes and provide more robust welfare assurance.²⁷ The introduction of a new legal framework was not seen as a threat since industry did not expect it to alter the current balance; indeed, the government agreed that industry should continue to direct code content and development and monitor their own compliance through farm quality assurance programmes.²⁸

In addition to these pressures, the 1994 GATT trade agreement had served to open up markets, but non-tariff trade barriers remained, due to increasing consumer preference for products with high environmental and animal welfare standards.²⁹ Animal welfare had also become a consumer preference issue.³⁰ New Zealand's pastoral agriculture sector was ideally placed to take advantage of the marketing opportunities that a new more modern animal welfare framework presented. With free roaming, grass-fed beef and lamb the norm in New Zealand, this provided a point of difference and opportunity for the market to differentiate itself, in comparison to Europe where animals had to be confined and overwintered in sheds, or other countries where intensive feedlot systems existed.³¹ Higher standards could thus be set, and codes would help ensure market access: the new legislation was also a branding exercise. Federated Farmers was at the forefront of those calling for a new framework, and with a seat on AWAC they were ideally placed to play a core policy role going forwards.

Free Market Forces and Agricultural Intensification

While pastoral farming practices stood up relatively well by world standards and a branding based around clean, green and animal-friendly products was in the interests of those industries, there was an inherent tension within the agricultural sector between the needs of those farmers and more intensive pork and poultry producers.

²⁶ See Lyn McKinnon "Farm Survival Rests on Total Quality" *Southerner* (New Zealand, 2 February 1997) at 1, and Peter Owens "Time for Farmers to Clean Up Production" *Southerner* (New Zealand, 1 February 1997) at 2.

²⁷ Comments by MAF Director of Animal Welfare David Bayvel in Marie Taylor "Tail Debate Rages On" *New Zealand Farmer* (New Zealand, 12 April 1995) at 10.

²⁸ At 10.

²⁹ "Risk Seen of More Failures" *New Zealand Farmer* (New Zealand, 9 November 1994) at 13.

³⁰ Above n 27, at 10.

³¹ Duncan McLean "Quality target for Core 200" *New Zealand Farmer* (New Zealand, 17 August 1994) at 3.

With an abundance of land, New Zealand had been a relatively late adopter of factory farming practices. When the APA was introduced in 1960, the pork and poultry industries were starting to intensify. The first mention of battery cages in the Hansard does not occur until 1954 when the Minister of Agriculture was asked to investigate the emerging practice and reported back that their use remained very limited.³² By the early 1980s factory farming practices were much more widespread, however the industry remained relatively diverse and a large number of smaller, less intensive family-owned farms still existed. The changes initiated by the fourth Labour government in 1984 would transform these industries and squeeze out those smaller producers.

While the extensive pastoral farming sector was orientated heavily towards export markets, the pork and poultry sectors were geared to meet local requirements and exported very little.³³ As agricultural subsidies were removed, and trade barriers were lifted, overseas imports came into the domestic market, drastically increasing competition here. The pork industry was hit hardest, as cheap imported pork products came into the country claiming a growing share in the market.³⁴ This increased pressure on the industry to lower costs by reducing inputs and increasing outputs – to intensify. In 1996, there were 4,700 farms with pigs, by 2000 that figure had dropped to 900, but only 470 of those were still *commercial* pig farming ventures and formally registered with the Pork Industry Board.³⁵ Over half of the breeding sows were now concentrated in the 100 largest farms.³⁶ Government expectations were that the number of farms would continue to reduce as the industry moved towards fewer pig producers with larger herds, this was viewed positively, as a consequence of the greater efficiency that had resulted from neoliberal reforms.³⁷

Similarly, between 1988 and 1998, the number of poultry farms had also dropped from 450 to 145 as large corporate players, such as Mainland Poultry, entered the market and smaller ventures closed.³⁸ These large companies were at a competitive advantage when securing contracts with supermarkets; not only could they supply large quantities of cheap products, but it was also practically more efficient for supermarkets to deal with several large companies rather than a multitude of smaller businesses.³⁹ By 1999, the average stocking density in the poultry

³² (25 August 1954) 305 NZPD 1373.

³³ David Mellor and Angus Bayvel “New Zealand’s Inclusive Science-based System for Setting Animal Welfare Standards” (2008) 113(4) *App. Animal Behaviour Sci.* 313 at 320 and 329.

³⁴ Farm reporter “Unity urged for Pork Producers” *The Evening Standard* (New Zealand, 7 July 1998) at 11.

³⁵ New Zealand Government “Sutton Speech to World Pork Conference” (press release, Scoop Media, 2 May 2000).

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ “Egg Group Confident” *The Press* (New Zealand, 27 August 1998) at 24.

³⁹ At 24.

meat industry was 36-38 kg bodyweight per square metre,⁴⁰ in comparison to the European standard of the time which was limited to 25kg per square metre. This equated to a difference of 20 birds per square metre in New Zealand compared to 12 in Europe.⁴¹ With a focus on the domestic market, these intensive industries had less need to develop welfare codes; indeed, the code of welfare for broiler (meat) chickens was the twenty-second code to be developed, and was only pushed through in November 1999 as the AWA itself was coming into force.⁴²

The AWAC was aware that New Zealand standards in this sector were a concern. In 1992, AWAC had convened a Caged Poultry sub-committee to monitor standards and practices in Europe closely, and acknowledged that layer hen welfare on intensive farms was ‘less than ideal’.⁴³ AWAC concern regarding the ability of battery cage systems to provide for animals’ needs was even noted in the code for layer hens.⁴⁴

Similarly, alongside housing guidelines set out within the pig code, AWAC had added a paragraph advising the industry that the confinement of pigs in sow stalls was now prohibited in some countries with which New Zealand traded and that in their view, the severe restriction of sows provided an unacceptable level of welfare.⁴⁵ In 1997 the Scientific Veterinary Committee of the Commission of European Communities had recommended against individual pens where sows could not turn around and by early 1999 the U.K. had already moved to prohibit the use of sow stalls.⁴⁶ The AWAC expected a prohibition was likely to occur here in due course.⁴⁷

It is interesting to note that despite these challenges, the Pork Industry Board was openly supportive of a new Act and saw the merit of having a legal framework to which they could attach their code.⁴⁸ They also accepted there was increasing consumer pressure domestically for a ban on sow stalls, and in August of 1999 the Board announced that they had determined to make

⁴⁰ Code of Recommendations and Minimum Standards for the Welfare of Broiler Chickens 1999 (Ministry of Agriculture and Forestry, Wellington).

⁴¹ Scientific Committee for Animal Health and Animal Welfare *The Welfare of Chickens Kept for Meat Production (Broilers)*, (European Commission Health and Consumer Protection Directorate-General, March 2000).

⁴² Above n 40.

⁴³ Animal Welfare Advisory Committee *1994 Annual Report* (Ministry of Agriculture and Forestry, April 1995) at 10.

⁴⁴ Code of Recommendations and Minimum Standards for the Welfare of Pigs 1999 (Ministry of Agriculture and Forestry, Wellington) at 6.

⁴⁵ At 16.

⁴⁶ Scientific Veterinary Committee *The Welfare of Intensively Kept Pigs. Report of the Scientific Veterinary Committee* (Commission of the European Community, Brussels, 1997) at 208.

⁴⁷ Above n 44, at 16.

⁴⁸ (10 September 1997) 563 NZPH (Animal Welfare Bill – Second Reading, Pete Hodgson).

welfare issues a priority and accelerate work to move towards alternatives.⁴⁹ Although approximately 75% of sows were housed indoors in 1999, only the very largest producers routinely used dry sow stalls: 25% of farms containing 29% of sows.⁵⁰ There remained “a diversity of non-confinement systems” and because of this the industry was still considered to be in a favourable position to address welfare concerns.⁵¹ However the industry was caught between a rock and a hard place, reform was possible but it would make them even less able to compete with cheap imported products. To this end the industry continued to lobby hard for restrictions on imported pork.⁵²

This very different context and set of pressures placed the pork and poultry industries in a significantly different position to the extensive pastoral agriculture sector, as industry groups entered the debate around the introduction of a new animal protection framework. The neoliberal reforms of the 1980s had not only left New Zealand without legally enforceable welfare standards in the farming sector, it had forced these industries to increase productivity and reduce on-farm costs in order to compete in the market. In turn this had driven industry intensification and worsened the conditions in which animals were kept. Regulatory intervention had become necessary as market-led self-regulatory frameworks were failing to respond to the public’s growing concerns over both animal welfare and environmental protection.⁵³

Responding to the ‘Animal Problem’: Animal Welfare and the Five Freedoms Model

Both Hodgson’s Bill and the government’s AWB adopted an animal welfare approach modelled on the five freedoms, an approach first developed in the U.K. The ‘five freedoms’ approach was formulated in response to issues arising from the growth and spread of intensive animal agriculture. Following the emergence and spread of factory farming practices in the U.K. throughout the 1950s animal advocates there had begun calling for an overhaul of animal protection frameworks. In 1964 Ruth Harrison published *Animal Machines*, setting out a detailed critique of intensive farming industries, and this book is now generally credited with being the catalyst for change. In 1965, the U.K.’s Minister of Agriculture, Fisheries and Food appointed a

⁴⁹ “Pork Board Considers Pig Welfare” *The Dominion* (New Zealand, 6 August 1999) at 14.

⁵⁰ N. G. Gregory and C. D. Devine “Survey of Sow Accommodation Systems Used in New Zealand New Zealand” (1999) 42(2) *J. Ag. Res.* 187 at 189.

⁵¹ At 194.

⁵² “Warning: Trade Bans Are Doomed to Fail” *Daily News* (New Zealand, 8 July 1999) at 15.

⁵³ Even proponents of industry self-regulation as a model note that intervention is required in such contexts. See Robert Baldwin, Martin Cave and Martin Lodge *Understanding Regulation: Theory, Strategy, and Practice* (2nd ed, Oxford University Press, Oxford, 2012) at 3 and also; Julia Black “Critical Reflections on Regulation” (2002) 27 *Austl. J. Leg. Phil.* 1 at 15.

committee to “examine the conditions in which livestock are kept under systems of intensive husbandry” and to advise the government on what standards ought to be set to address concerns.⁵⁴ The ‘Brambell Committee’,⁵⁵ as it became known, was comprised of a mixture of biology and veterinary specialists and agricultural advisors, and together they developed a working definition of ‘animal welfare’.⁵⁶ The goals of the welfare approach were twofold; they sought to overcome the limits of the anti-cruelty approach and move beyond simply punishing intentional ill-treatment, and to respond directly to the issues raised by the industrialisation of farming.

The Committee’s work was ground-breaking since it explicitly rejected the long-held industry narrative that productivity was evidence of the state of an animal’s welfare and that no conflict of interests existed between farmers and farm animals. In their submissions to the Committee, farming bodies had claimed that “continued productivity” should be the marker of good welfare, arguing that animal suffering invariably led to decreased productivity and reduced profits. The Committee disagreed, stating that this view was “an over-simplified and incomplete view and we reject it”.⁵⁷ Instead, the Committee asserted that welfare assessments should be based on scientific studies of animal behaviour.⁵⁸ The Brambell Committee identified five core welfare needs of animals:

1. The need to be free from thirst, hunger, and malnutrition;
2. the need for appropriate comfort and shelter;
3. the need for rapid diagnosis and treatment of illness and disease;
4. the need to be protected from fear and distress; and
5. the need to be able to display “normal patterns of behaviour”.⁵⁹

The last of these freedoms was the most controversial since it broadened the assessment of animal well-being by recognising that animals had not only physical and health-related needs, but also emotional and behavioural ones. The recognition of the need to display normal patterns of behaviour also had far-reaching implications for intensive farming industries. The Brambell

⁵⁴ Technical Committee to enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems *Report of the Technical Committee to Enquire into the Welfare of Animals Kept Under Intensive Livestock Husbandry Systems* (Ministry of Agriculture, Fisheries and Food, Great Britain, 1965) at 1.

⁵⁵ Named after the Committee’s chair Professor F. W. Rogers Brambell.

⁵⁶ At 10-11.

⁵⁷ At 11.

⁵⁸ In particular see chapter 4 of the Committee’s Report.

⁵⁹ At 16-17.

Committee stated that the “degree of confinement of an animal... necessarily frustrates most of the major activities which make up its natural behaviour” and that “(an) animal should at least have sufficient freedom of movement to be able without difficulty to turn around, groom itself, get up, lie down, stretch its limbs.”⁶⁰

As a result of these policy changes, the first animal welfare-based legislation was introduced in Britain in 1968.⁶¹ The model also heavily influenced animal welfare standards throughout Europe,⁶² and in 1976 the five freedoms were incorporated into the European Convention for the Protection of Animals Kept for Farming Purposes (the European Convention).⁶³ It was this model that was instrumental in progressing debate, and improved welfare standards throughout the European Union.

By comparison, New Zealand was a late adopter of the animal welfare model. The AWAC had recognised the five freedoms and had used them as the basis for their approach from 1991 onwards, but they were not incorporated into law or enforceable in any way.⁶⁴ The formal adoption of the animal welfare model within the government’s AWB was seen as a way to ensure New Zealand legislation was brought into line with that of key export markets. The government argued that this was necessary since animal welfare laws and traditional farming practices were attracting international attention, and the trade risks and expectations of both domestic and international consumers needed to be managed.⁶⁵ Their inclusion was not controversial; both Hodgson’s and the government’s bill had been modelled on the five freedoms.⁶⁶

As a result, clause 9 of the AWB provided that owners and persons in charge of animals “must ensure that the physical, health and behavioural needs” of animals were met, and defined those needs to include “proper and sufficient food and water”, “adequate shelter”, “the opportunity to display normal patterns of behaviour”, physical handling that “minimises the likelihood of

⁶⁰ At 13.

⁶¹ The Agriculture (Miscellaneous Provisions) Act 1968, s 2, 3 & 4.

⁶² For a discussion of the adoption of the model and reforms made as a result in Europe see David J. Wolfson “Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production” (1996) 2 *Animal L.* 123 at 140-143.

⁶³ This was amended and strengthened in 1992 with the introduction of the Protocol of Amendment to the European Convention for the Protection of Animals Kept for Farming Purposes, 35 *Off J Eur Communities*, No L 395/22 (December 31, 1992).

⁶⁴ AWAC (1997) “AWAC Animal Welfare Codes – the First Seven Years” 24(3) *Surveillance* 9.

⁶⁵ Ministry of Agriculture and Forestry, *MAF Policy Information Paper No. 27: Guide to the Animal Welfare Act 1999* (December 1999) 1.

⁶⁶ Animal Welfare Bill 1997 (43-1), cl 4.

unreasonable or unnecessary pain or distress”, and the “protection from and rapid diagnosis of significant injury or disease”. The inclusion of these provisions moved the focus away from punishing cruelty, towards establishing positive duties of care on owners and people in charge of animals.

Assessing “Physical Health and Behavioural Needs”

Although there was general agreement from all parties regarding the appropriateness of utilising the five freedoms as a basis for reform and as a conceptual guide to define animal welfare, there was significant debate over how these needs would be assessed, outlined and implemented in the legislation.

The AWB originally specified that an animal’s physical health and behavioural needs must be “met in accordance with *established experience* (emphasis added) and scientific knowledge”. This definition was lobbied for and supported by the pork and poultry industries on the basis that any new legislation should allow existing management practices to continue.⁶⁷ Industry representatives were concerned that new requirements for animals to be able to display normal patterns of behaviour would make battery cages and sow stalls illegal. They claimed that if they could not confine stock there would be major economic effects on the industries, that more time was needed to consider their options going forward, and that alternative systems were not yet available.⁶⁸ There was also precedent for the term “established experience” as it was already used in the European Convention,⁶⁹ indeed, even when the U.K. introduced new farming related regulations in 2000, these stipulated that animals’ needs be met in accordance with ‘established experience’.⁷⁰

Animal advocates, including the RNZSPCA, strongly opposed this wording, and the PPC recorded that the treatment of animals within the pork and poultry industries was highly criticised and placed under significant scrutiny. It was argued that if the provision was read to condone current practices, this would undermine the purpose of the Act. The PPC agreed,

⁶⁷ Animal Welfare Bill (No.2) 1998 (209-1) (commentary, as reported from the Primary Production Committee) at v.

⁶⁸ At v.

⁶⁹ Convention on the Protection of Animals Kept for Farming Purposes, ETS No.087 (signed 10 March 1976 entered into force 10 September 1978), art 3 and 4.

⁷⁰ See the Welfare of Farmed Animals (England) Regulations 2000 (1870) s 3(3), and regulations made under section 2 of the Agriculture (Miscellaneous Provisions) Act 1968. Note however that section 9 of the U.K.’s Animal Welfare Act 2006 now also employs the term “good practice” as do the Welfare of Farmed Animals (England) Regulations 2007 (paras 9 & 10).

finding that the pork and poultry industries' interpretation was inconsistent with the intention of the clause. The PPC reported that the behavioural needs of pigs and poultry being intensively farmed were not being fully met, and that such practices were "contrary to the obligation in the clause".⁷¹ The Committee recommended that the words "established experience" be replaced with "good practice".⁷² In discussing this change the Minister for Food and Fibre noted that;

In the course of considering submissions, the committee became aware of the number of people who assumed that the qualifier of "established practice" would sanction existing practices such as battery hens. This was not the intent. The Committee has therefore recommended that the phrase be changed to "good practice".⁷³

Select committee member and MP Jeanette Fitzsimons noted that the removal of the term "established practice" was an important step, it was intended to "make it quite clear that the fact that a practice has continued for many years in an industry is not in itself a reason that it should continue forever".⁷⁴ There was an expectation that the new framework would generate higher levels of respect for animals than had been the case in the past. This change was a significant and symbolic one, and it sent a strong message that Parliament intended to reform the law, not simply cement the status quo.

The Role and Standards of Codes of Welfare

A second core area of debate focused on the development and role of industry codes. The standards established in the AWB were designed to be general since it was envisioned that 'codes of welfare' would attach to the framework and set out the more detailed requirements. This made sense because the needs of animals varied according to their species and individual characteristics (e.g. whether animals were wild or domestic, or their age), and because the requirements on owners would also differ depending on the context and production purpose of the animal. Clause 61 of the AWB enabled codes of welfare to be drafted for specific species, for animals used for a specific purpose, for different types of animal establishments and different types of entertainment, procedures and practices. The incorporation of minimum standards

⁷¹ Animal Welfare Bill (No.2) 1998 (209-1) (commentary, as reported from the Primary Production Committee) at v.

⁷² At v.

⁷³ (16 June 1999) 578 NZPD (Animal Welfare Bill (No.2) - Consideration of Reports of Primary Production Committee, John Luxton).

⁷⁴ (16 June 1999) 578 NZPD (Animal Welfare Bill (No.2) - Consideration of Reports of Primary Production Committee, Jeanette Fitzsimons).

within codes of welfare had the advantage of enabling greater detail and guidance, ensuring that people's obligations and duties concerning animals were made very clear. It was also argued that codes had the advantage of being easily and quickly updated in response to changing practice, scientific knowledge or public attitudes.⁷⁵ Codes would provide clearer bottom lines and a more flexible, responsive system.

Responsiveness to public (e.g. consumer) opinion had become a priority, and clause 63 of the AWB required that codes of welfare be publicly notified and opened for submissions. Clause 70 further required codes to be reviewed at least every ten years. This meant that the standards would not be static, but regularly revised and updated. Issues that arose would not be left unaddressed for twenty or even thirty years at a time as they had previously been. It was a crucially important provision for animal rights advocates as it ensured that animal welfare issues were permanently on the table and subject to widespread debate and discussion. It provided what Habermas has termed, a 'channel of communication' and with more than 20 codes in existence, it meant that decision-makers would be continually reviewing and considering how animals were treated. The PPC claimed that this review process would "ensure that the range of views held within the community is taken into account when standards are being determined".⁷⁶ The framework, it was promised, would be open and responsive.

The Devil in the Detail

Where the controversy in the AWB arose was in the detail. The Bill provided that compliance with the minimum standards set out in a code of welfare would constitute a complete defence to any charges under the Act.⁷⁷ Conversely, breach of minimum standards would not be an offence in and of itself. This meant that the codes could be used as a shield for the industry, but not as a sword and that the minimum standards would not be legally binding. The PPC even highlighted that the code's operation as a defence from prosecution was "especially important for industries where current practices might not meet the requirements" of the Act.⁷⁸ This move was controversial because it demonstrated that a core purpose of the codes from the outset was to protect industry rather than animals, and that exemptions from compliance with the Act were anticipated.

⁷⁵ Above n 71 at ii.

⁷⁶ At iii.

⁷⁷ See clauses 11(3)(c), 20 and 31.

⁷⁸ Above n 71 at v.

Although the AWB allowed any person to prepare a draft code of welfare for consideration,⁷⁹ in practice it was envisioned that industries would continue to play this role. The PPC stated this provision enabled the “continuation of the current process” which had been “successful”, whereby codes are initially drafted by stakeholders or industry.⁸⁰ The intention was for the industry to continue to set the starting point for further discussion.

The primary legal check put in place over the code approval process was the requirement that all codes of welfare be developed in consultation with a new National Animal Welfare Advisory Committee (‘NAWAC’) and approved by the Minister of Agriculture. NAWAC’s role was to advise the Minister on animal welfare issues and help steer the code development process.⁸¹ All draft codes had to be sent to NAWAC, who would determine whether the code complied with the Act and check that affected persons had been consulted before the code was notified and opened for wider submissions.⁸² This means that at the point of notification NAWAC would have already determined whether a code complied with the Act, and further argument on this point would be made particularly difficult. In addition, NAWAC membership was comprised of a mixture of people from agricultural, commercial, veterinary and animal welfare fields who were responsible for determining whether codes were made in accord with both ‘good practice’ and ‘scientific knowledge.’⁸³ The line between matters of science and policy, however, was already worryingly blurred.

Within the code approval process several problematic provisions existed. Firstly, in determining whether to recommend a code be issued, NAWAC had to consider whether the proposed standards were the “minimum necessary” to ensure compliance.⁸⁴ This would operate to ensure that the bare minimum for compliance was promulgated as the standard. Secondly, in examining the codes’ content, NAWAC had to consider the submissions received and consultation undertaken, established management experience (this was altered to “good practice”), scientific knowledge, available technology, and any other matters considered relevant.⁸⁵ These considerations opened the door to wide-ranging concerns and also meant that code content would not simply be directed by the animals’ needs. Indeed, clause 65 of AWB did not expressly

⁷⁹ Animal Welfare Bill (No.2) 1998 (209-1) cl 62.

⁸⁰ Above n 71 at iii.

⁸¹ Animal Welfare Bill (No.2) 1998 (209-1) cl. 47.

⁸² Clause 63(2).

⁸³ Clause 50.

⁸⁴ Clause 65(1)(a).

⁸⁵ Clause 65(2).

refer to animals' needs at all, but to consideration of public opinion, industry perspectives, and practical considerations. Further under clause 65(3), the AWB specifically permitted NAWAC to recommend minimum standards that did not meet the obligations of the Act. In recommending a code of welfare that did not comply, NAWAC was required to consider the feasibility and practicality of a transition to new practices, religious and cultural requirements and the economic effects of transitioning from current to new practices.⁸⁶ A broad array of competing interests would challenge the primacy of animal welfare concerns and potentially weaken the standards set down in the AWB.

The power of NAWAC to recommend non-compliant codes was one of the most significant areas of debate since animal advocates felt it undermined the purposes of the Act. Alternatively, a number of industries using animals considered provisions for exemptions critical to their ongoing existence. For their part, the PPC considered that exemptions were necessary because there would be situations where it was not feasible for an industry to transition or where a transition would impose a financial hardship.⁸⁷ Debate around compliance strongly highlighted the problem of intensive agricultural practices and led to a discussion of the likely impacts of the legislation on a range of industries. It was accepted that the new requirements for animals to be able to display normal patterns of behaviour had called into question the legality of a wide range of existing practices. In particular, six areas of animal use and pre-existing codes were identified as problematic: the codes for circus animals, animals used in rodeo, exhibit animals (zoos, etc.), pigs, broiler chickens and layer hens.⁸⁸

It was MP Jeanette Fitzsimons that led the debate on behalf of animals on this issue in Committee as well as in the House. Fitzsimons called attention to the plight of pigs who lived their lives in sow crates where they were unable even to turn around, had no interaction with other pigs and would never see daylight or fresh air.⁸⁹ She spoke of battery hens who were in a similar predicament and of her frustration and distress that the PPC did not feel they were able to do anything to improve this situation, stating that the issue had been placed in the "too-hard basket".⁹⁰ Fitzsimons was a strong voice for animals in the House, 1999 was an election year, and although she sat in her capacity as an Alliance Party MP, the Green Party of which she was

⁸⁶ Clause 65(4).

⁸⁷ Above n 71 at iii.

⁸⁸ (16 June 1999) 578 NZPD (Animal Welfare Bill (No.2) - Consideration of Reports of Primary Production Committee, John Luxton).

⁸⁹ Ibid, per Jeanette Fitzsimons.

⁹⁰ Ibid per Jeanette Fitzsimons.

co-leader, was standing for election in their own right that year. The Green Party was already forging close ties with the ARM and the Greens had pledged to be the government's "animal rights conscience" and had even appointed a formal animal welfare spokesperson.⁹¹ The Green Party considered that factory-farming industries treated animals like machines and claimed that they were attempting to flout the legal standards being set.⁹²

For their part, several animal-based industries were concerned that the introduction of the new Act would put them at immediate risk of prosecution, and that until they had a code of welfare approved, the standards set in the Act would apply and they might be found in breach.⁹³ To allay industry's concerns the PPC recommended the bill be amended to enable the codes of welfare for the six potentially non-compliant industries to be "deemed codes" under the Act for a transitional period of three years.⁹⁴ This change was accepted and as a result the codes of welfare for rodeo, circuses, zoos, pigs, broiler chickens, and layer hens were rolled, over despite the questions regarding their compliance with the new law.⁹⁵

The hope was that during the three-year transitional period these industries would make progress towards reform and if they did not achieve compliance with the AWA, then at least they might have planned out a path towards doing so. This bought government and industry more time to deal with the complexities raised in those sectors, deferring the need for an immediate decision to be made. This also served to prioritise the code development process in these sectors, slating them to be amongst the first codes that would come up for consideration.

The industry did not get it all their way however. The PPC agreed greater clarity was needed to ensure clause 65 was not "routinely used as an opt-out clause to justify the continuation of current practices" that did not meet the legal obligations under the Act.⁹⁶ The PPC said they expected the clause would be "used rarely" and primarily concerning cases where animals were unable to display normal patterns of behaviour. They recommended the bill be changed "to make it clear that this power should be used only in exceptional circumstances" and the AWB was amended accordingly.⁹⁷ This amendment gave the ARM hope that non-complying codes would

⁹¹ Green Party of Aotearoa New Zealand "Greens to Be Government's Animal Rights Conscience (press release, Scoop Media, 18 November 1999).

⁹² Ibid.

⁹³ Above n 71 at v.

⁹⁴ Above n 71 at v.

⁹⁵ See section 191 and schedule 4 of the Animal Welfare Act 1999.

⁹⁶ Above n 71 at xiii.

⁹⁷ Above n 71, at xiii.

seldom be approved, and that when that power was used active consideration would be given as to how to transition each industry towards compliance. It was hoped that the AWA would trigger reform of intensive animal using industries or at least represent “another step on that path”.⁹⁸ Indeed, the ‘five freedoms’ model adopted in the AWA had been developed precisely in order to address concerns raised by intensive farming practices, so theoretically at least, it represented a significant change in policy and approach from what had gone before.

Law as Constituted

The debate concerning the AWB demonstrates that although some interest groups wield greater power regarding setting the priorities and starting point for debate, once discussion is opened, a large number of competing groups enter and affect the outcome. Animal advocates had secured several core changes in the bill, with each focused on ensuring the new AWA would not simply cement the status quo. Codes would be developed in line with good practice, not established practice, and exemptions would only occur in exceptional circumstances. These represented critical changes. It must be conceded however, that these changes had also become palatable to the economically powerful and export-led pastoral agricultural sector, so they supported these changes and for branding purposes also sought a robust standard that could be leveraged to assure consumers that high legal standards of animal welfare existed in New Zealand. Both this sector and government wanted a modern framework that they could claim was progressive and world-leading.

The adoption of the five freedoms based animal welfare model into the animal protection framework is an example of Hunt’s ‘incorporative hegemony’ at work. The pastoral sector sought to incorporate welfare concerns in order to ensure its dominance continued, since recognising and installing these subordinate interests also ensured their ongoing legitimacy. This reduced the gap and conflict between the ARM and this sector. However, it is also clear that the installation of the animal welfare approach was by its nature agonistic to industry. If implemented across the board the animal welfare model would have required systemic change to the way that many industries treated animals. There was no desire on the part of either industry or government for such wholesale reform, so that despite the change in approach, little practical change was contemplated.

⁹⁸ (10 September 1997) 563 NZPD (Animal Welfare Bill - Second Reading, Jeanette Fitzsimons).

Despite the fundamental changes made under the AWA no comprehensive review of existing standards and on farm-practices and conditions was undertaken in the wake of the new legislation and all but six of the twenty-one pre-existing codes of welfare were simply rolled over without any review or reform.⁹⁹ The pre-existing framework for regulating animal use for research, testing and teaching was formalised and put under a stand alone section of the Act, insulating it from the new provisions.¹⁰⁰ The general exemption in relation to hunting was also continued.¹⁰¹ It is informative that when consideration was given to the formulation of codes of conduct in relation to hunting or pest management it was accepted that any such codes “would have to allow for a different level – a second standard” to ensure that existing practices, such as hunting wild pigs with dogs remained legal.¹⁰² In short, the focus remained on accommodating existing practices and supporting existing, industry crafted, codes and standards.

It was accepted that “animal welfare and animal rights thinking” had begun to have an impact on the agricultural sector and that they presented a “major change management challenge”.¹⁰³ This led to concern to ensure that measures were put in place to prevent the new framework from being captured by special interest groups,¹⁰⁴ and a number of structural and procedural limitations were instituted. Animal using industries would continue to draft codes, economic and practical considerations would remain central in the code development process, and a mechanism for providing exemptions from compliance had been put in place. The NAWAC would wield significant power throughout the code approval process in their role as gate-keeper, and although the deferral of core decisions to the advisory body would serve to depoliticise determinations, the composition of the Committee and its policy role means that its composition and membership is inherently political. As will be seen in later chapters that examine the balance that came to be struck under the AWA, in practice, industry and animal production specialists would play a key role within that body and this itself became a significant concern for the ARM.

⁹⁹ Arnja Dale “Animal Welfare Codes and Regulations – The Devil in Disguise” in Peter Sankoff and Steven White (eds) *Animal Law in Australasia* (Federation Press, Sydney, 2009) at 175.

¹⁰⁰ See Part 6 of the Animal Welfare Act 1999. Section 81 provides that none of the protections in Parts 1 or 2 of the Act will prevent animal use for research, testing or teaching purposes.

¹⁰¹ Under s 175 (now repealed). The exemption for hunting made it practically impossible for cruelty charges to be laid in relation to wild animals even where the cruelty was intentional and extreme. For a good discussion of the issues in this area see Peter Sankoff “Wildlife and the Animal Welfare Act 1999: Can “Cruel” Acts of Hunting ever be Prosecuted?” 15 N.Z. J. Env'tl. L. 213. The general exemption was finally repealed by s 64 of the Animal Welfare Amendment Act (No. 2) 2015 No 49) and replaced with s 30A. Section 30A make it clear that it is an offence to wilfully or recklessly ill-treat a wild animal. However a recognised defence exists if a person can establish that their conduct is “part of a generally accepted practice”. See s 30A(3).

¹⁰² (16 June 1999) 578 NZPD (Animal Welfare Bill (No.2) - Consideration of Reports of Primary Production Committee, Pete Hodgson).

¹⁰³ A. C. D. Bayvel “Animal Welfare – A Threat or an Opportunity for Research, Farming and Trade?” 53 *Proceedings of the New Zealand Society for Animal Production* 1993 at 223.

¹⁰⁴ (10 September 1997) 563 NZPD (Animal Welfare Bill – Second Reading, Eric Roy).

Conflicting Discourse and World Views

The debates on the AWB highlight the vast gap between the discourse of animal advocates represented in the House by Fitzsimons, and the discourse of the other political parties. Fitzsimons talked about society's "peculiar ambivalence towards animals", of the way they were treated as "factors of commercial production" and how too often it is forgotten that animals are sentient creatures.¹⁰⁵ She argued for care and compassion to be extended to "the living world... to individual animals, to species of animals, and whole ecosystems".¹⁰⁶ Like the ARM's discourse, the Green Party's position challenged the primacy of anthropocentric and economic concerns. It was a fellow alternate discourse, and by its nature often counter-hegemonic. For Fitzsimons, the AWB raised fundamental questions about humanity's relationship to animals, and her discourse challenged the rationality of the current approach by highlighting the inconsistent treatment of animals under existing laws.¹⁰⁷ She contrasted for example, the extreme care legally outlined for companion animals in contrast to animals on factory farms, and lamented that change came not for the sake of animals, but from trade concerns. She argued that at least it was positive that European perceptions of New Zealand practices help to change and drive change, "if we are not prepared to do it ourselves for the right reasons".¹⁰⁸

While the animal rights perspective was represented in the various submissions made to the PPC on the AWB, it is clear that the presence of Fitzsimons on the Committee and in the House ensured those perspectives were not flatly dismissed, at least not without some debate and active resistance. Unsurprisingly Fitzsimons' position on issues such as rodeo, animal research, live exports and factory farming were controversial and engendered a response from other MPs, who suggested she was too closely aligned with animal rights thinking.¹⁰⁹ Indeed, some stated that it was views such as hers that represented one of the reasons that "bills like this do go to select committees".¹¹⁰ Others underlined the need for "sensible legislation" that was "not captured by

¹⁰⁵ (10 September 1997) 563 NZPD (Animal Welfare Bill - Second Reading, Jeanette Fitzsimons).

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ (10 September 1997) 563 NZPD (Animal Welfare Bill - Second Reading, Jim Sutton).

¹¹⁰ Ibid.

emotiveness”¹¹¹ a “practical approach” based on “good, sound, solid commercial reasons”¹¹² and which looked after primary producers and exporters.¹¹³

The Exclusion of Rights Talk

Examining the contexts in which discussion of animal rights arose in the debate shows that only two MPs employed rights talk in a positive light: Fitzsimons, and National MP John Banks. Fitzsimons referenced the gradually widening “circle of concern and compassion” that once only recognised property-owning men of certain races, and how rights had been extended in turn to other men, women, and children that had previously been chattels.¹¹⁴ She argued that as humans evolved, this care and compassion should be extended further to other parts of the living world. John Banks called for animals to be treated with “respect and dignity as creatures of God” and said that he judged countries by the provision they made “for animal welfare and animal rights”. Banks claimed that it was necessary to provide for the “welfare and the rights of those creatures that cannot give themselves welfare and rights”. He recognised that most did not share his views, but that he was “committed to animal rights” and looked forward to the debate.¹¹⁵ Banks also spoke passionately about historical figures such as William Wilberforce who had both fought for the abolition of slavery and introduced some of the first animal cruelty legislation.¹¹⁶

Most, however, expressly rejected animal rights ideology. For most MPs, animal rights was not a progressive idea, but a threatening one, and any issues that were seen to progress an animal rights’ perspective were firmly resisted due to concern about the slippery slope to a more radical approach. It was repeatedly noted that the bill adopted an animal welfare and not animal rights approach, and that rights and welfare did not comfortably together.¹¹⁷ The PPC considered that the recognition of any rights to animals was to be avoided, rights-based measures were inappropriate and would change the intent and the approach of the AWB.¹¹⁸

¹¹¹ (10 September 1997) 563 NZPD (Animal Welfare Bill - Second Reading, Eric Roy).

¹¹² (10 September 1997) 563 NZPD (Animal Welfare Bill - Second Reading, Jim Sutton).

¹¹³ (10 September 1997) 563 NZPD (Animal Welfare Bill - Second Reading, Doug Wollerton).

¹¹⁴ (10 September 1997) 563 NZPD (Animal Welfare Bill - Second Reading, Jeanette Fitzsimons).

¹¹⁵ (16 June 1999) 578 NZPD (Animal Welfare Bill (No. 2) - Consideration of Reports of Primary Production Committee, John Banks).

¹¹⁶ (10 September 1997) 563 NZPD (Animal Welfare Bill – Second Reading, John Banks).

¹¹⁷ (16 June 1999) 578 NZPD (Animal Welfare Bill (No.2 - Consideration of Reports of Primary Production Committee, Pete Hodgson).

¹¹⁸ Animal Welfare Bill (No.2) 1998 (209-2) (commentary, as reported from the Primary Production Committee) at xxi.

This restriction limited the debate on a range of issues. For example some submitters had argued killing an animal for research or teaching purposes (such as dissection) should require ethical approval in the same way that live animal use did. The PPC considered that so long as animals were killed humanely welfare concerns had been addressed and further requirements “would introduce an animal rights dimension”.¹¹⁹ The PPC argued that the welfare approach did not consider taking an animals life a harm and they noted by way of example that animals were routinely killed for food or sport; enforcing restrictions for one industry but not others would produce inconsistencies.¹²⁰ Some submissions called for greater protections and rights in relation to great apes, but the PPC explicitly rejected the employment of ‘rights’ terminology in relation to great apes on the basis that it contradicted the welfare approach.¹²¹

One of the most hotly debated issues that took place concerned whether or not tail-docking of dogs for cosmetic purposes should be prohibited. Hodgson’s Bill had expressly banned tail docking of dogs and his bill had the support of the agricultural, veterinary and research sectors, the RNZSPCA, and even the New Zealand Kennel Club.¹²² The government’s AWB had not included a prohibition as it was viewed as too controversial. To retain the prohibition, Hodgson had submitted an SOP to amend the AWB. What rendered the issue so fraught was the fact that it was accepted that when carried out under anaesthetic by a veterinarian the procedure was not painful, and therefore it was argued no animal welfare issue arose. The argument for prohibition came too close to asserting that a dog had ‘a right to retain his tail’ and forced direct discussion on whether human aesthetic preference for a breed to be docked should trump the dogs’ interest in keeping his or her tail.

Similarly, the emotional and behavioural impact of tail-docking on dogs was also discussed. It was argued that tail wagging was an expression of joy and this led to debate about whether its removal adversely affected their ability to express themselves.¹²³ In this way, the debate skirted close to arguments around bodily integrity and freedom of expression in relation to animals, subjects beyond the scope of the Act, yet because the debate centred around dogs there was also some sympathy for a ban in the House. Those arguing in support of a ban opposed tail-docking for its behavioural impact which hindered a dogs’ ability to interact and communicate with other

¹¹⁹ At iii.

¹²⁰ At iii.

¹²¹ At xxi.

¹²² (10 September 1997) 563 NZPD (Animal Welfare Bill – Second Reading, Doug Wollerton).

¹²³ (16 June 1999) 578 NZPD (Animal Welfare Bill (No.2 - Consideration of Reports of Primary Production Committee, Eric Roy).

animals and its owners. Those in favour of the ban also noted that veterinary opinion was opposed the practice.¹²⁴ One MP compared the practice to circumcision, unnecessary but retained at one time for merely being fashionable,¹²⁵ another called tail docking “barbaric”.¹²⁶ Some, like Labour MP Jim Sutton, claimed it was “an ethical issue” and felt it was wrong but could not articulate his reasoning other than his feeling that was that it was “not right” to cut off a dogs tail just because “we fancy the way they look”.¹²⁷

Those arguing against a ban on tail-docking dogs were concerned that there was little difference between docking a dog’s tail and docking a lamb’s tail and accused those seeking a ban of being influenced more by emotion than rationale.¹²⁸ Others argued that the ‘philosophical’ position of MPs should not override the wishes of those with a stake in the outcome: namely, dog breeders and owners.¹²⁹ Because the matter had become such a significant point of contention, the issue was made a conscience vote,¹³⁰ and a prohibition was eventually voted down.

The discussion on rights that took place demonstrates the restrictions regarding the debate. Rights talk was not viewed as acceptable in relation to animals and was itself a barrier to reform, stalling progress on issues such as the tail docking of dogs or the regulation of dissection, for fear of the ‘slippery slope’.

The AWA was passed into law on 14 October 1999 and would set the terms of debate from this point forward.

¹²⁴ (16 June 1999) 578 NZPD (Animal Welfare Bill (No.2 - Consideration of Reports of Primary Production Committee, Jeanette Fitzsimons).

¹²⁵ Ibid, per Jill Pettis.

¹²⁶ Ibid, per John Banks.

¹²⁷ Ibid, per Jim Sutton.

¹²⁸ Ibid, per Murray McLean.

¹²⁹ Ibid, per Gavan Herlihy.

¹³⁰ Ibid, per Robyn McDonald.

**Contesting the Legal Standards in Codes of Welfare –
The Players, the Process and the Science**

When the AWA was introduced in 1999, the ARM had cause to hope that greater protection for animals would be achieved. The government called the Act groundbreaking and said that it sent a strong statement that animals had “a right to expect proper and sufficient care” and that the country now had a modern, balanced and comprehensive animal protection framework in place.¹ The ethical framework adopted placed duties of care on owners and persons in charge of animals, requiring them to ensure that their “physical, health and behavioural needs” were met in accordance with “good practice” and “scientific knowledge”.² Modelled on the ‘five freedoms’, the Act required that animals be provided with proper and sufficient food and water, adequate shelter, appropriate handling, protection from and diagnosis of injury and disease, and the opportunity to display normal patterns of behaviour.³ The Minister of Food and Fibre claimed that the Act represented “a major philosophical shift” that demonstrated New Zealand’s “strong sense of ethical commitment” to animals and it would enhance the country’s “animal welfare reputation”.⁴ Federated Farmers similarly hailed the passage of the AWA as “the culmination of years of lobbying”, and said that they were “proud to have been a part of developing such forward-looking legislation” that would be recognised by trading partners and “ensure continuous market access”.⁵ In short it was framed as a win-win, for animals and for the agricultural sector.

As discussed in the previous chapter however, the way that the Act proposed to implement these new requirements was far more controversial since it was modelled on the pre-existing code based regime that had been voluntarily adopted by industry groups in order to provide welfare assurance to the market. In practice, the detail of what the Act required in terms of minimum standards would be set out within “Codes of Welfare”,⁶ and although in theory anyone could

¹ Ministry of Agriculture and Forestry, *MAF Policy Information Paper No. 27: Guide to the Animal Welfare Act 1999* (December 1999) at 2.

² Section 10.

³ See section 4, and for a discussion of the new approach above n 1 at 3.

⁴ New Zealand Government “Animal Welfare Act Heralds New Era” (press release, Scoop Media, 7 October 1999).

⁵ Federated Farmers “New Animal Welfare Bill Step Forward for NZ” (press release, Scoop Media, 7 October 1999).

⁶ The role and process for developing Codes of Welfare is set out under Part 5 of the AWA.

draft a code⁷ it was envisioned that industries would continue to play this role and that they would work collaboratively with the Ministry of Agriculture to set standards. As previously noted, part of the rationale behind the need for a new Act, perhaps even the most significant rationale, was that it would provide a framework for industry codes to attach to, elevating their status and legitimacy. Although a comprehensive animal welfare framework had been put in place, that framework was still deeply infused with neo-liberal ideology. This was reflected in the new provisions that guided the code development process. The neo-liberal regulatory state was still alive and well, and systemic bias remained. This chapter explores how the framework under the AWA operated in practice and the way in which these systemic biases manifested within the code development process.

In order to engage under the AWA, animal advocates had to employ welfare-based arguments and leverage the new standards in the Act on behalf of animals to secure reform. The objectives of the ARM were essentially focused on ensuring that the legislative changes made resulted in practical improvements for animals, and to this end they actively engaged in the code development process. This chapter examines the barriers that existed to this engagement and the movement's law reform project under the Act.

Codes of Welfare and the Balance Struck

Lawmaking is generally the preserve of Parliament, or at least, in relation to delegated legislation, of the Executive. In allowing private actors to initiate regulation under the AWA, significant legislative oversight was surrendered. Tertiary legislation, such as industry-drafted codes, became very common in the 1980s and 1990s as the state retreated and allowed business to play a core policy and enforcement role.⁸ From the outset, this approach fostered the notion that animal-using industries were the legitimate decision-making bodies and served to elevate the expectations of industry.

A National Animal Welfare Advisory Committee ('NAWAC') was established to oversee the code development process and act as a gate-keeper in this regard.⁹ NAWAC is a quasi-independent body. Members are appointed by the Minister for Agriculture and Forestry

⁷ Section 70 states that the Minister, NAWAC or "any other person may prepare a draft code of welfare".

⁸ John Burrows "Legislation: Primary, Secondary and Tertiary" (2011) 42 VUWLR 65 at 72.

⁹ NAWAC was established under Part 4 of the AWA see sections 56 -61.

(“MAF”)¹⁰ and include industry stakeholders and animal production scientists, laypersons, animal welfare advocates and veterinary specialists.¹¹ NAWAC provides advice on animal welfare matters and makes recommendations to the Minister on code content and approval.¹² The code development process under the AWA requires draft codes to be sent to NAWAC for consideration.¹³ If NAWAC then determines that the code complies with the purposes of the Act, is clearly drafted, and affected persons have been consulted, the code is notified and opened to public submissions.¹⁴ For the ARM, this process means that NAWAC has already made a preliminary determination as to a codes’ appropriateness ahead of the public consultation process, and that industry-drafted codes are the de-facto starting point for discussion. The RNZSPCA’s chief science advisor Arnja Dale has argued that those entering the broader consultation process start by facing a code that “contains everything the industry wanted” and begin an uphill battle attempting simply “to stop the worst of the practices”.¹⁵

Proponents of the code framework and development process, however, argue that the adoption of a more collegial model of regulation ensures “mutually respectful interactions”, avoids “entrenched positions”, facilitates code acceptance and secures industry cooperation in implementing the standards set.¹⁶ The government characterises the framework as providing an inclusive and collaborative approach and claims that the participation of key stakeholders fosters industry “ownership” and “buy-in”.¹⁷

The process for code development under the AWA bears a striking similarity to U.S.-style negotiated rule-making frameworks. In negotiated rule-making, a negotiation takes place *before* an agency issues a proposed regulation, and the negotiation is guided by a neutral facilitator, much like NAWAC in the current context. There is significant debate as to the effectiveness of ‘regulatory negotiation’. Some commentators argue that it produces better more informed rules, saves time, improves compliance and reduces the risk of litigation, and others contend that it

¹⁰ Now known as the Ministry for Primary Industries.

¹¹ Section 58 of the Animal Welfare Act 1999 sets out the membership criteria for NAWAC.

¹² Section 56 – 58.

¹³ Section 70(2).

¹⁴ See s 71(1). If NAWAC decides not to proceed with a draft code presented to them they must notify the Minister of that decision and give the code drafter their reasons in writing (s 71(2))

¹⁵ Arnja Dale “Animal Welfare Codes and Regulations – The Devil in Disguise” Peter Sankoff and Steven White (eds) *Animal Law in Australasia* (Federation Press, Sydney, 2009) at 184.

¹⁶ David Mellor and Angus Bayvel “New Zealand’s Inclusive Science-based System for Setting Animal Welfare Standards” (2008) 113(4) *App. Animal Behaviour Sci.* 313 at 319.

¹⁷ Above n 1, at 12.

cedes rule-making to explicit interest group bargaining, is inherently undemocratic, frequently resource-intensive, generates litigation and produces low baseline standards.¹⁸

In the previous chapter it was noted that the animal welfare model was specifically developed in order to provide a check in relation to factory farming: to ensure intensive animal agriculture addressed its treatment of animals and that the *behavioural needs* of animals, in addition to their physical and health needs, were met. The goal was to ensure that welfare assessments were based on more than productivity and health status, and that animals' social and emotional needs were also recognised and able to drive reform. The government identified six industries at potential risk of prosecution for non-compliance with the new provisions; amongst these were the core 'factory farming' industries: the layer hen, broiler chicken and pig farming industries.

Under the Act, compliance with a code of welfare constitutes a defence to any charges.¹⁹ In order to protect these industries while standards were being reviewed and updated, pre-existing industry codes were deemed codes of welfare²⁰ for a period of three years. This allowed lower standards to continue in these areas on a temporary basis until the sector was brought in line with the new requirements. These codes would be amongst the first notified and opened to public submissions, and the code development process in relation to them provided an ideal testing ground for examining how effective the new regime would be in terms of delivering both improved welfare standards and a more inclusive and responsive process. The ARM invested heavily in the code review process.

The Players: Movement and Industry Expectations of the Framework

There is no question that the ARM was hopeful about the possibility of reform under the AWA. The Act's explicit recognition that animals had social and behavioural needs,²¹ the assurance under s 73(3) that exemptions from compliance would only be permitted in "exceptional circumstances" and provision for an open submissions process to ensure responsiveness to public opinion, all served to raise movement expectations. For the ARM, the most potentially

¹⁸ The two main positions in relation to the debate over negotiated rule-making are represented by Philip Harter and Cary Coglianese. See Philip Harter "Assessing the Assessors: The Actual Performance of Negotiated Rule-making" (2000) 9 NYU Env. L. J. 32 at 52, and Cary Coglianese "Assessing the Advocacy of Negotiated Rule-making: A Response to Philip Harter" (2001) 9(2) N.Y.U. Env'tl. L. J. 386.

¹⁹ Section 13(2)(c).

²⁰ Section 191.

²¹ Section 10 places an obligation on owners and persons in charge of animals to provide for their "physical, health and behavioural needs". The Act acknowledges that these needs are species specific and that they include the ability to "display normal patterns of behaviour" (section 4).

transformative change lay in the Act's requirement that animals be provided with an "opportunity to display normal patterns of behaviour".²² It appeared self-evident to advocates that animals confined indoors their whole lives inside small cages on factory farms, were deprived of an opportunity to behave naturally. Arguments for hens to have nesting material, perches, the ability to forage, to dust-bathe, now appeared to have a clear legal foothold. Similar objections could also be raised where pigs were kept on intensive farms, since sow stalls and farrowing crates restricted pigs, socially isolating the animals and confining them in a space so small they were unable to turn around.

The most immediate impact of the new legislation was that it mobilised the ARM. The law reform project initiated by the AWA spurred the establishment of new and more specialised campaigning groups: the 'Campaign Against Factory Farming' (CAFF) was formed as an issue specific lobby group, and the 'Animal Rights Legal Advocacy Network' (ARLAN), a national network of lawyers and law students, was established to focus on law reform and would play a core role in contesting code standards.²³ In addition, the code process prompted the formation of a close alliance between SAFE, the Green Party, and the RNZSPCA who launched a joint factory farming campaign aimed at raising awareness regarding animal welfare concerns on intensive farms and encouraging the public to make submissions on the draft codes as each was reviewed by NAWAC.²⁴ The ARM was not simply mobilised by the code review process, it was united and focused on it.²⁵

At the same time animal advocates were realistic; they anticipated strong industry resistance to reform. The ARM understood that the legislation was at least in part an industry initiative and a branding exercise and were cognisant of the fact that transitional provisions had already been

²² See Animal Welfare Act 1999 s4 and 10.

²³ Public submissions on the Animal Welfare Bill were heard in November of 1998 and the Campaign Against Factory Farming (CAFF) was launched the following month. CAFF was a joint initiative of the RNZSPCA, SAFE and Wellington Animal Action and was based in Wellington in order to establish a permanent lobbying presence in the capital and coordinate a response to the upcoming submissions process as the Codes of Welfare for intensive farming industries were reviewed. (See 'Sows That' 9 Dec 1998 *The Dominion* and 'Parliament to Review Animal Welfare Codes' (2000) *Action For Animals* 1: 2). I founded the Animal Rights Legal Advocacy Network (ARLAN) in 2001 while a law student at the University of Auckland's Faculty of Law. ARLAN was designed to mobilise the legal community on animal rights issues and provide a legal response to the code review process.

²⁴ See "SPCA Targets Code in Fight over Sow Crates" *Daily News* (New Zealand, 18 October 2001) at 18, and Green Party of Aotearoa New Zealand "Grey Lynn Public Meeting on Factory Farming" (press release, Scoop Media, 22 November 2001).

²⁵ The value of the code review and submissions process under the Animal Welfare Act has been discussed in detail by Peter Sankoff who argues that the 'channel of communication' it provides mobilises and focuses animal advocates, and ensures animal welfare issues remain on the legislative agenda. 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 L.* 281.

made for the intensive farming sector. Indeed, an RNZSPCA spokesperson warned that the Act had given standing to industry codes and that the new regime might “not necessarily enhance animal welfare”.²⁶

Objectively considered, the factory farming campaigns launched by the ARM at this time were incredibly successful. Over 1,500 submissions were received when the code for broiler chickens was notified,²⁷ 64,000 submissions were made in response to the pig code²⁸ and more than 100,000 in relation to the layer hen code.²⁹ The RNZSPCA commissioned Colmar-Brunton to conduct public opinion polls and these showed that 79% of New Zealanders opposed battery hen production,³⁰ and 87% favoured a ban on sow stalls.³¹ The public education initiatives had done their work. These polls and the sheer number of public submissions on the codes demonstrate the widespread public support for reform and sent a clear message from the public to NAWAC, the government and to industry.

Industry, however, also had certain expectations. From the outset, the pork and poultry industries were openly combative. The Pork Industry Board (Pork Board) stated that they would fight to retain sow crates and even asserted that dry sow stalls reduced stress to the animals.³² Farmers defended the use of individual crates claiming that the system meant “pigs got more individual attention” and that it was “not a bad system” - in fact it kept the pigs warm and well-fed.³³ The Egg Producers Federation (EPF) announced in the media that they were “unlikely to ever switch production from caged eggs” and called for an additional five years deference of any decision on the basis that there was insufficient scientific evidence that hen welfare was better protected in non-cage systems.³⁴ While animal advocates sought to leverage law’s promise that animals must be able to display normal patterns of behaviour, these industries sought to leverage the s 10 requirement that those needs be met in accordance with “good practice” and “scientific

²⁶ Patrick O’Meara “Welfare Bill Won’t Stop Animal Abuse” *The Dominion* (New Zealand, 12 October 1999) at 12.

²⁷ New Zealand Government “Code of Practice for Broiler Chickens Published” (press release, Scoop Media, 27 June 2003).

²⁸ “64,000 Submissions Lift Hopes of Sow Stall Ban” *Southland Times* (New Zealand, 9 February 2002) at 26.

²⁹ See Iane Bishop “Consumers Willing to Pay More” *Southland Times* (New Zealand, 31 May 2003) and Michael Morris “The Ethics and Politics of the Cages Layer Hen Debate in New Zealand” (2006) 19 *J. Agric. Environ. Ethics* 495 at 504.

³⁰ RNZSPCA “Higher Egg Prices Preferred to Battery Cages” (press release, Scoop Media, 20 May 2002).

³¹ RNZSPCA “Sow Stall Ban in Sight” (press release, Scoop Media, 8 February 2002).

³² “Pigs: Farmers Will Fight to Retain Crates” *Rural News* (New Zealand, 26 July 2001).

³³ “Charges of Cruelty In Industry” *The Press* (New Zealand, 22 June 2000).

³⁴ “Egg Layers Unlikely to Switch From Free Range” Radio New Zealand Newswire (New Zealand, 18 July 2001, 12:33).

knowledge”. It became clear that the industries intended to defend existing practices on both these basis.

A range of statutory and structural constraints bolstered the pork and poultry sectors’ preference for intensive farming practices and operated to ensure resistance to reform. It is important to note that all three main industry lobby groups, the Pork Board, EPF and the Poultry Industry Association of New Zealand (PIANZ) were all dominated by large industrial-scale producers. Morris has described the broiler industry as an “oligopoly”, since 98% of the market is controlled by three vertically integrated companies, making it a particularly powerful, and united, lobby group.³⁵

The Pork Board operates under the Pork Industry Board Act 1997, and it is statutorily bound to work in the interests of pig farmers to obtain “the best possible net ongoing returns for New Zealand pigs, pork products and co-products” and ensure the “best possible net ongoing contribution to the New Zealand economy.”³⁶ The body’s core objects require them to prioritise financial concerns. The provisions of the Pork Industry Board Regulations 1999 further ensured that larger producers had a greater say in the direction and running of the Board by allocating one vote for every 500 pigs housed, up to a maximum of 20 votes for those farms with 10,000 or more animals.³⁷ Because more than half of the industry’s breeding sows were concentrated on the largest 100 (and most intensive) farms and it was in their interests to push for the retention of sow crates, this view was reflected in the Pork Board’s positioning.³⁸

Similarly, the EPF represents commercial egg producers, and votes are also allocated based on hen numbers. Larger battery farming operations are better enabled to set industry policy and approach.³⁹ All egg producers purchasing more than 100 day-old chicks must pay a levy to the EPF under the Commodity Levies Act 1990.⁴⁰ Those producers then receive a say on the activities of the EPF and how those funds are expended. Farmers with between 100 and 5,000 hens obtain one vote, those with 5,000 – 10,000 birds receive two votes, and an additional vote

³⁵ Michael Morris “The Ethics and Politics of Animal Welfare in New Zealand: Broiler Chicken Production as a Case Study” (2009) 22 J. Agric. Environ. Ethics 15 at 22.

³⁶ Pork Industry Board Act 1997, s5.

³⁷ Pork Industry Board Regulations 1999, reg 21(1) .

³⁸ New Zealand Government “Sutton Speech to World Pork Conference” (press release, Scoop Media, 2 May 2000).

³⁹ Michael Morris “The Ethics and Politics of the Caged Layer Hen Debate in New Zealand” (2006) 19 J. Agric. Environ. Ethics 495 at 499.

⁴⁰ At this time, the relevant regulations were contained in the Commodity Levies (Eggs) Order 1999.

accrues for each additional 5,000 birds.⁴¹ In the early 2000s almost one million of the country's 2.8 million layer hens were held by a single company, Mainland Poultry,⁴² and over 90% of the eggs produced in the industry came from caged hens on battery farms.⁴³

These practical realities mean that there has been ongoing debate regarding the ability of these producer boards and industry bodies to represent the interests of smaller-scale, organic and free-range operators, and to look beyond a purely economic or production-related view to address wider consumer and ethical concerns.⁴⁴ Because industry was expected to take the lead in terms of the code development process, the initial draft codes of welfare for layer hens, pigs and broiler chickens were each drafted by their respective industry body: the EPF, the Pork Board and PIANZ.

One by one, the industry drafted codes were submitted and NAWAC agreed to notify and release them for comment. The Draft Animal Welfare (Broiler Chickens) Code of Welfare and Draft Animal Welfare (Pigs) Code of Welfare were notified in 2001, and the Draft Animal Welfare (Layer Hens) Code of Welfare followed in 2002.

Advocates had hoped to see a ban on both battery hen cages and dry sow stalls since both practices were by now being phased out throughout the European Union. In 1999 the EU Council Directive 1999/74/EC had been passed requiring a phase out of battery hen cages in favour of furnished cages with a perch, nesting and scratching area and 750cm² space per bird. While in 2001, EU Directive 2008/120/EC laid down minimum standards for the protection of pigs, requiring a ban on sow stalls and transitioning to group housing for pregnant sows. A gradual transition for each practice had been proposed: battery hen cages were scheduled to be phased out by 2012, with sow stalls following suit in 2013.

⁴¹ Rules of the Egg Producers Federation of New Zealand Incorporated. A copy of the rules is reproduced in the Report of the Regulations Review Committee "Complaint Regarding Commodity Levies (Eggs) Order 2004" (20 June 2006) Appendix E at 28.

⁴² P. Spiller "RIP – The Demise of Free-range Eggs" *Organic NZ* (New Zealand, 2004) Issue 63(5) at 26–28.

⁴³ David Pierce "SPCA Backs Eggs Laid by Barn Hens" *Evening Post* (New Zealand, 21 Oct 1999) at 18.

⁴⁴ In 2006 the Free Range Egg Association filed a formal complaint with the Regulations Review Committee over the requirement to pay a levy without receiving representation or voting powers. See: Report of the Regulations Review Committee "Complaint Regarding Commodity Levies (Eggs) Order 2004" (20 June 2006). A 2012 report by the Ministry for Primary Industries "encouraged" the EPF "to provide for special interest groups, like organic producers and free-range egg producers" suggesting representation on the governance board as a solution to their lack of representation. Prakash Narayan and William Rutherford "An Evaluation of Compulsory Level Frameworks for the Provision of Industry-good Goods and Services: A New Zealand Case Study" (paper presented at the New Zealand Agricultural and Resource Economics Society Conference, Nelson, August 30-31 2012).

The content of the draft Codes of Welfare released by the Pork Board, EPF and PIANZ came as a shock to the ARM, since all envisioned a continuance of current standards and practices. The draft Broiler Code of Welfare, written by PIANZ, had set a maximum stocking density for chickens of 40kg per square metre, a figure almost double the maximum permitted in the EU where the limit was 24kg per square metre.⁴⁵ This would allow around 20 chickens to continue to be packed into a space the size of a telephone box. The Pork Board's Draft Code of Welfare continued to provide for the ongoing use of farrowing crates and dry sow stalls for pigs⁴⁶ and the Draft Layer Hen Code, developed by the EPF, planned for the ongoing and indefinite use of battery hen cages. Existing space requirements in the layer hen industry were set at 450cm² per bird although the Code did provide for an increase in this space allocation. The Draft Layer Hen Code proposed that all *new* cage systems introduced from 2003 onwards provide birds with 550cm² space and put a ten year life span on older cage systems to ensure transition to the new standard by 2013.⁴⁷ This amounted to an 11 year transition period to deliver birds an additional credit card-size worth of space – to give an idea of the space allocation per hen, 550cm² is roughly equivalent to an A4 sheet of paper. This was where the starting point for debate had been set, and what the ARM had to work to change.

The Process: Fostering Industry 'Ownership' and a Responsive Framework

Neither the NAWAC or the government were expecting industry to be so combative, or the public submissions process to generate the level of response it did. The Minister of Agriculture had been warning the pork industry for some time that the market was “extremely sensitive to welfare concerns” and that public opposition to sow stalls should be viewed as a “danger sign”.⁴⁸ He had publicly urged the industry to look at reform as an opportunity, calling on them to “take the initiative”.⁴⁹ With less than 30 percent of pig farmers using sow stalls, the Minister felt that a phase out by 2006 was not an impossible target and would enable the pork industry to *lead* reform, and move *ahead* of Europe.⁵⁰ Behind the scenes, NAWAC was also attempting to

⁴⁵ For more detailed discussion and critique of the broiler code see Peter Sankoff “Five Years of the “New” Animal Welfare Regime: Lessons Learned From the New Zealand Experience with Farm Animals and Animal Welfare Legislation” (2005) 11 *Animal L* 7 at 11-12.

⁴⁶ Draft Animal Welfare (Pigs) Code of Welfare 2001, Minimum Standards 9 and 10.

⁴⁷ Draft Animal Welfare (Layer Hens) Code of Welfare 2002, Minimum Standard 8.

⁴⁸ Jonathon Milne “Treat Your Pigs Well Says Sutton” *The Dominion* (New Zealand, 27 July 2000) at 3.

⁴⁹ “Pig Farmers Slated” *The Evening Standard* (New Zealand, 28 July 2001) at 12.

⁵⁰ At 12.

persuade the layer hen industry to phase out battery cages and better align the sector with European practices.⁵¹

The large number of public submissions and ongoing negotiations with industry caused significant delay, and with the deemed codes due to expire at the end of 2002, the government sought to extend the s 191 exemption. In a letter to SAFE, Sutton advised that more time was needed to give affected industries time to “re-evaluate” the feasibility of changes.⁵² As a result the Animal Welfare Amendment Act was passed in 2002 in order to extend the three year limit for review of the deemed codes to four years, and make provision to enable that time frame to be extended by a further two years, by Order in Council.⁵³

There is insufficient space here to discuss in detail the code development process and negotiations that took place in relation to the pig, broiler and layer hen codes, since each code generated considerable debate and controversy. Rather than discuss each superficially, the Code of Welfare for Layer Hens has been selected for closer examination and discussion. It demonstrates some of the issues pertinent to all three codes and also highlights the dynamics at play in relation to the consultation and code development process under the AWA.

The Draft Animal Welfare (Layer Hens) Code of Welfare

In May 2003, in response to the public submissions received and in consideration of the issues raised in relation to battery hen cages, NAWAC revised and updated the standards set out in Draft Code of Welfare for Layer Hens. NAWAC accepted that battery cages did not comply with the Act but considered that an immediate ban was impossible. Section 73(3) of the AWA permitted NAWAC to recommend the approval of non-complying codes in “exceptional circumstances” and in doing so s 73(4) required them to consider the feasibility, practicality and economic effects of transitioning from current to new practices. On this basis, NAWAC considered an exemption from compliance was temporarily necessary and amended the code to

⁵¹ Notes from the meeting of NAWAC and the EPF, 25 July 2003, released under the Official Information Act 1982, indicate that NAWAC considered battery cages did not comply with the Animal Welfare Act and had been pushing for a phase out of the practice by 2023.

⁵² SAFE “Animal Welfare Committee Accused of Incompetence” (press release, Scoop Media, 10 October 2002).

⁵³ Animal Welfare Amendment Act 2002, cl.4.

provide for a phase-out of battery cages by 2023; a lengthy transition, but a transition nevertheless.⁵⁴

The EPF's response to the reworked code was rapid. The EPF sent a letter threatening legal action claiming that NAWAC was at significant risk of "falling into errors of law" in exercising their "judicially reviewable power".⁵⁵ The EPF also stated that natural justice had not been observed, irrelevant considerations had been taken into account and the decision was not rational.⁵⁶ They argued that Parliament had not intended to "destroy established farming systems where there are no unequivocally better alternative systems" and had incorporated an "economic/welfare reasonableness balance" into the Act. They also argued that in determining to notify the code, NAWAC must have considered that the draft code complied with the Act. While NAWAC could alter that view, the EPF claimed that they could not alter the code. They asserted that a change in approach must be based on new information and that no such information had been highlighted to them, in addition they had not been given any right of reply or further submission.

The AWA does not in fact make provision for codes to be altered by anyone except the drafter or the Minister.⁵⁷ NAWAC can only make recommendations: for example, they may recommend that the Minister should not approve a code, and where they do so the Act requires them to produce a report outlining the reasons for their adverse recommendation⁵⁸ and send a copy of that report to the drafter. Where the Minister would like a matter to be given more consideration, s72(2) permits the code to be referred back to NAWAC, but again, NAWAC has no power to amend the code, only to issue a further report. On this basis the EPF considered that the framework essentially treated code drafters as if they were the 'owners' of the code.⁵⁹

This interpretation is not incorrect. The framework under the AWA gives substantial power to code holders to determine code content and NAWAC's role is in an *advisory* capacity. NAWAC's main power would appear to lie in their initial role as gatekeeper, underpinning the importance of NAWAC's preliminary determination as to a code's appropriateness and

⁵⁴ Michael Morris *Factory Farming and Animal Liberation. The New Zealand Connection*. (Earl of Seacliffe Press, Wellington, 2011) at 80-81.

⁵⁵ Letter from Jack Hodder (Chapman Tripp Ltd) on behalf of the EPF to NAWAC regarding the Animal Welfare (Layer Hens) Code of Welfare (4 June 2003). Released under the Official Information Act 1982.

⁵⁶ *Ibid*.

⁵⁷ The Minister's power to amend a Code is set out under section s75(1)(a) of the Animal Welfare Act 1999.

⁵⁸ Section 74(2).

⁵⁹ Notes from the meeting of NAWAC and the EPF, 25 July 2003. Released under the Official Information Act 1982.

compliance before acceptance and public notification. This generates a responsiveness problem as it renders an industry's draft code difficult to modify in response to the public submissions process, it effectively means that much of the in-depth consideration and consultation on codes will take place *prior* to notification. This further restricts the input of animal advocacy groups and the public, and encourages codes to be viewed as a *fait accompli* at the point of notification. Once notified, alteration requires industry acceptance or a Ministerial intervention, and where the Minister requires further assistance from NAWAC in this regard, another round of consultation is initiated.

An urgent meeting was subsequently held between NAWAC and the EPF (and the EPF's lawyers). The EPF claimed Parliament would not have passed an Act that allowed such "dramatic change in a production system" and that too much emphasis had been placed on the birds' needs to display normal patterns of behaviour. They said that the "economic consequences" of the transition had not been sufficiently considered.⁶⁰ The EPF wanted NAWAC to refrain from making any announcement regarding current cages until a "review of the scientific literature" had been completed. To this end, they suggested NAWAC postpone any decision until 2008. NAWAC, however, felt that waiting until 2008 to initiate what was envisioned to be a 20-25 year phase out "would not be reasonable".⁶¹ In response the EPF warned NAWAC that they considered they had a strong case against them and would likely win on judicial review in terms of the natural justice arguments. It was the EPF's view that they 'owned' the code. In return, NAWAC threatened to reject the EPF's code entirely, and draft their own in its stead.⁶²

The details of the legal advice and subsequent meeting negotiations are known because a copy of the letter threatening legal action was leaked to factory farming campaigners by disgruntled free-range farmers, who felt the EPF was not representing their interests fairly and was "dominated by battery cage interests".⁶³ Although the EPF presented a united front, these issues were controversial within the industry. A core line of argument against reform employed by the EPF was that further research was needed to prove that alternative systems produced better welfare outcomes for hens. This raised the heckles of free-range farmers whose branding relied on

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid. The summary of minutes show that NAWAC responded to the EPF's threat of legal action by "responding that one possible outcome of the EPF's stance, was that NAWAC could reject the EPF's code and draft its own".

⁶³ Free Range Eggs "NAWAC Condemns Hens to Cages Indefinitely" (press release, Scoop media, 30 August 2004).

welfare as a point of difference. Free-range farmers complained that the EPF had spent more than \$700,000 of the industry's commodity levy on lobbying to retain cages, and on legal fees to send lawyers to Wellington to put pressure on the government.⁶⁴ Free-range producers had also lodged a formal complaint to the Regulations Review Committee over their lack of representation within the EPF and the way that voting requirements had been regulated under the Commodity Levies Act 1990.⁶⁵

By the middle of 2003 none of the six deemed codes had been formally approved or signed off by the Minister, although the Broiler Code was close. The codes were now moving back and forth between industry, NAWAC and the Minister. In a media statement, the Minister described the code process as "rigorous and lengthy" and he reiterated that consultation with industry was fundamental and necessary "to ensure those responsible for animals affected by the codes could continue to comply with the statutory requirements".⁶⁶ A further extension was granted for the deemed codes by Order in Council in December 2003.

With the NAWAC and EPF still at an impasse over the Layer Hen Code, in May 2004, the EPF lodged another submission and organised additional meetings with NAWAC and the Minister. A private meeting then took place between the Minister and the EPF. This meeting appears to have broken the deadlock. Following that meeting, the EPF sent the Minister a letter of thanks and the Minister wrote to NAWAC advising them to take EPF concerns into account, deciding to intervene on the industry's behalf.⁶⁷ In August of 2004 an updated copy of the draft Code was leaked to animal advocates showing that the phase-out of battery cages had been removed. The Animal Welfare (Layer Hens) Code of Welfare 2005 was approved by the Minister in December of 2004 and came into force in January 2005. A new Act, five years of dedicated campaigning and lobbying by the ARM, and more than 100,000 submissions from the public on battery cages, had produced no change.

⁶⁴ Ibid.

⁶⁵ Report of the Regulations Review Committee "Complaint Regarding Commodity Levies (Eggs) Order 2004" (20 June 2006),

⁶⁶ New Zealand "Government Extension on Animal Welfare Codes Granted" (press release, Scoop Media, 19 December 2003).

⁶⁷ A copy of the correspondence was provided to Dr Michael Morris under the OIA. See Michael Morris *Factory Farming and Animal Liberation. The New Zealand Connection*. (Earl of Seacliffe Press, Wellington, 2011) at 81.

The Code of Welfare for Layer Hens reinstated the initial Minimum Standard that had been set out in the industry's first draft; space requirements were set at 450cm² per bird and all new cages would be required to increase that space up to 550cm². While the first draft had envisioned a transition of all cages to the new standard by 2013, the delay in implementing change had pushed the transition period out a year to 2014.⁶⁸ A comment from NAWAC was included in the code which stated that battery hen cages that provided less than 550 cm² space per bird did not fully comply with s 10 of the Act, however, retention of the lower standard until 2014 was justified on the basis of "exceptional circumstances". These exceptional circumstances referred to the feasibility and practicality of the transition, and economic effects on industry. NAWAC stated that they would:

... ideally like current cages to be eventually phased out but is unable to recommend replacement of current cages with alternative systems, including enriched cages, until such time as it can be shown that, in comparison to current cage systems, in the context of supplying New Zealand's ongoing egg consumption needs, they would provide consistently better welfare outcomes for birds and be economically viable.⁶⁹

NAWAC claimed that "further research comparing cage and alternative systems" was required and that a final decision would not be made until that scientific research had been reviewed. They promised to reconsider the standard in 2009.⁷⁰ This positioning was essentially that suggested by the EPF in their meetings with NAWAC.

The turnabout outraged activists who already considered the 2023 phase out an unacceptably long transition to reform.⁷¹ The ARM did not accept that more research was needed or that cages that provided birds with 550cm² worth of space were any more compliant than ones that provided 450cm². It must also be emphasised that the ARM had been campaigning for a ban on battery hen cages since the 1980s, and that the Animal Welfare Advisory Committee (AWAC), NAWAC's predecessor under the APA, had also been delaying reform on the basis that "more research was required" for over a decade. AWAC had first convened a Caged Poultry Committee

⁶⁸ Animal Welfare (Layer Hens) Code of Welfare 2005, Minimum Standard 7.

⁶⁹ At 26.

⁷⁰ At 19 and 27.

⁷¹ SAFE "Leaked Code Sanctions Hen Cruelty" (press release, Scoop Media, 31 August 2004).

to look into the matter in 1992, and had been investigating alternative methods for housing egg-laying poultry since that time.⁷² An RNZSPCA spokesperson said it was “hard to see the logic” behind the call for more research since there was such a “huge body of international research available”, and that research was what had driven reform in Europe.⁷³ The RNZSPCA’s view was that NAWAC had “shown a shameful degree of weakness in succumbing to this pressure”.⁷⁴

Challenging Code Compliance – the Regulations Review Committee

In response to the release of the Code of Welfare for Layer Hens, the ARM laid a complaint with Regulations Review Committee (RRC). Codes of welfare are deemed regulations for the purposes of the Regulations (Disallowance) Act 1989⁷⁵ and must be made in accordance with their empowering statute: this opened up an avenue for complaint and additional scrutiny. The complaint to the RRC was lodged by ARLAN, who alleged that the Code of Welfare for Layer Hens was not made in accordance with the objects and intentions of the Act, which required that animals have the opportunity to exhibit normal patterns of behaviour, except in exceptional circumstances.⁷⁶ ARLAN argued the code had considerably widened the exceptions proscribed, beyond the Act’s intent and that the code made unusual or unexpected use of the powers conferred by the AWA.⁷⁷ They also argued that it was not the intention of the Act to permit open-ended and *ongoing* use of non-compliant systems, and noted that while current cages did not comply, barn and free-range systems did therefore it was not a case that no alternatives were available. ARLAN further claimed that the Act had envisioned that a transition would be made to new practices where existing standards did not comply, but that NAWAC had effectively deferred their decision on the issue until 2009 and in so doing went beyond the scope of their powers. In response to the complaint, NAWAC claimed that their “inability to determine a clear pathway forward” was itself an exceptional circumstance and reiterated their view that there was no indication that alternatives would provide “a net improvement over and above current cage systems”.⁷⁸

⁷² Animal Welfare Advisory Committee *1994 Annual Report* (Ministry of Agriculture and Forestry, April 1995) at 10.

⁷³ Benedict Collins “Only ‘Minor changes’ in New Code” *Rural News* (New Zealand, 27 January 2005).

⁷⁴ *Ibid.*

⁷⁵ See Animal Welfare Act 1999, s 79.

⁷⁶ A copy of ARLAN’s complaint on the Animal Welfare (Layer hens) Code of Welfare 2005 is attached to the report of the Regulations Review Committee, see Appendix E, Regulations Review Committee “Final Report on Complaint about Animal Welfare (Layer Hens) Code of Welfare 2005” (9 May 2006) at 26.

⁷⁷ Regulations Review Committee “Final Report on Complaint about Animal Welfare (Layer Hens) Code of Welfare 2005” (9 May 2006).

⁷⁸ At 14.

The RRC agreed with NAWAC that lack of an alternative system that could provide for improved net welfare *could* amount to an exceptional circumstance, but found that in not providing any fixed date for a phase out of cages, s 73(3) had been extended too far. The RRC reiterated that s73(4) envisioned a transition where there was non-compliance, and that NAWAC had recognised cages did not comply and yet failed to implement such a transition. Failure to do so meant that the code did “not comply with the objects and intentions of the Act”. NAWAC had overextended the notion of exceptional circumstances and made unusual or unexpected use of the powers under the Act.⁷⁹

The RRC recommended the government review Minimum Standard 7, which related to stocking densities, to comply with the obligations of the AWA and provide “a specified date for any review of current non-complying cages and for the transition to an alternative system”.⁸⁰ The RRC also made it clear that they expected their findings would have implications for other code where the same problem existed and NAWAC had adopted a similar approach.⁸¹

The government determined not to act on the recommendations of the RRC. They stated that a decision could not be made in relation to an alternative housing system for hens until definitive conclusions as to the “welfare benefits” were available, and until then increased cage size was an “interim measure”.⁸² The government restated NAWAC’s assertion that while current cage systems did not comply, cages that provided 550cm² or more space did. Furthermore, they agreed that a date for any transition could not be set because there was insufficient data on the current welfare status of New Zealand layer hens. According to the government, further information on the New Zealand context and environment for hens here was required and a programme was being developed to look into the matter.⁸³

Law on the Books versus Law in Practice: Regulatory Negotiation and the Code Process

The process by which the code for layer hens was negotiated and developed cannot be said to have produced a more cooperative or less adversarial approach. Neither was the code development process particularly efficient in terms of the time it took to put standards in place,

⁷⁹ At 17.

⁸⁰ At 16-17.

⁸¹ At 17 - 19.

⁸² “Governmental Response Regulations Review Committee Final Report of the Regulations Review Committee on Complaint about Animal Welfare (Layer Hens) Code of Welfare 2005”.

⁸³ Ibid.

or the costs involved. The intensity of the negotiations prolonged the process and thwarted meaningful reform so that animal welfare standards across the board remained ostensibly unchanged more than a decade after the AWA was introduced.

Similar debate over standards had occurred in relation to the other codes under review. The Animal Welfare (Pigs) Code of Welfare 2005 contained exemptions from compliance for both sow stalls and farrowing crates.⁸⁴ NAWAC acknowledged that these confinement systems did not provide animals with an opportunity to display normal patterns of behaviour either, but relied on the s73(3) exceptional circumstances provision to permit each practice to continue. NAWAC supported a ban and phase out in principle - but again claimed that more time was required to consider "current New Zealand and international research" and assess "alternative systems".⁸⁵ More time was also required to assess the "feasibility, practicality and economic effects of any change" to the pork industry. NAWAC promised to review the science again in 2009, deferring the matter until New Zealand based research could be undertaken. NAWAC had adopted the same problematic approach and relied on the 'exceptional circumstances' provision in each case to leave both the pig and layer hen codes essentially unchanged. NAWAC's use of that provision in multiple codes was already highly contentious, and made more so by the RRC's findings that it was being improperly employed.

In recommending approval of the Code of Welfare for Broiler Chickens and the retention of existing high stocking densities (20 birds per square metre compared to the average of 12 in the EU) NAWAC had similarly asserted that there had not been any New Zealand-based studies on welfare issues in the broiler industry here. They admitted that overseas research and commercial trials "may have relevance to the New Zealand broiler industry" but stated that before changes could be made there needed to be "independently driven research and development carried out in New Zealand conditions".⁸⁶ NAWAC recommended research be initiated and that they would review the stocking density again in five years time (2008).

The deferment of any decision in these areas, pending further research, had resulted in a decade of delay to reform. Additionally, far from reducing the risk of litigation, the process had generated threats of legal action and led to formal complaints being laid with the RRC. The code approval process set out under the AWA had elevated industry expectations and certainly

⁸⁴ Animal Welfare (Pigs) Code of Welfare 2005 at 32 and 35.

⁸⁵ At 32 and 35.

⁸⁶ Animal Welfare (Broiler Chickens) Code of Welfare 2003 at 22.

encouraged industry ‘ownership’ of codes; to the point where they asserted a proprietary-type claim over them.

Despite the clear issues raised by the framework, the government continued to proclaim the virtues of the regime and promote the approach internationally. At a global conference on animal welfare in 2004, government officials extolled the virtues of involving industry in the formulation of codes, as a major factor in “securing stakeholder cooperation with implementing reform”.⁸⁷

Similarly, the government’s press releases, which were made as each code was approved, contained the same rhetoric and claimed that robust ethical standards had been set. They also emphasised that codes had been developed in close consultation with animal welfare advocates, in particular the RNZSPCA. The RNZSPCA squarely challenged this claim in the media and their statements reflect a very different view regarding their level of involvement. When the government proclaimed that the Code of Welfare for Broiler Chickens had been developed in consultation with the SPCA the organisation’s Chief Executive Mr Blomkamp stated he was “flabbergasted” at such a “mischievous” claim, and asserted that the reality was that they had made a submission which had either been “ignored or discounted”, essentially excluding the SPCA from the substantive consultation process.⁸⁸ The RNZSPCA also characterised the code process as an exercise in “rubber-stamping”.⁸⁹ Almost completely excluded from the consultation process, the RNZSPCA had been forced to resort to making OIA requests for updates on progress with the codes. These had been repeatedly declined while NAWAC worked closely with industry bodies like the Pork Board in secrecy.⁹⁰ This refutes the Government’s characterisation of the negotiations as an open and inclusive process. In reality, the real negotiation was between industry bodies, NAWAC and the Minister for Agriculture, and animal advocacy organisations had been shut out of the core discussions that had taken place.

⁸⁷ David Mellor and Angus Bayvel “The Application of Legislation, Scientific Guidelines and Codified Standards to Advancing Animal Welfare” (paper presented to Global Conference on Animal Welfare: an OIE Initiative, Paris, 23-25 February 2004) 237 at 239.

⁸⁸ RNZSPCA “SPCA Alarm Over Animal Code Process” (press release, Scoop Media, 3 July 2003).

⁸⁹ RNZSPCA “SPCA Condemns Weak Rodeo Code” (press release, Scoop Media, 8 December 2003).

⁹⁰ Above n 88.

This examination of the code development process raises significant issues over the way that the standards in the Act are implemented in practice, and the gap that exists between the protections promised by the legislation and those actually delivered to animals. Neoliberal ideology infiltrates the framework and structures in place, permitting industry to set the starting point and providing commercial stakeholders with procedural mechanisms that can be leveraged to extend the negotiation process. Industry bodies themselves were either statutorily directed to prioritise financial concerns, or structurally constituted so that commercial agribusiness interests dominated and controlled the decision-making bodies within each sector. Deregulation and trade liberalisation reforms implemented in the 1980s and 90s had exposed the pork and poultry industries to market forces and had not only driven this sector to intensify but created rigid and inflexible private sector actors that now struggled to respond to demands for change.⁹¹ Indeed, this is precisely the dynamic predicted by Wolch in the 1990s when she theorised that a shift from governmental control towards governance would “shackle” the system’s “potential to create progressive social change”⁹² with direct implications for the operation of democracy.

Coglianesse argues that frameworks based on regulatory negotiation frequently fail to live up to the heightened expectations of the parties involved and that regulatory outcomes simply serve to mask underlying conflicts and create new ones.⁹³ He argues that the intensity of negotiated rule-making makes participation expensive and time-consuming in comparison to traditional lawmaking.⁹⁴ Groups involved heavily scrutinise rules and expend significant time and resources, which in turn increases the stakes for all involved. Coglianesse additionally states that the process is inherently more likely to engender legal challenge. This occurs because threats of litigation can be utilised to force the government back to the table to continue negotiation, thus creating a new round of refining details and a continuation of the rule-making process.⁹⁵ These factors were certainly evident in the development of the Code of Welfare for Layer Hens. Legal action was also threatened by the Pork Board in relation to the Code of Welfare for Pigs. When the matter

⁹¹ See Philip Cerny “Paradoxes of the Competition State: The Dynamics of Political Globalization” (1996) 32(2) *Government & Opposition* 251 at 264.

⁹² Jennifer Wolch *The Shadow State: Government and Voluntary Sector in Transition* (Foundation Center, New York, 1990) at 15.

⁹³ Cary Coglianesse “Assessing the Advocacy of Negotiated Rule-making: A Response to Philip Harter” (2001) 9(2) *N.Y.U. Envtl. L. J.* 386 at 427.

⁹⁴ At 415.

⁹⁵ At 426.

was revisited again by NAWAC as promised in 2009, negotiations again stalled over the Board's threat of legal action, including the threat of obtaining an injunction to prevent code release.⁹⁶

Coglianesse's observations regarding the quality of the outcomes are just as pertinent as the ones made in relation to the process. He argues that committees tend to avoid difficult issues since consensus is hard to obtain in these areas. He also observes that agencies that are committed to finding consensus frequently find that the only way to break a deadlock is to produce a rule that ignores the unresolved issue or deals with it in a vague way.⁹⁷ This form of negotiating process makes the lowest common-denominator more likely and often results in key decisions being deferred, to be disputed at a later date.⁹⁸ Freeman extends this analysis, arguing that at its most extreme, the surrender of rule-making to explicit interest group bargaining "facilitates illegal outcomes".⁹⁹ In the present study, this pattern is clearly evident. At the end of the code development process, animal welfare standards remained poor, determinations on the 'hard issues' had been deferred pending more research, and the RRC had found that unusual and unexpected use had been made of statutory powers undermining the intentions of the Act.

The Science: NAWAC and the Assessment of Animal Welfare

It is also vital that NAWAC's claims in relation to science and their use of science are critically considered. NAWAC's decision to recommend code approval and the continuance of existing standards was justified on the basis of insufficient "scientific knowledge". In each case NAWAC deferred making a decision claiming that "more research" was needed.

NAWAC's claim in relation to the science can be broken down and examined in its constituent parts, the assertion was that:

1. 'more research' was required;
2. of the 'New Zealand context';

⁹⁶ The continuing threats of legal action against NAWAC by the Pork Industry Board are discussed in the Hansard at (29 July 2010) 665 NZPD 12836 (Questions for Oral Answer - Pig Farming Accuracy of Condition Reports); and (16 December 2009) 659 NZPD 8635.

⁹⁷ A range of commentators have noted this tendency on committees where consensus is the goal, see Cary Coglianesse "The Limits of Consensus: The Environmental Protection System in Transition: Toward a More Desirable Future" (1999) 41(3) Environment 28; Cornelius Kerwin (1999) *Rule-making: How Government Agencies Write Law and Make Policy* (CQ Press, Washington, 1999), and Jane Mansbridge *Beyond Adversary Democracy* (Basic Books, New York, 1980) at 167.

⁹⁸ Cornelius Kerwin (1999) *Rule-making: How Government Agencies Write Law and Make Policy*. (CQ Press, Washington, 1999).

⁹⁹ Jody Freeman "The Private Role in the Public Governance" (2000) 75 N.Y.U. L. Rev. 543 at ,655.

3. to establish that alternative systems ‘in comparison to current systems’ provided ‘consistently better welfare outcomes’; *and*
4. were ‘economically viable’,¹⁰⁰ sometimes also phrased as a concern for alternative systems to demonstrate they could ‘supply demand’.¹⁰¹

The last aspect of their claim is possibly the most crucial element and it helps make sense of the line of reasoning and approach being adopted. Throughout the code process, NAWAC appears to have presumed that any new system adopted must be able to compete, in terms of efficiency and outputs, with existing practice.

All reform has an associated cost, and consideration of that cost is permissible under s73(4) of the AWA to determining what transitional arrangements and time frame is appropriate. That consideration does not prevent reform, only impacts on how reform is implemented. The other point where economic concerns may enter is under s73(2) which provides that in determining whether to recommend code approval NAWAC must consider; the submissions received, good practice, scientific knowledge, available technology and “any other matters considered relevant”. It is interesting to note that economic concerns were not seen as sufficiently important to require express recognition here, but there is no question that economic concerns will frequently be relevant.

NAWAC did more than simply incorporate consideration of economic factors under s73(2), however. On a policy level, NAWAC appears to have adopted a position that reform would be inherently unreasonable if alternative systems resulted in reduced profitability or failed to compete in terms of economic efficiency. Existing less intensive systems were not considered to be ‘alternatives’ to intensive systems, since they were not viewed as a viable option for intensive industrial-scale agricultural producers. This makes it clear that economic considerations, while not explicitly stated, are in fact at the core of NAWAC’s reasoning and approach. The presumption is that alternative systems must be able to compete in terms of economic efficiency; they must not increase costs or overly burden industry and should be capable of generating similar outputs and returns. Only when these presumptions are understood does NAWAC’s claim that alternatives cannot produce consistently better welfare outcomes make sense. Large battery hen facilities can house 300,000 - 400,000 hens. Barn systems cannot compete on that scale and nor can free range systems. The social structure of flocks breaks down beyond a

¹⁰⁰ Animal Welfare (Layer Hens) Code of Welfare 2005 at 26.

¹⁰¹ At 26.

certain point and both barn and free range systems require more stock management and animal husbandry inputs. Without those inputs, hen welfare suffers.

NAWAC accepted that barn and free-range systems complied with the Act, and that farms where sows are group housed and larger farrowing pens are used (rather than crates or stalls) also comply. Those alternative systems were already widely utilised in the pig industry at the time the code was first considered. However, NAWAC did not consider that they presented an acceptable alternative to non-complying systems. Any new system adopted must not only deliver better animal welfare, but also be able to meet the economic needs of the large-scale industrial producers in each industry. This presumption is what appears to be hidden within the science-based claims NAWAC makes.

The first three parts of NAWAC's claim on the science have also been widely disputed, particularly the assertion that more research and specifically more New Zealand-based research is needed. A number of commentators have pointed out that the sweeping legislative reforms that occurred in the U.K. and Europe in the late 1990s and early 2000s were predominantly driven by and based upon extensive and peer-reviewed science.¹⁰² This was the science that animal rights advocates sought to raise in their submissions on the codes. Reform within the layer hen industry throughout the E.U. was based on a review of the science undertaken by the Scientific Veterinary Committee of the European Commission (SVC) which found that "enriched cages and well designed non-cage systems" had been shown to have a number of "welfare advantages over battery systems".¹⁰³ The Scientific Committee of Animal Health and Animal Welfare (SCAHAW) conducted a similarly comprehensive review of the welfare issues for broiler chickens finding a correlation between lameness and high stocking densities, consequently recommending that they be kept below 30 kg per m².¹⁰⁴ Similarly, the European Commission and the U.K's Farm Animal Welfare Council conducted studies that found the welfare of pigs was compromised by severe restrictions of space.¹⁰⁵ The findings of the expert advisory and scientific committees that exist in the UK and Europe are not controversial but are widely accepted, and animal advocates were surprised when those large studies were not accepted or utilised by NAWAC.

¹⁰² See Arnja Dale "Animal Welfare Codes and Regulations – The Devil in Disguise" Peter Sankoff and Steven White (eds) *Animal Law in Australasia* (Federation Press, Sydney, 2009) 184 at 191.

¹⁰³ Scientific Veterinary Committee *Report on the Welfare of Laying Hens* (Commission of the European Directorate-General for Agriculture, Brussels, 1996) at 208.

¹⁰⁴ *Ibid.*

¹⁰⁵ See Directive 91/630/EEC laying down minimum standards for the protection of pigs [2000] and discussion in C. Spedding *Animal Welfare* (Earthscan Publications, London, 2000).

Dr. Arnja Dale, the RNZSPCA's Chief Scientific Officer, has noted that NAWAC frequently "refuses to rely on this international evidence of harm to animals"¹⁰⁶ and has characterised NAWAC's use of science as "erratic". Dale claims that "international peer-reviewed research" is incorporated into the decision-making process at times but "not utilised at all" at others.¹⁰⁷ Dr. Michael Morris, the science advisor for CAFF, has also expressed his concern at the insistence of calling for New Zealand-based research where extensive overseas studies exist, arguing that "the implication seems to be that standard breeds of animals, kept in standardised conditions, would somehow behave differently because they are on New Zealand soil."¹⁰⁸

A related claim made by NAWAC that has drawn criticism is their assertion that the research is inconclusive as to whether non-caged systems provide consistently better welfare outcomes than alternative systems. Commentators again point to the large international studies that have repeatedly established both the cruelty inherent in intensive systems and the higher welfare provided by lower stocking densities, barn, free range or group housing facilities. Weaver et al. notes that in debates such as this, in particular with combative industry, science will be presented on both sides of the policy divide.¹⁰⁹ This is a common dynamic in the environmental and animal welfare arena and frequently results in inertia;¹¹⁰ however Weaver argues that even where the science is unclear the ethical debate often can, and should, proceed.¹¹¹ Dale has also criticised NAWAC's readiness to err on the side of productivity at the expense of animal welfare whenever there is a degree of uncertainty.¹¹²

In examining the reports and articles published by scientists who are critical of the code development process and the robustness of NAWAC's scientific determinations a core claim emerges as a common thread. This theme can be most clearly articulated and summarised in an article by Morris and Beatson entitled 'Animal Science in New Zealand: Can Science make a

¹⁰⁶ Above n 102, at 193.

¹⁰⁷ At 191.

¹⁰⁸ Michael C. Morris "The Use of Animals in New Zealand: Regulation and Practice" (2011) 19 *Society & Animals* 368 at 374.

¹⁰⁹ S. A. Weaver and M.C. Morris "Science, Pigs and Politics: A New Zealand Perspective on the Phase-Out of Sow Stalls" (2004) 17 *J. Ag. Enviro. Ethics* 51.

¹¹⁰ For further discussion see William Freudenburg, Robert Gramling and Debra Davidson "Scientific Certainty Argumentation Methods (SCAMs): Science and the Politics of Doubt" (2008) 78(1) *Soc. Inquiry* 2. Also David Michael and Celeste Monforton "Manufacturing Uncertainty: Contested Science and the Protection of the Public's Health and Environment" (2005) 95 (Suppl.1) *Am. J. Public Health* 40, and Riley Dunlap and Aaron McCright (2011) "Organized Climate Change Denial" in John Dryzek, Richard Norgaard and David Schlosberg (eds) *The Oxford Handbook of Climate Change and Society* (Oxford University Press, New York, 2011).

¹¹¹ Above n 109.

¹¹² Above n 102, at 191.

Difference?’¹¹³ The authors note that NAWAC has preferentially relied on physiological, productivity or mortality-related data and research, and that the value of behavioural studies to inform welfare assessments has consistently been dismissed.¹¹⁴ They claim NAWAC invariably adopts a highly “positivist” scientific approach: they demonstrate a clear preference for objective quantitative-based research over more qualitative studies.¹¹⁵

The authors state that this serves to both bias and narrow the scientific determination, since so long as animals are not ill, injured, dying or in obvious pain, and they have not become less productive, then no welfare concerns are recognised as arising. Morris argues that animals on factory farms are more likely to suffer from boredom, frustration, depression or mental illness than sickness or disease, and to show repetitive stereotypical behaviours such as pacing and gnawing on bars, or learned helplessness and so be withdrawn and unresponsive, rather than experiencing overt physical pain or suffering.¹¹⁶ Commentators have highlighted that overseas, expert bodies have expressly incorporated behavioural studies¹¹⁷ and that this is partly what has made the difference to their welfare assessments and driven reform.¹¹⁸

Morris and Beatson argue that there are two aspects to this bias: the first is epistemological in nature, where ‘reliable knowledge’ is being equated with ‘objective data’.¹¹⁹ The second aspect recognises that there is a quasi-political component to this preference, since industry scientists continue to attempt to equate productivity with good welfare, and animal production researchers tend to undertake and cite studies that demonstrate animals in intensive systems have low mortality, remain productive and so have an adequate health status.¹²⁰ The irony is that the ‘animal welfare model’ that the AWA is based upon was expressly formulated in order to break through this bias. The legislative recognition given to animal’s “behavioural needs” was the

¹¹³ Michael Morris and Peter Beatson, Peter (2011) “Animal Suffering in New Zealand: Can Science Make a Difference?” (2011) 6 (1-2) *Kotuitui: NZ J. Soc. Sci. Online* 125.

¹¹⁴ A critical analysis of NAWAC’s scientific determination and the research those decisions were based on has been undertaken by Morris in relation to each of the three intensive farming codes see: S. A. Weaver and M.C. Morris “Science, Pigs and Politics: A New Zealand Perspective on the Phase-Out of Sow Stalls” (2004) 17 *J. Ag. Enviro. Ethics* 51; Michael Morris “The Ethics and Politics of the Caged Layer Hen Debate in New Zealand” (2006) 19 *J. Ag. Enviro. Ethics* 495 at 506; and Michael Morris “The Ethics and Politics of Animal Welfare in New Zealand: Broiler Chicken Production as a Case Study” (2009) 22 *J. Ag. Enviro. Ethics* 15.

¹¹⁵ Above n 113, at 127.

¹¹⁶ Morris, Michael (2006) ‘The Ethics and Politics of the Cages Layer Hen Debate in New Zealand’ *J. of Ag. & Env. Ethics* 19:495-514 at 500 – 501.

¹¹⁷ Above n 113 at 127

¹¹⁸ Above n 116 at 500 – 501.

¹¹⁹ Above n 113, at 127.

¹²⁰ At 127.

mechanism designed to ensure behavioural research informed decision-making. This was the device intended to assist the plight of animals on factory farms and yet did not.

Interestingly NAWAC's Chair over this period (2000 – 2005) was animal welfare scientist David Mellor, and he has since admitted that:

... few of the standards in early codes directly assessed subjective or emotional experiences (of animals), a situation that still applies to codes today... This is because the objective methods for monitoring and managing functional states as opposed to the subjective experiences they generate appeared to be more robust from a regulatory standpoint in being less susceptible to legal challenge.¹²¹

This points to the bias not simply being epistemologically-based but driven by concern that the scientific assessment must be able to withstand potential legal challenge from industry groups and that this may have also fostered the highly conservative approach. This pressure from industry may also partly explain why Morris' examination of the scientific reports and opinions of NAWAC reveal that the Committee has taken an extremely inclusive and accommodating approach towards accepting the studies submitted by industry scientists.¹²² Morris has stated that NAWAC has frequently accepted unsubstantiated, non peer-reviewed studies, relatively obscure or industry-funded research, and acted in reliance of those sources, rather than referring to the large scientific reviews used overseas as the basis for reform.¹²³

What is also of interest is that a new expression of the reason-emotion binary is evident here, emerging in the debate on the science. NAWAC's preference for objective physiological data as a measure of suffering or low welfare and the rejection of more subjective behavioural studies was also a refusal to consider the emotional impact of intensive practices on animals.

Behavioural studies proceed on the assumption that animals are psychologically like us in fundamental ways, that they can feel lonely, frustrated, bored, helpless, or anxious. Behavioural studies *are* scientific-based *and* rational, and they provide critical information regarding the specific needs of animals. Without this information it becomes impossible to truly provide for

¹²¹ Mellor, David. (2012) 'Animal Emotions, Behaviour and the Promotion of Positive Welfare States' *New Zealand Veterinary Journal* 60(1): 1 – 8, 6.

¹²² See Michael Morris "The Ethics and Politics of the Caged Layer Hen Debate in New Zealand" (2006) 19 *J. Ag. Enviro. Ethics* 495 at 506 and Michael C. Morris "The Use of Animals in New Zealand: Regulation and Practice" (2011) 19 *Society & Animals* 368 at 376.

¹²³ *Ibid.*

their welfare adequately. The expulsion of this data in preference for more quantifiable measures such as productivity, mortality rates, presence of illness and disease, or even physiological indicators of stress (e.g. blood cortisol levels) is itself a form of resistance to argument informed by emotion and a denial of its relevance to ‘reasoned’ decision making. It is the same ideological debate but masked in the trappings of ‘science’ and ‘objectivity’ and potentially even more powerful because of this.

Conflicts of Interest

The approach taken by NAWAC has also led many to question the membership balance on the Committee, and its weighting in favour of industry bodies and animal production scientists.¹²⁴ The core U.K. and European expert advisory bodies charged with making scientific assessments typically have a range of additional checks in place that are absent in the case of NAWAC. The European Union’s SVC requires conflicts of interest to be declared, that members be free from external influence, and that expert bodies like SCAHAW operate independently, unlike NAWAC which is attached to the Ministry of Agriculture.¹²⁵ By 2005 animal advocates in New Zealand were increasingly calling for the development of an independent Commissioner for Animals to be established as an attempt to disentangle the ethical, scientific and economic concerns so they could be explicitly and separately considered on a policy level.¹²⁶

In a small country like New Zealand, the potential for conflicts of interest is already greatly increased since there is a limited pool of expertise on which to call. When NAWAC advises that more research is necessary, a portion of that research is invariably conducted by members of the committee and/or takes place at institutions with representatives on the committee. Members of NAWAC have received significant funding to undertake animal welfare research, including grant money to investigate issues such as forced moulting in broiler hens, layer hen condition, nose ringing in sows, slaughter techniques and pig health in non-intensive systems.¹²⁷ Several members of the broader research community have even lodged formal complaints following

¹²⁴ See Arnja Dale “Animal Welfare Codes and Regulations – The Devil in Disguise” Peter Sankoff and Steven White (eds) *Animal Law in Australasia* (Federation Press, Sydney, 2009) 184 at 185; and Peter Sankoff “Five Years of the “New” Animal Welfare Regime: Lessons Learned From the New Zealand Experience with Farm Animals and Animal Welfare Legislation” (2005) 11 *Animal L* 7 at 21.

¹²⁵ Michael Morris “The Ethics and Politics of Animal Welfare in New Zealand: Broiler Chicken Production as a Case Study” (2009) 22 *J. Agric. Environ. Ethics* 15 at 27-28.

¹²⁶ The Green Party, SAFE and RNZSPCA have all called for an independent Commissioner, as well as legal academics. See Peter Sankoff “Five Years of the “New” Animal Welfare Regime: Lessons Learned From the New Zealand Experience with Farm Animals and Animal Welfare Legislation” (2005) 11 *Animal L* 7 at 19-20.

¹²⁷ See MAF Funded Animal Welfare Operational Research 1993-2004, Appendix 3 in *Animal Welfare Advisory Committee 1994 Annual Report* (Ministry of Agriculture and Forestry, April 1995).at 27 – 44.

unsuccessful bids for Ministry contracts, alleging ‘insider favouritism’ exists within the current system.¹²⁸

In 2000, NAWAC’s chair, David Mellor, was one of those accused of having a conflict of interest and it was admitted that the issue had been raised and discussed when he was appointed.¹²⁹ The director of MAF at that time defended the appointment, stating that “the brutal reality is that in New Zealand the number of scientists who are involved in animal welfare research is very limited. To get the best expertise on the committee, you appoint them to that”.¹³⁰ MAF assured the public that there was a robust and contestable bidding and selection process, and that where members had undertaken work, they had been judged the best person to do so.¹³¹ However robust that funding allocation may be in practice, these relationships cast doubt on the objectivity of NAWAC, and increase the *risk* that such factors influence the balance struck.¹³²

Implications for Movement and Deliberative Democracy

Throughout the code development process the ARM attempted to work *with law*; their arguments and submissions employed *animal welfare* discourse not *animal rights* discourse. The objective was to free animals from conditions of severe confinement on factory farms and for animals to be provided with an opportunity to display normal patterns of behaviour. This positioning aligned with the objectives set out in the AWA *and* with societal views on the treatment of animals. Despite this, advocates made no progress in this area, ideological bias’ was built into the framework and processes in place, and affected how the Act was interpreted and applied. Not all parties were equal at the negotiating table. Existing frameworks prioritised economic concerns and so protected and promoted the interests of certain actors and commercial agribusiness over others, and ensured that the status quo prevailed even where societal values had advanced and the law had been altered in order to progress reform.

The state’s retreat from more active involvement and deference to industry bolstered the already problematic power imbalances that existed, and undermined the framework’s ability to respond not only to the concerns of the ARM, but to the wider electorate. Indeed, public opinion polls

¹²⁸ Milne, Jonathon. “Scientist has No Conflict of Interest says Ministry” *The Dominion* (New Zealand, 2 October 2000) at 3.

¹²⁹ At 3.

¹³⁰ At 3.

¹³¹ At 3.

¹³² See comments of law lecturer Peter Sankoff: “Animal Welfare Act Neutered by NAWAC” *Rural News* (New Zealand, 26 July 2005).

indicate that the values of the ARM and society at large were one and the same on this matter, and in launching their challenge to factory farming practices, the ARM was articulating society's rejection of the intensive farming sector's treatment of animals. This power imbalance also undermined the effective operation of the law. In such situations, legal commentators such as Hartog have asked, 'what then was the law?' A legitimate answer may well be that 'it depends on who you are asking'.

CHAPTER 6

Animal Testing of Psychoactive Substances

Under the Psychoactive Substances Act 2013

In addition to attempting to get new animal protection law on the books and engagement under the AWA, the ARM also engages with the law outside traditional animal protection frameworks. A significant number of laws have consequences for animals, whether they enable intensive farms to be built, natural habitats to be destroyed or require animal testing to be undertaken. Typically, these laws do not explicitly incorporate consideration of animal interests, as it is presumed that existing animal protection frameworks operate in that gap/space. Because the ARM frequently disagrees with the adequacy of current animal protection laws, it is not unusual for groups to attempt to engage with these ‘collateral frameworks’ and utilise them as an alternative pathway to reform. This engagement raises its own set of challenges; the primary one being convincing legislators and regulators as to the relevance of raising animal issues in that forum. This chapter examines one recent example of movement engagement in this context: NZAVS’ campaign to obtain a ban on the testing of psychoactive substances under the Psychoactive Substances Act 2013 (‘PSA’).

In the early 2000s, an extensive range of new herbal party pills began appearing on the New Zealand market, advertised as energy pills or dietary supplements. Safety concerns arose following several incidents where people were hospitalised after taking the pills, and there were calls for greater regulation of the emerging industry. The PSA was introduced in 2013 to regulate the availability of psychoactive substances, in order to ensure the safety of these products. A license would now be required to import, manufacture, research or sell the substances, and an expert advisory committee, the Psychoactive Substances Expert Advisory Committee (PSEAC) was established to evaluate the safety of these products and advise whether a substance should be approved or not. NZAVS aimed to ensure that any safety tests undertaken for this purpose would not use animals.

NZAVS’ campaign to ban animal testing of psychoactive substances has been selected for examination for a number of reasons. As already noted, it is an example of a legislative campaign initiated outside the parameters of the Animal Welfare Act (AWA) where animal

interests were not already recognised. In addition, an attempt was also made to amend the AWA, so it represents an example of multiple routes to reform being attempted simultaneously and allows engagement in each to be compared and contrasted. The campaign also shows the diverse range of mechanisms employed by the movement in order to engage with law. In attempting to obtain the ban, the movement participated in public submissions processes on the Psychoactive Substances Bill 2013 (PSB), and Animal Welfare Amendment Bill 2013 (AWB). They also raised a petition which was referred to a select committee. The movement worked closely with both the Green and Labour Parties so that a range of private members bills and Supplementary Order Papers were also launched in support.

As a relatively recent initiative, an examination of the movement's work to ban animal testing of psychoactive substances also highlights some of the contemporary forces at play, particularly the increased channels of communication that have opened up under MMP, and the role and impact that social media campaigns can play. As a ban on the testing of psychoactive substances on animals was ultimately obtained, it is useful to examine the mechanisms which were instrumental to overcoming barriers. But of all these issues, the one that stands out most prominently throughout the engagement on the PSA is the central role that expert advisory bodies and expert evidence played in the decision-making process. An examination of that role highlights the complex interaction between the technical and the political; the scientific and the ethical; the emotional and rational; and the discourse associated with each.

Engagement under the Psychoactive Substances Bill 2013

When the government and Ministry of Health first canvassed the need for regulation of psychoactive substances, this immediately raised concerns among animal advocates. NZAVS attempted to find out more information on the proposed scheme in order to assess the animal testing implications. Following a request made under the Official Information Act 1982 (OIA) NZAVS was provided a copy of an expert report (The 2012 Report) that had been written for the Ministry of Health (MoH) outlining the toxicity tests that would be required to assess the safety of psychoactive substances under any regulatory framework.¹³³ That report advised the MoH that animal testing would be required to certify the safety of psychoactive substances before they

¹³³ Ministry of Health *Regulations Governing the Control of Novel Psychoactive Drugs – Defining Parameters Associated with Toxicity* (21 March 2012).

were approved for the market and revealed that LD50 toxicity testing on animals, including dogs, was being considered.¹³⁴

NZAVS' concerns were twofold. Firstly, they had serious concerns regarding the accuracy and quality of the information in the 2012 Report provided to the MoH and in response, they commissioned their own expert toxicology report and forwarded this to the Ministry.¹³⁵

Secondly, they were concerned that the ethical issues arising as a result of any new framework had not been considered.¹³⁶ NZAVS asked the MoH and Associate Health Minister Peter Dunne (the Minister) whether the ethical and legal issues relating to animals had been considered. They sought information, under the OIA, regarding the details of any discussions or advice on this subject. They were told that no information existed but were reassured that the need for examining the animal testing issues was understood and that this work would be carried out.¹³⁷

In late 2012 NZAVS launched a nationwide campaign opposing any animal testing of psychoactive substances. This resulted in significant media coverage when it was revealed that the 2012 Report had suggested lethal toxicity testing on dogs. A front-page article in the *Sunday Star Times* read 'Party Pills Testing Will Mean Dogs Have to Die'.¹³⁸ NZAVS also drafted a formal petition to present to Parliament, and the RNZSPCA, SAFE and the Green Party offered their support to the measure. Advocacy groups argued that no animals should have to suffer or die so that more recreational drugs could be released onto the market, the testing was inherently unnecessary and unethical. The MoH held its ground with the Minister stating that although a public consultation process would take place, the "hard truth" was that animal testing, including tests on dogs, was an "unpleasant" and "unavoidable" but "a necessary reality", and required in order to assure public health and safety.¹³⁹ This framing would remain unchanged throughout the debate that followed.

Animal Testing Issue Ruled Out of Scope

¹³⁴ The contents of the 2012 Report are discussed in NZAVS's submission to the Primary Production Committee; NZAVS "Submission on the Animal Welfare Amendment Bill 2013" at [3] and [20].

¹³⁵ Amy Clippinger and Kirstie Sullivan *Comments on Regulations Governing the Control of Novel Psychoactive Drugs – Defining Parameters Associated with Toxicity* (A Report to the Ministry of Health, December 2012).

¹³⁶ NZAVS "Submission on the Psychoactive Substances Bill 2013" at [18].

¹³⁷ The history and background to NZAVS' correspondence and the OIA requests to Peter Dunne and the Ministry of Health is recounted in NZAVS' "Submission on the Psychoactive Substances Bill 2013".

¹³⁸ Neil Reid "Party Pills Testing Will Mean Dogs Have to Die" *Sunday Star Times* (New Zealand, 2 December 2012) at 1.

¹³⁹ At 1.

The Psychoactive Substances Bill (PSB) was introduced to the House in February 2013, referred to the Health Select Committee (Health Committee), and opened to public submissions. An interim Psychoactive Substances Expert Advisory Committee (iPSEAC) was also established to assist the Health Committee with any scientific or technical issues arising.

Although the focus of the PSB was to regulate the availability of psychoactive substances and provide for their importing, manufacture and sale, the animal testing implications arising from that regime led to a large number of submissions on that matter. The Health Committee received 476 submissions solely concerned with animal testing and 52 primarily concerned with animal testing but also commenting on other matters.¹⁴⁰ Legal advice was sought from the Office of the Clerk of the House as to whether these submissions could even be considered. The Office responded that animal testing concerns were not relevant to the subject matter of the bill. Standing Order 257(1) provided that bills must relate to one subject area only and any substantive proposal to amend the bill at this stage would turn the PSB into “an omnibus bill” which the committee was not permitted to allow.¹⁴¹ These rules effectively prevented (relevant) ancillary issues from being considered. The Health Committee was advised that the appropriate forum for animal testing issues to be raised was under the AWA. This advice appears to be relatively standard, and animal welfare-related initiatives outside the AWA are frequently closed down on this basis.

The Office also warned the Health Committee that any consideration of animal testing submissions could create a false expectation that the issue could be addressed under the PSB, when in fact the matter was not within the scope of the bill.¹⁴² The decision over whether or not to hear submissions on animal testing split the committee. Labour, Green and New Zealand First members voted in favour of hearing the submissions in any case, and National voted against hearing submissions. As the vote was tied, the submissions were not heard.¹⁴³ The disagreement, however, caused serious rifts within the committee. The Labour Party publicly accused the government of “gagging” submitters,¹⁴⁴ and the Green Party announced they would be holding

¹⁴⁰ Letter from Arwel Hughes (Office of the Clerk of the House of Representatives) to members of the Health Select Committee regarding the scope of the Psychoactive Substances Bill (26 April 2013).

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Psychoactive Substances Bill 2013 (100-2) (as Reported from the Health Committee) at 10.

¹⁴⁴ New Zealand Labour Party “Animal Testing Opponents Get Short Shift” (Press Release, Scoop Media, 8 May 2013).

their own public hearings to ensure New Zealanders were given their opportunity to be heard and present their evidence.¹⁴⁵

Committee chair Dr. Paul Hutchison subsequently announced that animal testing issues were “out of scope” and would not be heard. He advised submitters that those matters fell under the jurisdiction of the AWA. Because those submissions were ruled out of scope, the departmental report that was subsequently prepared by the MoH and which summarised the relevant issues makes no mention of animal testing or the concerns surrounding it that had been raised by the public: they were rendered invisible.¹⁴⁶

Re-Opening the Door: NZAVS’ Petition

Although NZAVS’ petition for a ban on animal testing of psychoactive substances had only been running for six weeks, it had already garnered more than 40,000 signatures in support. In order to attempt to keep a dialogue open, NZAVS now presented their petition to the House.¹⁴⁷ The petition was referred back to the Health Committee which effectively re-opened dialogue and enabled NZAVS to present their submission on the bill.

NZAVS presented three main arguments. Firstly, that recreational drugs were similar to cosmetics, an unessential item, rendering animal testing not ethically justified. Secondly, that sufficient non-animal test methods existed that could be used in their place. Lastly, that animal-based toxicology testing was a less reliable test method so that non-animal tests were also preferable from a health and safety point of view.¹⁴⁸ They also contested the content of the 2012 Report on which the Ministry was relying as their primary source to determine whether animal testing was necessary to ensure the safety of psychoactive substances.

¹⁴⁵ Green Party of Aotearoa New Zealand “Green Party to Give Animal Advocates Their Voice” (Press Release, Scoop Media, 8 May 2013).

¹⁴⁶ See Ministry of Health *Departmental Report: Psychoactive Substances Bill*, (15 May 2013). At present there remains a discretion as to whether minority views are reported. See Clerk of the House of Representatives *Effective Committee Membership: A Guide for Members of Parliament* (2014) at 71. When the standing orders were reviewed in 2001 both the Green Party and Human Rights Commission called for the framework to require inclusion of minority views in their reports. See Clerk of the House of Representatives *Review of the Standing Orders: Report of the Standing Orders Committee* (September 2011) at 32.

¹⁴⁷ Petition no 2011/63 Petition of Stephen Manson on behalf of the New Zealand Anti-Vivisection Society, and 42,019 others. Requesting that the New Zealand Parliament includes a clause specifically prohibiting animal testing in any proposed legislation aimed at the regulation of psychoactive substances (“party pills” or “legal highs”). (Presented by Mojo Mathers, 28 May 2013).

¹⁴⁸ *Ibid.*

Contesting the Science

The referral of NZAVS' petition to the Health Committee finally forced decision-makers to consider the animal testing issue. NZAVS presented the petition on the 28th of May 2013. The following day the Minister contacted the iPSEAC seeking urgent and notably “preliminary” advice on the animal testing issue.¹⁴⁹ Despite continuous reassurances to NZAVS that an expert advisory committee would consider the animal testing issues at hand, and NZAVS providing their own expert report for consideration, no investigation or discussion of these issues had taken place. The entire matter had ostensibly been ignored until this point. This also shows that the Ministry's mind had effectively been closed regarding debate on animal testing issues. Because of this, the iPSEAC now had to sit under urgency and had a very short space of time—a matter of weeks—to consider the issue of animal testing.

In making their submissions on the petition to the Health Committee NZAVS directly questioned the reliability of the 2012 Report. In their submission on the Bill NZAVS argued there was a critical lack of expertise on the issue of alternatives within the scientific community in New Zealand, and that there was a lack of local specialists. The organisation noted that in order to locate solutions and answers on the matter, they had needed to obtain expert advice from overseas scientists specialising in in-vitro (non-animal) test methodology and alternatives. NZAVS also stated that the advice provided to the Ministry in the 2012 Report was outdated and inaccurate; the report presumed that psychoactive substances were developed in a similar way to pharmaceuticals when they were not, it recommended LD50 testing despite that test having been withdrawn from use here since 2002, and it showed a lack of knowledge about recent developments in the field and testing regimes now in place overseas. They noted, for example, that several European countries were moving to ban animal testing of recreational drugs and highlighted that a ban on safety testing of tobacco and alcohol products had been in place in the U.K. since 1997. Furthermore, it was Home Office policy to refuse to license applications to safety-test psychoactive substances on animals. NZAVS also argued that data from animal tests had been shown to be only 40-60% predictive of the human response in comparison to modern cell line testing which were 80 – 97% predictive.¹⁵⁰ They noted sufficient non-animal tests

¹⁴⁹ Letter from Associate Professor Richard Robson (Chair, Interim Psychoactive Substances Committee) to Peter Dunne (Associate Minister of Health).

¹⁵⁰ NZAVS “Submission to the Health Select Committee relating to Petition 2011/63 of Stephen Manson on behalf of the New Zealand Anti-Vivisection Society and 42,019 others” at [16].

existed and had now been validated for use, and that these should instead be used to establish safety.

By now the iPSEAC had reviewed the initial expert advice as well and agreed that there were significant issues with the advice. The iPSEAC agreed that the LD50 tests recommended in the 2012 Report were outdated and unnecessary, also that acute toxicity testing was not necessary and even conceded that “different species metabolised the same substance differently and so gave different assessments of risk” which meant that there were “acknowledged problems with utilising animal models as surrogates for humans”.¹⁵¹ The iPSEAC’s solution to the later problem, however, was to recommend that any testing regime must test not just on one species, but test across *multiple species* to improve reliability. The iPSEAC also acknowledged that many alternatives now existed, but claimed that insufficient numbers were ‘validated’, so that the test protocols had not been formally scheduled under existing regulatory frameworks. The iPSEAC thus recommended that some animal testing be permitted and that a regular review occur to keep a check on which tests were being validated.

Conflicting Science and the Disagreement of Experts

In examining the treatment of expert advice on this issue, a range of highly problematic issues emerges, most notably the rushed nature of the deliberation regarding highly complex matters. NZAVS implored the government to give the iPSEAC more time to consider the information before passing the bill as they considered the process had been insufficiently robust. NZAVS and the iPSEAC agreed on several points, but there were some key issues in contention: NZAVS said that iPSEAC’s approach assumed that recreational drugs were tested in the same way as pharmaceuticals when they were not; NZAVS also contested that insufficient non-animal tests had been validated. They suggested that a fuller and more detailed consideration of the information may have led iPSEAC to a different conclusion.

NZAVS was also of the view that given the lack of expertise in New Zealand, overseas experts from Europe and the U.S.A. should have been consulted. They argued that this would have assisted in helping investigate and potentially resolve the conflicting expert advice received on the issue of alternatives. NZAVS also pointed out to the Health Committee that the NAEAC—the expert advisory body operating under AWA with respect to animal testing matters—had been

¹⁵¹ Letter from Associate Professor Richard Robson (Chair, Interim Psychoactive Substances Committee) to Peter Dunne (Associate Minister of Health).

in touch with regulatory agencies in the U.K. to discuss the issue of psychoactive substances. NZAVS appears to have sought to bring the NAEAC into the discussion, understanding that they also had obtained external advice on the matter. The NAEAC had made a submission on the PSB, but since submissions on animal testing matters had been ruled out of scope it was unclear whether their view had been considered.¹⁵²

NZAVS had filed OIA requests attempting to identify whether the MoH and NAEAC were in contact with each other and whether the Ministry was aware of developments on this front.¹⁵³ NZAVS were informed that there had been *no* correspondence between NAEAC and the MoH and they were therefore extremely concerned by this. NZAVS attached copies of correspondence between NAEAC and the U.K. Home Office to their submission to highlight the discussions taking place. In fact, following discussions with U.K. regulators, the NAEAC had independently come to support a ban on the testing of psychoactive substances on animals.¹⁵⁴

One of the central issues with the way that expert advice was treated throughout this process arises from the way that the iPSEAC appears to have been segregated from central deliberations and to have operated independently rather than in collaboration with others. The relevant experts and advisory bodies were not in contact throughout the process, even though they were investigating the same issues. NZAVS' submissions on the science also had to be delivered to (and so through) the Health Committee. NZAVS had been seeking to engage with the iPSEAC directly for some time, and had written to the Minister on multiple occasions asking if they could submit their expert and technical advice directly to the iPSEAC so that the overseas experts NZAVS had contacted could be brought into the discussion and offer their input. NZAVS reported that none of their communications had been acknowledged or responded to and they had been locked out.¹⁵⁵

The lack of openness and transparency in the process meant that it was unclear what information was being passed to whom. One of NZAVS' most significant concerns was that the right information was channelled to the right people so that a decision would not be made based on incomplete information or misinformation. Because NZAVS was considered an 'outsider' they

¹⁵² National Animal Ethics Advisory Committee "Submission to the Health Committee on the Psychoactive Substances Bill 2013" at [2].

¹⁵³ NZAVS "Submission to the Health Select Committee relating to Petition 2011/63 of Stephen Manson on behalf of the New Zealand Anti-Vivisection Society and 42,019 others" at 14.

¹⁵⁴ National Animal Ethics Advisory Committee "Submission to the Health Committee on the Psychoactive Substances Bill 2013" at [2].

¹⁵⁵ NZAVS "Submission on the Psychoactive Substances Bill 2013" at [4].

were even more isolated from the processes taking place, and were left to file multiple OIA requests in an attempt to determine which agencies were involved and which information was guiding decisions; essentially attempting to connect different groups of experts and ensure everyone was privy to the same information. That this collaboration and information sharing was not happening of its own accord, and that the relevant agencies did not appear concerned at the degree of disconnect is worrying.

NZAVS also noted that the iPSEAC had made a series of assertions but had not provided the data or evidence on which those assertions were based, which had made it impossible to challenge their findings and contest the science. For example, the iPSEAC claimed that animal tests were unavoidable but which tests it was felt were unavoidable had not been specified. The iPSEAC had also asserted that insufficient testing protocols had been validated, but had not identified the specific areas they considered insufficiently validated. As a result, NZAVS attached a detailed and comprehensive listing of recognised non-animal based testing protocols to their submission. They apologised for the quantity of material being submitted, but said they felt it was necessary to ensure the Health Committee had all the available information.¹⁵⁶

Information blockages like this significantly undermined the scientific and technical considerations that were made, however, the government appeared unconcerned. From the outset, their focus had been on closing down debate on animal testing and the science, in order for the bill could be passed as quickly as possible. Public demand for a regulatory response to limit psychoactive substances was significant, and the government was under pressure to push through the new measures as quickly as possible.¹⁵⁷ Delay to ensure robust science supported their regulations was not a priority.

For their part the Health Committee, while listening to NZAVS' submissions on these technical matters, maintained the position throughout that alternatives did not exist; that animal testing was necessary; and that the scientific issues involved should be left to the iPSEAC to determine. NZAVS attempted to break through this discourse and open up more substantive dialogue on the science; however, the barriers to contesting the science were maintained in a number of ways. Firstly, through the withholding of information, so that submitters were not privy to the scientific

¹⁵⁶ NZAVS "Submission to the Health Select Committee relating to Petition 2011/63 of Stephen Manson on behalf of the New Zealand Anti-Vivisection Society and 42,019 others".

¹⁵⁷ Bronwyn Torrie "Politicians Bypass Animals' Function in Party Pill Testing" *The Dominion Post* (New Zealand, 10 May 2013) at 2.

evidence on which experts were basing their decisions. Secondly, the distance between the experts and submitters was maintained through processes that rendered direct dialogue impossible. Due to these issues, the Health Committee unconditionally accepted the expert opinion of iPSEAC as fact, and NZAVS' evidence on the science was easily sidelined.

Contesting the Ethics

Debate on the ethics was equally challenging. NZAVS also sought to question the underlying ethics of testing non-essential products on animals and presented the results of a public opinion poll commissioned on the subject that showed 73.7% of the public was opposed to *any* testing of recreational drugs on animals.¹⁵⁸ Only 14.7% thought that animal testing should be allowed even if it was the best testing method available.¹⁵⁹ Since the animal testing issue had first emerged, NZAVS had been calling for the more significant ethical question to be considered; whether psychoactive substances *should* be developed at all if that development necessitated animal testing.

NZAVS had understood that if the potential impact on animals was not taken into account when the bill was being drafted, then it would be difficult to reinstate it later. This concern was proven correct, as political and policy-related work had not been undertaken. Because of this, the framework under the PSB established a regulatory process for approving new psychoactive substances that assumed companies and manufacturers should be able to do this as a right, regardless of whether animal tests were required. The framework did not contemplate placing any restrictions on this.

The focus of the iPSEAC was by its nature always going to be restricted to technical issues: determining *how* products should best be tested and whether animal tests *could* be replaced. The '*should* they be tested' question was beyond its scope. It was a political and non-technical consideration. Nonetheless, the Health Committee took iPSEAC's advice on the technical questions and used it as the basis for asserting that animal tests were necessary. They were, of course, only necessary if the paramount concern was not to limit the development and approval of recreational drugs; however this distinction was not recognised. On this matter, NZAVS and

¹⁵⁸ Horizon Research Limited "Why Kiwis Won't Swallow Party Pill Tests on Animals" (press release, Scoop Media 22 April 2013).

¹⁵⁹ Ibid.

the Health Committee were destined to talk past each other; they had adopted different starting points, in part because of the focus of the PSB.

Wielding Science as Power – The Deferral to Experts

Throughout the animal testing debate, Health Committee Chair Paul Hutchison argued that the opinion of the iPSEAC should be determinative. As the question was a technical one, it was necessary to go with the ‘consensus of experts.’¹⁶⁰ The repeated call to leave the development of any testing regime to those with the appropriate technical expertise¹⁶¹ and the solution to a panel of ‘expert scientists and toxicologists’¹⁶² removed public access to debate on the substantive issue. When Green Party MPs countered that submitters *also* had expert evidence to give, and attempted to raise the concerns of NZAVS in the House, they were told that they clearly must not “understand the science”.¹⁶³ Thus those that disagreed were framed as ignorant and irrational, and their argument was not met by factual counter-argument but by discourse and posturing.

Much has been written on technocracy and the scientization of politics; of science wielded as ideology.¹⁶⁴ Hutchison’s statement that science must be at the *centre* of government, not simply adjacent to it or informing it, but playing a determinative role, was a call for science to prevail over politics, and so too over deliberative democracy. Indeed, documents released to NZAVS under the OIA revealed that the MoH was briefing the Associate Health Minister Peter Dunne throughout the process, on how to respond to questions on the matter. Their advice was to focus on the public health and safety issues, to express the sentiment that while animal tests were regrettable they were nonetheless necessary, and to reiterate that a ‘technical expert advisory committee’ would be considering all testing applications.¹⁶⁵

¹⁶⁰ See Bronwyn Torrie, Bronwyn. 10 May 2013 “Politicians Bypass Animals’ Function in Party Pill Testing” *The Dominion Post* (New Zealand, 10 May 2013) at 2. and debate in Parliament: (4 December 2012) 686 NZPD 6993 (Drugs, Psychoactive—Animal Testing).

¹⁶¹ See response to Question 7730 from Mojo Mathers to the Associate Minister of Health Todd McClay (25 June 2013).

¹⁶² “Testing Will Need Animals” *Timaru Herald* (New Zealand, 10 July 2013) at 6.

¹⁶³ (9 July 2003) 692 NZPD 11789.

¹⁶⁴ A classic essay on this point is Habermas’ “The Scientization of Politics and Public Opinion’ in Jürgen Habermas *Toward a Rational Society: Student Protest, Science, and Politics* (Jeremy J. Shapiro (translator), Beacon Press, Boston, Massachusetts, 1970) at 62 - 80.

¹⁶⁵ Neil Reid “Ministry Reviews Stance on Animal Testing” *Sunday Star Times* (New Zealand, 13 January 2012) at 6.

The above exchanges highlight the inherent tension between the two spheres of action: the technical and the political. The referral of decision-making roles to expert advisory bodies inherently serves to depoliticise the determinations by transforming matters of policy into matters of science and rendering them incredibly resistant to challenge. The process of referring problems to technical experts also narrowed the terms of reference, and conveniently, enabled the trickier, more politically-charged ethical and ideological concerns at hand to be sidelined. When issues are delegated to advisory boards and committees for consideration, the lines of accountability are also blurred; it becomes unclear who is making the political determinations. Power is maintained not only through structural and procedural mechanisms, hegemony also has a discursive dimension. The way a debate is framed and who is in charge of framing it is a strategic and politically-charged determination.

The critical point of contention for opponents of the bill was *not* whether animal tests were necessary to determine toxicity, but rather *whether* the testing of recreational drugs on animals was *justified* in the first place. The government's construction of the debate as a technical consideration of facts was also an attempt to exclude broader questions of values. The real ethical issue was whether the economic imperatives of the psychoactive industry or the interests of animals should prevail. The central conflict was clearly not regarding the science but the ethics of the issue, and how to respond to the psychoactive substance sector. It was the view of both the Green party and NZAVS that economic concerns lay at the heart of the push to maintain industry access to animal tests; they considered that the actual barrier was not a lack of alternative test methods, but that those alternatives came at three times the cost.¹⁶⁶

A Concession on Alternatives: Incorporative Hegemony

With continuing debate in the House and strong dissent within the Health Committee itself drawing the process out far longer than anticipated, the government again sought legal advice, this time asking what kind of amendments to the PSB *would* be within scope. The Office of the Clerk advised that an “amendment to preclude the use of information derived from animal testing” in any applications for approval could be in order.¹⁶⁷ This statement was a step too far for the government, and they opted instead to amend the bill by adding a provision. This

¹⁶⁶ See comments of Green Party MP Steffan Browning (9 July 2013) 692 NZPD 11789, and NZAVS Press Release “Parliament's Last Chance to Stop Animal Tests of Legal Highs” (press release, Scoop Media, 21 June 2013).

¹⁶⁷ Letter from the Office of the Clerk of the House of Representatives to members of the Health Committee, providing further advice on the scope on the Psychoactive Substances Bill 2013 (5 June 2013).

provision required that the PSEAC in determining whether to approve a new psychoactive substance, not to have regard to animal test data where a “suitable alternative” testing method existed.¹⁶⁸ This is another example of Hunt’s ‘incorporative hegemony’; a concession made in order to regain control and legitimacy in the face of challenge. The government reiterated their view that animal testing was necessary and that a ban was “not possible”, but conceded that compromise was required because the animal rights issue had become an obstacle to passing the law as soon as possible.¹⁶⁹

This compromise fell notably short from what advocates had been seeking. Both NZAVS and the Green Party were critical of the new provision and felt that the amendment had been drafted in haste, that the wording was vague, core terms had been left undefined, and that the requirement would be practically impossible to implement and enforce thereby providing limited protection for animals.¹⁷⁰

Green Party MP Kevin Hague, who had sat as a member of the Health Committee, was one of the strongest voices against the new alternatives provision and made a pertinent observation. Hague noted that the iPSEAC had from the outset held the view that animal testing was necessary, and that this was something that was ‘self-evident’ to them. Hague questioned how a body with such a predetermined position could be awarded responsibility of assessing the availability of alternatives. Hague argued “we are never going to see an alternative test publicly notified by that group” because their reasoning, he claimed, was circular.¹⁷¹ It was self-validating, and the provision was only acceptable since it would have no practical impact.

Unwilling to let the issue go, Green Party MP Mojo Mathers drafted a Supplementary Order Paper, SOP 260, to attach to the PSB, calling for the bill to be amended so that animal testing data could not be considered in approving psychoactive substances. The SOP was voted down by a majority of 61 to 51, with Labour, the Maori Party, Mana Party and Act supporting the measure, while New Zealand First abstained.¹⁷² Mathers also launched a private members bill to amend the PSA, announcing that support in the House had now reached such a degree that if the New Zealand First party would change its vote from abstinence to support, they would be able to

¹⁶⁸ Psychoactive Substances Act 2013, s12 (replaced on 8 May 2014, by section 6 of the Psychoactive Substances Amendment Act 2014).

¹⁶⁹ “Some Animal Testing Necessary: SPCA” *The Daily Post* (New Zealand, 15 June 2013) at A10.

¹⁷⁰ NZAVS “Parliament’s Last Chance to Stop Animal Tests of Legal Highs” (press release, Scoop Media, 21 June, 2013).

¹⁷¹ (9 July 2013) 692 NZPD 11797.

¹⁷² At 11775.

pass an amendment.¹⁷³ That Bill was never drawn, but it demonstrates how contentious the issue remained and how close the voting on the issue was in the House.

The Psychoactive Substances Act was subsequently passed and came into force on 17 July 2013.

Seeking Reform Under the Animal Welfare Act

As the PSA had now passed into law, advocates sought to raise the issue of animal testing psychoactive substances under the AWA. The AWA was itself undergoing review at this time, and the Animal Welfare Amendment Bill 2013 had already been introduced to the House and opened for submissions. Further, when National had refused to amend the PSB, it was not only the Green Party that had been left disgruntled. Labour MP Trevor Mallard had matched the Greens' initiative with one of his own, and drafted a Supplementary Order Paper (SOP), SOP 341, attaching it to the Animal Welfare Amendment Bill that was already in progress; this had opened up another route for engagement.

SOP 341: The Attempt to Ban Psychoactive Substances Under the AWA

This time the SOP was referred to the Primary Production Committee (PPC) for consideration because the initiative came under the AWA. The core advisory committees that operate under the AWA are the National Animal Welfare Advisory Committee (NAWAC) and the NAEAC. In their submissions to the Committee, the NAWAC supported a ban on animal testing for psychoactive substances and stated that they had concerns regarding the ethics of the testing. They also noted that the U.K. had banned testing of tobacco and alcohol products on animals, and had a policy in place against licensing applications to test recreational drugs.¹⁷⁴ The NAEAC also supported Mallard's SOP 341 and agreed that the debate had raised "serious ethical issues".¹⁷⁵ NAEAC had contacted the Home Office in the U.K. to discuss the matter and had come to form the view that the U.K. approach was the ethically appropriate one.¹⁷⁶

The MoH also made a submission and offered their advice on the matter. The MoH advised that their own expert advisory committee had already considered the matter and that animal testing

¹⁷³ Green Party of Aotearoa New Zealand "Another Chance to End Animal Testing of Legal Highs" (press release, Scoop Media, 1 August 2013).

¹⁷⁴ National Animal Welfare Advisory Committee "Submission to the Primary Production Committee on the Animal Welfare Amendment Bill 2013" at [5].

¹⁷⁵ At [4-5].

¹⁷⁶ At [4-5].

was “essential for assessing the carcinogenicity, toxicology and unexpected systemic effects of psychoactive substances”¹⁷⁷ The MoH claimed that without data from animal tests the safety of psychoactive substances could not be assessed.¹⁷⁸

Following submissions, the PPC found that:

1. The AWA already provided robust protection for animals;
2. That animal ethics committees (AECs) had already considered and weighed the benefits of testing against the costs to animals in approving research;
3. That the PSA aimed to deliver vital “human health benefits”.¹⁷⁹

The PPC considered that adequate provision had already been made for the interests of animals to be considered. They further argued that prohibiting animal testing of psychoactive substances would “prevent the Psychoactive Substances Act working as intended.”¹⁸⁰ They adopted the same discourse as the Health Committee before them, against the advice of their own departmental expert advisory committees. As a result the PPC recommended “no change”,¹⁸¹ even though they accepted that “all advocacy groups, most industry groups, all animal scientists, academics and animal law experts, most professional bodies and most private citizens” *supported* SOP 341.”¹⁸²

The PPC’s claim that the AWA already provided sufficient protection and AEC’s sufficient oversight was particularly controversial given that the committee that regulated animal testing under the Act felt reform was required in order to strike the correct balance. NAEAC had advised the PPC that in the U.K. experiments were centrally licensed and Home Office policy had enabled an effective ban to be implemented preventing testing of psychoactive substances there. NAEAC had then advised that in New Zealand such determinations would be left to institutional AECs. While it was not explicitly stated, NAEAC’s opinion; that AECs would be “unlikely” to approve such experiments; highlighted that there was no guarantee of this here. A large number of AECs exist and these might differ in their analysis of the ethical considerations and so reach different decisions. The absence of a centralised body to approve and license

¹⁷⁷ Ministry for Primary Industries *Animal Welfare Amendment Bill: Report of the Ministry for Primary Industries* (February 2014) at 71.

¹⁷⁸ At 71.

¹⁷⁹ At 72.

¹⁸⁰ At 72.

¹⁸¹ At 72.

¹⁸² At 71.

animal experiments in New Zealand restricts the reach of government and its core advisory bodies, which means there is reduced control and oversight. NAWAC and NAEAC's support of SOP 341 is an admission of sorts of the inherent uncertainty generated by the AWA regulatory framework, that delegated decision-making powers to a large number of different bodies. It also undermines the assertion of both the PPC and the Health Committee before them, that sufficient oversight existed within the AEC framework, since these bodies disagreed.

Thus, after being told that animal welfare and testing concerns were 'out of the scope' of the PSA and should be dealt with under the AWA, reform under the AWA was deemed inappropriate on the basis that it would undermine the PSA. The line of reasoning adopted by each select committee constructed the two frameworks in such a way that they operated to block all pathways to reform. Because reform within one had the potential to impact on the other, no interference with either was permitted and the status quo prevailed.

It is also critical to note that the most significant barrier to reform under the AWA did not come from the expert advisory bodies that operated under the Act but directly from the government, which held the majority vote on both Select Committees. The government acted on the advice of the iPSEAC in relation to the PSB where that advice supported the government's position, and conversely, against the advice of NAWAC and NAEAC under the AWA, when the expert advice disagreed with their position. What was decisive was government positioning while the advice of the expert committees was secondary.

Internal Dissent and Socially Robust Knowledge

Various commentators have discussed the diverse issues that arise regarding the operation of specialist advisory committees and expert advice, sometimes referred to as the 'dilemma of expertise'.¹⁸³ The voice of expertise tends to overstep, translate and transform the debate. If checks are not in place, it can also be prone to capture or manipulation for political purposes. This underlines the importance of having clear lines and separating the scientific and political decisions being made. Increasingly, there has also been a call for procedures to be put in place to safeguard natural justice and ensure other voices are not locked out of the broader discussion, and that conflicting scientific argument is visible.

¹⁸³ Helga Nowotny "Democratising Expertise and Socially Robust Knowledge" (2003) 30(3) Sci. Public Policy 151.

It is vital to recognise that debate was taking place internally within all the various advisory committees operating, but also between them. It would be incorrect to view the decisions of those bodies as speaking for all involved; they represent only the positioning of the dominant power block within each structure. There was, in fact, a diversity of opinion within the governance and regulatory bodies involved.

The iPSEAC contained an animal welfare representative, the SPCA's Bob Kerridge, whose views were frequently at odds with the other members. The SPCA was very aware that their presence gave legitimacy to decisions with which they fundamentally disagreed. For this reason, Kerridge spoke out in the press to make his opposition to testing psychoactive substances on animals clear, emphasising that his presence should not be taken as evidence that he condoned such practices. Kerridge stated that his role was to make the iPSEAC aware of the many proven alternatives to animal tests that existed, and to voice the Society's position, even if his power to effect change was ultimately limited because he was "but one voice".¹⁸⁴ This voice however, was only visible because of the SPCA's media statements but was invisible within the Committee's advice to the Minister.¹⁸⁵ Kerridge's presence had ticked the token box that an animal welfare representative had been consulted, but this did not signify that the representative had substantive input. Indeed, Kerridge spoke out because he understood that if he did not, his voice would be completely invisible.

The integrity of frameworks suffers where this internal dissent becomes stifled or invisible. A genuinely participatory approach to democracy requires not only a recording of dissent but engagement with it, for bodies to actively attempt to clarify what the cause of the conflict.¹⁸⁶ The benefit of recognising that a plurality of views and a plurality of expertise exists is that it enables more socially robust knowledge to be generated. It is easy for advisory bodies to become insular, closed to outside inputs and themselves become self-replicating and self-validating bodies. Nowotny argues that an extension of expertise beyond those confines generates not only greater transparency but also helps to "democratize expertise".¹⁸⁷ It ensures expertise does not become hegemonic or captured, and that the views within those bodies do not become entrenched and immovable but themselves open to challenge.

¹⁸⁴ RNZSPCA "The Royal NZ SPCA Does Not Condone Animal Testing" (press release, Scoop Media, 16 June 2013).

¹⁸⁵ Letter from Associate Professor Richard Robson (Chair, Interim Psychoactive Substances Committee) to Peter Dunne (Associate Minister of Health).

¹⁸⁶ Angela Liberatore and Silvio Funtowicz "Democratizing Expertise, Expertising Democracy: What does this mean, and why bother?" (2003) 30(3) *Sci. Public Policy* 146 at 149.

¹⁸⁷ Above n 184, at 153.

Political Pressures and New Channels of Communication

The debate over animal testing of psychoactive substances continued into 2014. The continual stream of private members' bills, petitions and SOPs enabled the ARM to keep the issue alive, so that each time a door was closed they were able to wedge it open again. Debate on the amendments to the AWA continued, and the Greens, Labour and Act MPs collectively spoke out on the animal testing issue. The debate was emotive. The testing of psychoactive substances on animals was called out as “state-sanctioned cruelty”, and MPs discussed the “unimaginable pain and miserable death” that puppies might be made to suffer, of the need to do the right thing and the importance of government not overriding democracy.¹⁸⁸ Some also argued that the matter was an economic issue of importance to the country's animal welfare reputation – warning that the world was watching.¹⁸⁹

Public support was also significant. Not only did the opinion polls show support for a ban, but when the government passed the PSA, it triggered widespread protest as thousands of people took to the streets to March. This prompted an immediate response from the Associate Minister of Health who reassured the public that no licenses to test psychoactive substances on animals would be issued until the PSEAC had completed its consideration. He also assured people that the MoH would be meeting with animal welfare representatives.¹⁹⁰

When Mallard introduced SOP 341 to the House, he highlighted that within 36 hours of the announcement over 4,000 people had contacted MPI and that during in the same time his Facebook page had received more than 32,000 views. He warned the House that the issue was “going viral”.¹⁹¹ This was significant since 2014 was also an election year and this heightened the conflict between Labour and National as each endeavoured to garner public support. Ahead of the election the Labour Party was not only supporting the animal testing ban on psychoactive substances but were promising a range of other reforms, including the gradual phasing out of factory farming practices such as colony cages.¹⁹² The impending election served to make all political actors particularly cognisant of public opinion. The subject of animal testing for

¹⁸⁸ (27 August 2013) 693 NZPD 13056 (Animal Welfare Amendment Bill – First Reading).

¹⁸⁹ Ibid.

¹⁹⁰ New Zealand Government “Minister Welcomes Animal Welfare Marches” (press release, 30 July 2013).

¹⁹¹ (27 August 2013) 693 NZPD 13056.

¹⁹² Sue Kedgley “Animals Deserve Vote of Support”. *The New Zealand Herald* (New Zealand, 11 Sept 2014) at A032.

recreational drugs, not only on rats and mice but potentially dogs, assisted to generate wider public support for an animal testing ban.

A spate of deaths and incidents where people were hospitalised as a result of using party pills and synthetics in early 2014 also increased community demand for a complete ban, as public pressure groups argued the PSA had not gone far enough.¹⁹³ Councils and mayors throughout New Zealand complained that the regulatory regime was flawed and a complete ban on the sale of legal highs and party pills, both psychoactive substances, was necessary.¹⁹⁴ Finally, following a televised political debate on the matter, the government had a change of mind and announced they would be passing an amendment to ban all legal highs and remove them from sale as a matter of urgency. With the government's announcement of a ban on psychoactive substances, Prime Minister John Key admitted publicly for the first time that some members of cabinet remained "uncomfortable" about the regime's proposed testing on animals, particularly if they had to be tested on animals other than rodents.¹⁹⁵

These last comments prompted a public response from some members of the animal research sector and members of the PSEAC. Malcolm Tingle, a researcher and member of the PSEAC issued a strong media statement in support of the need for animal tests reiterating that "decisions must be made on scientific, not current political grounds". Tingle emphasised that the choice of animal species used must be a scientific and not political decision.¹⁹⁶ The country's chief science advisor Peter Gluckman also came out in the media to advocate the necessity of testing on animals in order to ensure safety, calling this a clear "bottom line".¹⁹⁷

Key, however, disagreed. He announced that if the advice was that animal tests must be undertaken on animals *other than rodents*, then they should not be tested at all. Key stated that he had asked the Health Committee for an assurance that they would only be tested on rats, but said that they could not provide it, maintaining their view that multiple species must be used. As

¹⁹³ See Louise Berwick "Legal-High Policy Not Enough" *The Southland Times* (New Zealand, 17 Feb 2014) at 1 and "Public Revolt Grows over Legal High Shops" *Waikato Times* (New Zealand, 6 Feb 2014) at 5.

¹⁹⁴ Ben Heather, "Lobbying by Mayors Led to Legal Highs Ban" *Manawatu Standard* (New Zealand, 23 July 2014) at 5.

¹⁹⁵ "It's High Time We Accepted Most of Us Want a Fix" *The New Zealand Herald* (New Zealand, 30 April 2014) at A023.

¹⁹⁶ Science Media Centre "Legal Highs and Animal Testing – Experts Respond" (press release, Scoop Media, 2 May 2014).

¹⁹⁷ "Animal Testing Needs to Stay: Top Scientist" *Sunday Star Times* (New Zealand, 4 May 2014) at 4.

a result, Key announced that a decision had been made to ban animal tests under the PSA.¹⁹⁸ Key said that if this prevented new recreational drugs from entering the market this was “no bad thing”. He articulated that the government had taken lots of advice and it had been a mistake; “We should have just said no”.¹⁹⁹

The Psychoactive Substances Amendment Bill was passed under urgency on the 6th May 2014 and banned any consideration of animal test data in support of approval for psychoactive substances.²⁰⁰

It is revealing that as soon as the Prime Minister determined that greater restrictions and even a ban on psychoactive substances would ‘not be a bad thing’ and the need to defend the status quo was removed, he also became willing to discuss the substantive ethical concerns on animal testing. The ethical issues suddenly became apparent and open for discussion. In finally considering those issues, Key quickly formed the opinion that while testing might be necessary to develop new medicines it was “quite a different issue for a recreational drug”.²⁰¹ As political power reasserted itself, so too were the value-laden aspects of the decision made more accessible.

The engagement of the ARM on the issue of animal testing of psychoactive substances demonstrates the multiple barriers that exist to securing reform, even when there is widespread public support. Crucially, the reform that resulted here could not have been achieved in a pre MMP era. The presence of the Green Party in particular, was vitally important to the ARM and their access to Parliament.

The Green Party has its own animal welfare policy. Although they do not adopt an animal rights perspective their positioning is very closely aligned with that of the ARM. The Green Party, for example, supports a ban of rodeo, factory farming, genetic engineering of animals, a re-balancing of the composition of AECs and the establishment of an independent Commissioner

¹⁹⁸ “Testing of Recreational Drugs on Animals to Be Banned” *Manawatu Standard* (New Zealand, 5 May 2014) at 5.

¹⁹⁹ Claire Trevett “PM Vetoes Animal Testing for Drugs” *The New Zealand Herald* (New Zealand, 6 May, 2014) at A010.

²⁰⁰ Section 4(f) of the Psychoactive Substances Act 2013 now provides that “animals must not be used in trials for the purposes of assessing whether a psychoactive product should be approved” and section 12 prohibits the advisory committee under the Act from having regard to test results that were obtained through use of animal testing.

²⁰¹ “Testing of Recreational Drugs on Animals to Be Banned” *Manawatu Standard* (New Zealand, 5 May 2014) at 5.

for Animals.²⁰² In many ways, the Green Party's discourse is also an alternate discourse; they advocate an extension of the principle of non-violence beyond humans and recognise that animals have intrinsic worth.²⁰³ Because the goals of the ARM are necessarily moderated in order to engage with the law, for all practical purposes the interests and agendas of the movement and the Green Party are frequently the same. They provide representation for the movement's concerns, not only in the House but in select committee.

In contrast to the increased openness and pluralism of opinion permitted in the House, the engagement of the ARM shows how closed many expert advisory bodies remain to external inputs. Indeed, NZAVS could not find a way to engage directly with the iPSEAC, and governmental control of select committees meant that they were able to control how the issues were framed and managed.

²⁰² Green Party Aotearoa New Zealand *Animal Welfare Policy* (September 2014).

²⁰³ *Ibid.*

CHAPTER 7

Engagement Outside of Animal Protection Frameworks: the RMA and HSNO

Collateral frameworks are laws that affect animals and their interests but do not make express mention of those interests or recognise animal welfare concerns. As seen in chapter 6 in relation to the regime under the PSB, advocates who attempt to engage in these frameworks face several challenges since animal welfare-based arguments are typically viewed as out of scope. While the PSB was being introduced to the House, advocates were at least able to make submissions and attempt to force decision-makers to consider the interests of animals through petitions and SOPs. Once a framework is in place and already on the books, however, if the legislation has not recognised animal concerns in law it can be extremely difficult to remedy that omission. Animals and their interests must compete against a range of other pressing political issues and concerns, and it can be difficult to get them on the legislative agenda.²⁰⁴ When the ARM engages in contesting these frameworks, the lines of argument are even more restricted. The movement may still engage, however, animal rights and animal welfare discourse is unavailable, and new strategies and lines of discussion must be employed.

This chapter explores some examples of the ARM's engagement under two such regimes; the Resource Management Act 1991 (RMA) and the Hazardous Substances and New Organisms Act 1996 (HSNO).

The Resource Management Act

One of the frameworks that the ARM most frequently engages with is the RMA where they regularly oppose resource consent applications for intensive farming developments. The purpose of the RMA is to ensure that resources are 'sustainably managed'.²⁰⁵ Sustainable management

²⁰⁴ The main window of opportunity that exists for reform of this nature generally occurs where other, often unrelated amendments, are being canvassed and an Amendment Bill has been proposed. In fact it is arguable that the animal testing ban achieved under the PSA, discussed in the previous chapter, was only made possible because a ban on psychoactive substances generally had become inevitable, reopening the door and enabling reform on the animal testing issue. Canadian animal law scholar Peter Sankoff has noted that without formal review mechanisms and requirements in place, standards for animal care are "left to the whim of legislators" and will seldom be a political priority. See 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 L.* 281 at 303.

²⁰⁵ Section 5.

requires that the “social, economic and cultural well-being” of communities is provided for, that ecosystems are safeguarded, use of resources protected for future generations, and that any adverse environmental effects are avoided, remedied or mitigated.²⁰⁶ Intensive farms raise several potential problems in this regard. They are often noisy and malodorous operations, have high water use requirements and generate a significant amount of effluent in contrast to more traditional pastoral farming ventures. When the RMA was initially enacted, it explicitly classified “factory farms” as “industrial or trade premises” in recognition of the increased environmental concerns they raised.²⁰⁷ Due to the issues they raise, intensive farms are commonly classified as a “restricted discretionary activity” within the district and regional plans of councils, and so require explicit resource consent and council approval.²⁰⁸ Councils must also determine if the resource consent application should be publicly notified, non-notified, or given limited notification to affected persons. It is the notification process that opens up consents to submissions, which provides a mechanism for ARM to engage under the RMA framework.

Factory farming is a highly controversial activity, not just for the ARM, but also for local communities. Opinion polls have consistently shown widespread public opposition to intensive farming practices, in particular, caged egg production,²⁰⁹ the confinement systems used on intensive piggeries,²¹⁰ and more recently, dairy intensification projects and U.S. style feedlot operations. What this means in practice is that although the RMA does not incorporate any specific regard for ‘animal welfare’, whenever resource consents are publicly notified, hundreds, if not thousands, of submissions against these ventures are created. The majority of these submissions attempt to raise animal welfare concerns. For example, when Mainland Poultry sought to expand its Dunedin-based intensive layer hen farm in 2001, over a hundred submissions were received. The public outcry reached the extent that the Council sought legal advice on whether they could extend their statutory considerations to include animal welfare concerns.²¹¹ When applications were made in 2009 to establish sixteen new intensive dairy

²⁰⁶ Resource Management Act 1999. s 5.

²⁰⁷ Section 2 (repealed by the Resource Management Amendment Act 1997 No.104) for a discussion of the submissions made by the Pork Industry Board and argument on this issue see Resource Management Amendment Bill (No.3) 1996 (141-2) (commentary, as reported from the Planning and Development Committee) at xxi.

²⁰⁸ Under section 87A of the RMA restricted discretionary activities require resource consent.

²⁰⁹ A Horizon Research poll in 2001 found that 85% of the public supported a ban on battery hen cages within 5 years See: SAFE “New Poll Reveals Universal Opposition to Cages” (press release, Scoop Media, 27 Sept 2011)

²¹⁰ A Colmar Brunton poll undertaken in 2001 when industry codes were under review showed 87% public support for a ban on dry sow stalls (RNZSPCA “Poll Gives Thumbs-Down To Sow Stalls” (press release, Scoop Media, 4 Dec 2001). A poll undertaken by Horizon Research on behalf of SAFE in May 2018 showed 76% opposition to the use of farrowing crates for nursing sows. A copy of that research is contained in SAFE “Submission to the Primary Production Committee on the Petition to Ban Farrowing Crates” (6 June 2018), see Appendix 3: Horizon Research “Farrowing Crates” (May 2018).

²¹¹ SAFE *SAFE: The Voice for All Animals* (October 1999) at 7.

farms in the Mackenzie basin, utilising under-cover cubicle stalls to house almost 20,000 cows, over 3,000 submissions were received with at least 75% raising animal welfare concerns.²¹² The high level of public concern prompted Environment Canterbury to seek legal advice on whether animal welfare could be considered.²¹³ More recently, in 2018, Tegel's resource application to establish a new 'mega-farm' in Dargaville generated more than 5,000 public submissions with the Council acknowledging once again that "a central theme in submissions are concerns expressed about animal welfare".²¹⁴ These concerns, and the numbers of submissions being made are only increasing over time. This is reflective of the failure of the AWA to adequately address changing social values and the now widespread opposition to intensive animal farming.

The legal advice obtained and the subsequent position adopted by Councils has invariably been that animal welfare is not relevant to determinations under the RMA. In the Mackenzie basin, the legal advice provided to the Ministry for the Environment was that animal welfare was not relevant to considering "environmental effects", and that the interests of animals were already addressed by the AWA.²¹⁵ It was considered that "animal welfare issues fell outside the jurisdiction of the RMA" and that they were "unable to consider animal welfare issues as part of its decision-making process".²¹⁶ This position, that animal welfare concerns are irrelevant, means that they are specifically excluded from determinations under the RMA and submitters are advised that animal welfare, although a source of concern to many "is not allowable."²¹⁷

As a result, although many people and organisations make substantial submissions on animal welfare matters, these lines of argument are invisible within the formal legal documents produced and council decisions on resource consents. Animal welfare concerns are therefore not

²¹² Sally Rae "Deadline Looms for Dairy Plans" *Otago Daily Times* (online ed, New Zealand, 14 January 2010).

²¹³ This was the advice of the Environmental Protection Authority in several briefing papers prepared for the Ministry for the Environment, see EPA *Briefing Paper 10-B-0117: Mackenzie Dairying Call-In: Call-In Direction, Appointment Letters and Terms of Reference for the Board of Inquiry* (January 2010) and EPA *Briefing Paper 10-B-00003: Resource Consent Applications for Dairy Farming Under-Cover in the Mackenzie Basin* (January 2010).

²¹⁴ See Imran Ali "Failed Chicken Farm a Missed Opportunity" *Northern Advocate* (New Zealand, 3 October 2018) at A001 and Northland Regional Council / Kaipara District Council, Hearings Committee Agenda, Tegel Foods Ltd at 69.

²¹⁵ EPA *Briefing Paper 10-B-0117: Mackenzie Dairying Call-In: Call-In Direction, Appointment Letters and Terms of Reference for the Board of Inquiry* (January 2010) and EPA *Briefing Paper 10-B-00003: Resource Consent Applications for Dairy Farming Under-Cover in the Mackenzie Basin* (January 2010).

²¹⁶ Ministry for the Environment "Minister Calls in Mackenzie Basin Dairy Discharge Consents" (press release, 28 January 2010).

²¹⁷ This was the direction to submitters opposing the development of a Tegel farm in Dargaville recently, see "Last Chance for Tegel Submissions" *Kaipara Lifestyler* (New Zealand, 1 March 2018).

noted in any of the case law under the RMA.²¹⁸ Although advocates' substantive concern is denied entry, the argument still proceeds and is presented instead on matters such as effluent disposal or odour, and these lines of argument *are* often successful and can lead to consent refusal.

To investigate how movement engagement occurs under the RMA, it is useful to examine a few of the more notable resource consent decisions and cases. One of the most notable examples was that involving Craddock Farms, which in 2014 applied to develop one of the country's largest caged egg farms in South Auckland.

*Craddock Farms v Auckland Council*²¹⁹

In 2014, Craddock Farms applied for resource consent to build a large colony cage intensive egg farm, that would house more than 300,000 hens.²²⁰ In response, the Auckland Council decided that a limited notification consent process would be sufficient, meaning that only the owners of the three adjoining properties would be notified and able to make submissions on the resource application.²²¹ All three notified parties were determined to oppose resource consent, with the most vocal opponent, the Berry family. The Berrys were opposed to the farm in principle. Peta Berry was of the opinion that cages needed to be banned permanently, and she would go on to become a spokesperson for the 'Ban Chicken Layer Cages' campaign that emerged.²²²

The ARM and local community provided strong support to the campaign.²²³ SAFE organised protests directed at the Council, and an activist dressed as a giant chicken delivered hay-bales to Auckland Mayor Len Brown's office urging the Council to decline resource consent.²²⁴ A 10,000 strong petition was sent to investors calling on them to withdraw their funding support and "not to invest in more cruelty".²²⁵ The RNZSPCA also made a public statement against the

²¹⁸ For detailed examination of the treatment of animal welfare issues under the RMA framework and relevant caselaw see Oska Rego *Animal Welfare and the Resource Management Act 1991* (Masters thesis, University of Otago, New Zealand, 2017).

²¹⁹ [2016] NZEnvC 51

²²⁰ Ban Chicken Layer Cages "Animal Rights Activists Join Together With Local Communities" (Scoop Media, 15 April 2016).

²²¹ Shane Eade "Potential stink ends chicken farm proposal" *Franklin County News* (New Zealand, 14 January 2015).

²²² Above n 221.

²²³ Ibid.

²²⁴ Stop Craddock Farms "Len Brown Gets Hay Bales from Giant Chicken" (press release, Scoop Media, 18 December 2014).

²²⁵ Tao Lin "Activists Target Egg Farm Appeal" *The Press* (New Zealand, 27 November 2015) at 10, and Alexandra Newlove "Farm Protest Reaches 10,000" *The Northern Advocate* (New Zealand, 27 October 2015) at A003.

farm, stating that it was a ‘backwards step for animal welfare’, calling on the council to refuse resource consent.²²⁶ In short, the matter was highly political.

The legal battle was a time consuming and expensive endeavour. The neighbours opposing consent raised concerns in the media at the “inequity” of the process, explaining that they were “ordinary people with day jobs”, they had their own farms to manage, and limited time and resources.²²⁷ They claimed that the process was “almost prohibitive” and that people like themselves did “not stand a chance against companies like Craddock Farms who can throw everything they can at it.”²²⁸ The legal cost of opposing resource consent was significant with one party spending over \$100,000 in order to obtain the legal representation, expert advice, and reports needed to contest the matter.²²⁹ This legal opposition was facilitated through public fundraising initiatives and donations from supporters who were also opposed to factory farming.²³⁰ While only the three neighbouring property owners were able to submit, in reality, they were representing a much broader community and so had access to additional resources.

Those expert reports and advice were crucial, it enabled odour experts to be employed, and the council subsequently declined consent on that basis. Council reiterated “for an absence of doubt” that their “sole reason” for refusing resource consent was due to “concerns in relation to odour” emanating from the proposed site.²³¹ Craddock Farms then appealed the decision to the environment court. As the case commenced so did protests, this time outside the court.²³²

There is almost no reference to the broader community debate or concerns in any of the proceedings on the matter, apart from one brief note acknowledging that the Council had received a community petition opposing the development.²³³ The petition contained more than 800 signatures and was only mentioned on the record because it was presented to the Council at the hearing by one of the notified parties along with their submission. The Council accepted that

²²⁶ RNZSPCA “Proposed Cages Chicken Farm ‘Backward Step’” (press release, Scoop Media , 17 November 2014).

²²⁷ Shaun Eade “Appeal for Colony Caged Chicken Farm in Patumahoe Date Set for November” *Stuff* (online news media <<https://www.stuff.co.nz>>, 17 August 2015).

²²⁸ Shaun Eade, “Patumahoe Colony Caged Chicken Farm Appeal Date Set” *Stuff* (online news media <<https://www.stuff.co.nz>>, 17 August 2015).

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ *Craddock Farms v Auckland Council* [2016] NZEnvC 51 [40]

²³² See Tao Lin “Activists Target Egg Farm Appeal” *The Press* (New Zealand, 27 November 2015) at 10, and Alexandra Newlove “Farm Protest Reaches 10,000” *The Northern Advocate* (New Zealand, 27 October 2015) at A003.

²³³ Auckland Council “Decision following the hearing of an application for resource consent under section 88 of the Resource Management Act 1991 by Craddock Farms Ltd” (17 – 19 November 2014) at 20-21.

the petition “was a measure of the general opposition to the proposal in the community”, although the grounds of the community opposition and content of the petition were not recorded or discussed and were ostensibly ignored as irrelevant to the substantive issue.²³⁴

The *Craddock* case is noteworthy, not only for the way it excludes argument regarding animal welfare by parties making submissions against the resource consent but for where it allows reference to animal welfare concerns to enter. In the 54-page decision report of the environment court, animal welfare is referred to by Craddock Farms as one element of the “positive effects of the proposal”.²³⁵ As part of the decision-making process under the RMA, the council and later court are charged with weighing the “positive” and “adverse” effects of any development.²³⁶ Although animal welfare concerns could not constitute an “adverse effect”; since opponents’ argument on this issue was not permitted; Craddock Farm’s application and submissions make arguments on this basis. Craddock Farms highlighted in their application that they operated under a code of animal welfare, that the code contained new and upgraded standards, and that those standards had been developed in conjunction with the National Animal Welfare Advisory Committee (NAWAC).²³⁷ They also argued that approval of their venture would provide “continuity of the established business in response to the 2012 Animal Welfare Code”.²³⁸

When the environment court came to consider the “effects” of the development, as required under s104(1)(a) of the RMA, they held that there was “no issue about the positive effects”. The positive effects were clear: the farm would “supply food to its markets, provide employment” and be a modern operation “designed to comply with the newly introduced code”.²³⁹ Not only was a discussion of animal welfare permitted within Craddock Farms submissions and application, compliance with animal welfare standards constituted a positive effect.

Conversely, the adverse effects that the council and environment court considered were confined to issues such as potential visual problems, noise, dust and odour effects on adjoining properties and the potential for groundwater contamination to affect the water supply to land, in short, issues related to the proprietary interests at stake. Although those opposing consent could not raise animal welfare issues, and so could not contest Craddock Farms animal welfare claims or

²³⁴ At 20-21.

²³⁵ *Craddock Farms v Auckland Council* [2016] NZEnvC 51 at [23].

²³⁶ Resource Management Act s 104(1)(a).

²³⁷ *Craddock Farms v Auckland Council* at [3].

²³⁸ At [3].

²³⁹ At [23].

rebut the construction of code compliance as a “positive” effect, Craddock could contest the severity and merits of the “adverse” effects claimed by their opponents. To this end, Craddock Farms called on two odour experts, a landscape architect, a traffic engineer, an engineering hydrologist, an acoustics consultant, and a statistician to give evidence on their behalf. The parties that were contesting consent called in only two experts, both odour experts. The council, defending their decision, also offered evidence from an odour expert. As a result, over 40 pages of the 54-page report from the environment court decision focus on assessing and contesting evidence on the likelihood of odour emissions from the site. The court upheld the Council’s decision, and the resource consent was denied on the basis of objectionable odour to neighbouring properties.

The environment court also observed a technical detail; according to Rule 23A.2.1.11 of the District Plan all properties within 300m of the proposed sites should have been notified; *nine* additional properties fell within this zone yet had not been notified and able to make submissions.²⁴⁰ Had the environment court’s decision upheld Craddock Farms appeal, the matter could have been taken to the High Court on judicial review to inquire into the extent of the notification.²⁴¹ This issue could well have been determinative since s104(3)(d) of the RMA prohibits granting of a resource consent if an application should have been notified but was not. It is impossible to know if this factor influenced the court’s decision, but it likely insulated the case from being taken any further by Craddock Farms.

Interestingly, the Council was of the view that the site selected was too small for such a large facility, and had placed the future location of the chicken sheds far too close to adjoining properties. For their part, Council would have been willing to grant consent if Craddock had been willing to scale down the development to a more appropriate size.²⁴² The Council noted that Craddock Farms had been given the opportunity to downscale but had given this option “no consideration.”²⁴³

Hegemonic Processes and the RMA

²⁴⁰ At [10 – 18].

²⁴¹ At [18].

²⁴² At [48].

²⁴³ At [48].

This case demonstrates the wide array of issues that arise when the movement engages under the RMA. The issues are not unique to this case but are conclusively demonstrated by it. The barriers to engagement in this context are many; the RMA is interpreted in a way that prevents animal welfare-based arguments from being raised by notified parties, but permits compliance with a code of welfare to be leveraged as a positive effect. The focus on proprietary interests inherently restricts the notification requirements; and the costs associated with mounting an effective challenge against large, well-resourced corporate opponents are often prohibitive.

The bias that exists in this area symbolises part of the hegemonic processes that ensure that the ‘correct’ outcome is reached. As the Craddock Farm case demonstrates, they are not insurmountable barriers but success relies on access to law, the possession of proprietary or relevant interest that is recognised in law, and the financial resources to take the matter further. Even where these components are in place, notified parties seldom have the resources or deep pockets to match those available to their opponents. It remains a ‘David versus Goliath’ battle.

An Economic Anthropocentric Approach

The Environmental Defence Society (EDS) has criticised the ideology behind the RMA and approach of the framework, arguing that the RMA adopts an “economic anthropocentric approach’ which ensures that “human interests are put at the centre of decisions about resource use and protection” and that human interests themselves are narrowly defined in economic terms.²⁴⁴ Councils, and the courts in their turn have adopted an increasingly restricted interpretation of who qualifies as an affected party, employing tests that focus on actors that have a proprietary interest. Several commentators have criticised this approach because it operates to the exclusion of the wider community and environmental advocacy groups, and for the way in which it elevates commercial interests.²⁴⁵ As the *Craddock* case demonstrates, even where there is strong community feeling regarding an issue, their concerns are typically excluded from the decision-making process.

²⁴⁴ Greg Severinsen and Raewyn Peart *Reform of the Resource Management System: The Next Generation – Working Paper* (Environmental Defence Society, Auckland, 2018) at 36.

²⁴⁵ For discussion of the issue see Christian Whata “Environmental Rights in Times of Crisis” (2013) 9 RM Theory & Practice 42; RMA, pt 6A. and Sarah Nolan “Affected Persons under the Resource Management Act 1991” (2007) 13 *Canta*. LR 121 at 150. The view that a proprietary interest is required was taken by Blanchard J in *Westfield (New Zealand) Ltd v North Shore City Council* [2005] 2 NZLR 597 (NZSC) where he held that a proprietary right was essential to constitute an affected person. It should be noted, however, that all three judges took separate positions on the matter, Tipping J was concerned with not shutting the door on non-proprietary interests and Elias CJ dissented, arguing that reliance on proprietary interests was inconsistent with the wide definition of ‘environment’ under the Act (at 618).

Some members of the judiciary have expressed their disagreement with the way that the provisions in the RMA have been interpreted and applied. In *Westfield (New Zealand) Ltd. v North Shore City Council*²⁴⁶ Elias CJ, dissenting, argued that the focus on proprietary interests was inconsistent with the wide definition of environment in the Act and policies inherent in the legislation.²⁴⁷ The RMA adopts a very broad definition of the environment which encompasses ecosystems “and their constituent parts”, and includes people, communities, natural resources, and the “social, economic, aesthetic and cultural conditions” that affect these matters.²⁴⁸ Social and cultural values, which include concern for the welfare of animals, are compatible with this approach and the conception of ‘environment’, and attempts have been made to broaden the scope of determination on this basis.

In 1997, the Kaimanawa Wild Horse Society argued wild horses were “a natural and physical resource” and as such constituted a “part of the environment”.²⁴⁹ In order to halt a muster and cull of horses, they sought a declaration under s 311 of the RMA that the Department of Conservation had failed to recognise their s 17 duties: to avoid or mitigate “adverse effects” on the environment. This declaration was made on the basis that the cull would irreparably affect the process of natural selection and genetic material within the population. The motion was struck out: the court held that there was an “implied restriction” on the scope of the RMA; that it applied only in relation to certain types of activities, including matters such as the control of land use, activities in the coastal marine area or discharge of effluent. The claim was therefore classified as too broad.²⁵⁰

In their submissions on resource consents, both advocates and members of the public alike often try to argue that animals form a part of the natural environment and that community views concerning animals should be brought within the scope of the determination. In response to a resource consent application made by Tegel to establish a large chicken farm in Dargaville, local iwi from Kāpehu Marae made an extensive submission on this subject asserting that “(as) kaitiaki for the area it would be negligent of us not to consider the welfare of chickens it is

²⁴⁶ [2005] 2 NZLR 597 (NZSC).

²⁴⁷ *Westfield (NZ) Ltd v North Shore City Council* [2005] 2 NZLR 597 (NZSC) at 1.

²⁴⁸ Section 2.

²⁴⁹ *Kaimanawa Wild Horse Preservation Society Inc v Attorney-General* [1997] NZRMA 356.

²⁵⁰ at [3].

proposed to raise in the proposed development”²⁵¹ The Marae called for animal welfare to be considered as part of the Cultural Impact Assessment they were preparing.

When the ARM attempts to bring concern for animals within the RMA framework, their endeavours are supported by other concerned citizens. The neoliberal and anthropocentric ethics prioritised under the Act fail to achieve the kinds of outcomes *society* desires.²⁵² The New Zealand Law Society has warned that a “shake-up” of the country’s RMA law is coming, and the Law Foundation has funded a review of the current framework by EDS.²⁵³ In turn, the EDS has called for a reconsideration of the *values* underpinning the RMA and the Act has enshrined in law as a result of the Act.²⁵⁴ Some specific elements of the EDS review are concerned with how to incorporate community expectations into the RMA best, how “competing values” could be more fairly weighed and how the framework could be adjusted to be better placed to respond to changing values over time.²⁵⁵ At present, economic concerns dominate the regime, and the EDS review of the framework has highlighted the importance of establishing decision-making processes that foster deliberative democracy and can ensure an ongoing community conversation can take place.²⁵⁶

Industry Bias within the RMA Framework

In examining cases such as that of Craddock Farms and applications made by other factory farms under the RMA, it becomes clear that industries based on animal production routinely utilise existing animal welfare frameworks to strengthen their case. Companies seeking resource consents reference their legal obligations under the AWA using this as an opportunity to claim that their practices promote high standards of animal welfare. As part of their most recent resource consent application to establish a new broiler chicken farm, Tegel made a wide range of such claims arguing that all Tegel farms meet or exceed the standards in the AWA and that their

²⁵¹ The term Kaitiaki translates as ‘guardian’. See Submission 246: 246 M Mutu to Kaipara District Council on RMI170441 “ Supporting Information ‘Interim Statement of Kāpehu Marae” (7 March 2018) in respect of the proposal by Tegel Foods Ltd for a Free Range Broiler Poultry Farm to house 1.32 million chickens at any one time at Mititai, Arapohue, next door to Kāpehu Marae and Urupā” to the proposal by Tegel Foods Ltd for a free range broiler poultry farm to house 1.32 million chickens at Mititai, Arapohue’ at 10.

²⁵² Greg Severinsen and Raewyn Peart *Reform of the Resource Management System: The Next Generation – Working Paper* (Environmental Defence Society, Auckland, 2018) at 40 - 41.

²⁵³ Lynda Hagen “Preparing for Likely Resource Law Overhaul” (2017) 908 LawTalk 27.

²⁵⁴ Above n 254 at 40-41.

²⁵⁵ At 38.

²⁵⁶ At 38.

farming practices “adhere to the ‘five freedoms’ principles of animal welfare”.²⁵⁷ The application discusses the importance of animals being free from pain, injury and disease, discomfort, fear and distress and being able to express normal behaviour.²⁵⁸

In their written submission, one advocate countered that birds on New Zealand farms have been “bred to grow to full size in 6-8 weeks. Birds gain weight so rapidly that their immature skeletons cannot carry their weight. The birds at this farm will suffer from breathing difficulties, difficulties walking and leg deformities. The council should take the scale of this suffering into account”.²⁵⁹ At present, however, only one voice can be heard under the RMA, and it is the voice of industry. The advocate’s submission on animal welfare is deemed ‘out of scope’, meaning industry claims are not contested and animal welfare is constructed as a “positive effect” on the environment.

Intensive farming industries not only avoid a challenge on animal welfare grounds, but have long sought to completely escape the reach of the RMA. When it was first enacted in 1991, the RMA made explicit reference to factory farms as “industrial or trade premises” in acknowledgment of the increased environmental dangers the ventures raised. This specific reference to factory farms was strongly opposed by industry groups, with the pork and poultry industries successfully lobbying for a three year exemption from compliance with s 15 of the Act, which placed restrictions on the discharge of contaminants into the environment.²⁶⁰ In 1993, when the country voted in favour of electoral reform and it became clear that a Mixed Member Proportional (‘MMP’) system was being introduced, the industries jointly called for the term “factory farming” to be removed from the framework altogether.²⁶¹ This removal was to ensure the “problem” was addressed, as one MP put it, before “greenie populism” frustrated the “sensible economic initiative”.²⁶² The industries argued that the intention had always been to exempt factory farms indefinitely and that they should not be subject to the provisions at all.²⁶³ In response to industry concerns, Parliament agreed to remove the term “factory farm” from the

²⁵⁷ Tonkin and Taylor Ltd. *Free Range Broiler Farm, Arapohue: Assessment of Effects on the Environment: A Report Prepared for Tegel Foods Ltd* (October 2017) at 10.

²⁵⁸ At 10.

²⁵⁹ See “Submission 239”, John Darroch, “Submission to Kaipara District Council on RM170441 and NRC 039494.01.01” (7 March 2018).

²⁶⁰ Section 418(1)(d) of the RMA exempted factory farms from compliance with s15(1)(c)-(d) as one of several “existing permitted uses” allowed to continue (repealed by the Resource Management Amendment Act 1997 No.104).

²⁶¹ See discussion in the House (27 June 1996) 556 NZPD (Resource Management Act – Factory Farms, Simon Upton).

²⁶² (27 June 1996) 556 NZPD (Resource Management Act – Factory Farms, Ross Meurant).

²⁶³ See Resource Management Amendment Bill (No.3) 1996 (141-2) (commentary, as reported from the Planning and Development Committee) at xxii.

RMA and from 1997 onwards the matter was left for individual Councils to determine whether more specific regulatory provisions and controls were required and if so, to incorporate these via their regional and district plans.²⁶⁴

Many environmental commentators have argued that political preference for a “light-touch, self-regulatory, regional and industry-led” approach led to the transfer or devolution of responsibility for environmental standards and regulation to local government under the RMA.²⁶⁵ What this policy delegation to councils has produced is considerable variation in the implementation, monitoring, and enforcement of the Act, with some councils placing strict controls and others providing virtually no restrictions.²⁶⁶ The treatment of public notification provisions in the RMA can differ substantially from region to region, affecting the way in which the ARM can engage. Furthermore, councils are also charged with monitoring consent compliance once it has been approved, and the priority this is accorded is also highly variable. Even where resource consents are in place to regulate the adverse environmental effects of factory farms, compliance with the terms of those consents has become an ongoing problem. A Ministry of Agriculture report published in 2010 found that 27% of the farms surveyed were “significantly non-compliant” with their resource consents.²⁶⁷

Progress Despite Barriers

However, industry has not had it all their way. The sheer persistence with which the ARM, supported by the wider community, contests resource consents under the RMA has led to significant delays in the consenting process, which is now impacting on the sector. The NAWAC is increasingly cognisant of the growing issues with resource consenting.²⁶⁸ In recent years, mounting pressure for change has seen the intensive farming sector accept a degree of reform. Changes to the Code of Welfare for Layer Hens made in 2012, for example, mandated a gradual

²⁶⁴ See Resource Management Amendment Bill (No.3) 1996 (141-2) (commentary, as reported from the Planning and Development Committee) at xxii.

²⁶⁵ Rob Burton and Geoff Wilson “The Rejuvenation of Productivist Agriculture: The Case for ‘Cooperative Neo-Productivism’” in Reidar Almås and Hugh Campbell (eds) *Rethinking Agricultural Policy Regimes: Food Security, Climate Change and the Future Resilience of Global Agriculture*. (Emerald, Bingley, U.K., 2012) 51 at 60.

²⁶⁶ Rob Burton and Geoff Wilson “The Rejuvenation of Productivist Agriculture: The Case for ‘Cooperative Neo-Productivism’” in Reidar Almås and Hugh Campbell (eds) *Rethinking Agricultural Policy Regimes: Food Security, Climate Change and the Future Resilience of Global Agriculture*. (Emerald, Bingley, U.K., 2012) 51 at 60.

²⁶⁷ At 61.

²⁶⁸ Gwyneth Verkerk, NAWAC representative speaking to the Primary Production Committee on the Petition of Debra Ashton for Save Animals From Exploitation (SAFE) End the Use of Farrowing Crates, Live Video Stream of Primary Production Committee hearing of MPI and NAWAC submissions, 18 October 2018: <<https://web.facebook.com/PPSCNZ/videos/2165460943721328/>>.

change away from ‘battery hen cages’ to ‘colony cages’, which offer more space and contain a perch and scratching area.²⁶⁹ However, because both the movement and public at large had been calling for a complete ban of intensive cage-based systems, these reforms did little to quell general dissatisfaction.²⁷⁰ What those reforms did achieve was to require intensive egg farms to update their sheds and cage systems. Since colony cages are larger and hens must be provided with more space, farms that wished to maintain their levels of production must expand their footprint. Alternatively, some large operators have sought to establish new farms in order to ensure they maintain supply levels. Farms that select either of these routes require resource consents, and those consents are increasingly contested.

NAWAC has claimed that resource consent-related delays are now “literally adding years to what are well-intended change processes” and that this has also seen “councils increasingly blocking intensive farming industry”.²⁷¹ In October 2018, Parliament’s Primary Production Committee (‘PPC’) heard submissions on a petition launched by animal rights group SAFE, seeking a ban of farrowing crates. Farrowing crates are small stalls where nursing sows are housed in intensive piggeries, and they are so small that the sow cannot even turn around while confined in them. In their submission to the PPC, NAWAC suggested that the most practical and humane alternative to farrowing crates would be for the industry to move towards the use of ‘farrowing pens’, which provide room for the sow to move.²⁷² NAWAC, however, have said that they are concerned that indoor intensive farming systems are likely to be unacceptable to the public and are unlikely to provide for “rapidly changing community values”.²⁷³ Thus there is growing acceptance that these issues are arising not only because of agitation from a growing ARM but as a result of a fundamental and increasing disconnect between what civil society wants and what current laws deliver with respect to animal welfare.

NAWAC argued that the transition from farrowing crates to farrowing pens would likely require piggeries to redevelop and obtain appropriate resource consent, and this is no longer assured or possible to obtain in a timely manner.²⁷⁴ The question then remains whether these challenges to intensive factory farms under the RMA are stalling the process of gradual, incremental change in the industries or whether they will serve to force substantive reform.

²⁶⁹ Animal Welfare (Layer Hens) Code of Welfare 2012.

²⁷⁰ Green Party of Aotearoa New Zealand “Colony Systems Are Still Cages” (press release, Scoop Media, 26 June 2013).

²⁷¹ Above n 270.

²⁷² Ibid.

²⁷³ Ibid.

²⁷⁴ Ibid.

Channels of Communication

The study of engagement under the RMA underscores how essential it is to have access to channels of communication. While discussion of substantive animal welfare issues is not possible and the Act is interpreted in a way that favours access by those with proprietary interests, the ARM and broader community have nonetheless been able to have an impact despite these limitations. The impact is achieved indirectly by leveraging environmental and property-based concerns, and through the provision of support and sometimes financial assistance to members of the community that have the status to make submissions.

The prioritisation of economic concerns has led to a narrow construction of adverse effects and has similarly restricted who qualifies as an affected party. It also signifies that the framework under the RMA is struggling to respond, but is perhaps structured in such a way that it is fundamentally incapable of responding to broader and changing community values. A potential point where non-anthropocentric values may be able to access the framework and force a more holistic conception of the environment is under s 8 of the RMA, which requires decision-makers to take the principles of the Treaty of Waitangi into account. Section 7 of the RMA also requires regard be given to “kaitiakitanga” to achieve the purpose of the Act. The concept of kaitiakitanga reflects a notion of guardianship and protection in relation to the natural world. The recent submission of Kāpehu Marae contesting resource consent to be given to a Tegel farm in Dargaville attempted to raise animal welfare related argument on this basis.²⁷⁵ Unfortunately, or not, as the case may be, this submission will no longer be heard as the Overseas Investment Office recently turned down Tegel’s bid to purchase the proposed site and as a result, the venture is no longer going ahead.²⁷⁶

The assertion that all animal welfare concerns that arise must be dealt with under the AWA inherently limits the ability of the legal system to respond to issues when and where they do emerge in new or other contexts. It also carries with it an assumption that welfare issues have

²⁷⁵ See Submission 246: 246 M Mutu to Kaipara District Council on RMI170441 “Supporting Information ‘Interim Statement of Kāpehu Marae’ (7 March 2018) in respect of the proposal by Tegel Foods Ltd for a Free Range Broiler Poultry Farm to house 1.32 million chickens at any one time at Mititai, Arapohue, next door to Kāpehu Marae and Urupā” to the proposal by Tegel Foods Ltd for a free range broiler poultry farm to house 1.32 million chickens at Mititai, Arapohue’ at 10.

²⁷⁶ In August 2018 Philippines poultry company Bounty Holdings crossed the 90% shareholding threshold and the company was delisted from the New Zealand Stock Exchange. See “Tegel to quit listings in NZ and Oz as takeover goes ahead” *The New Zealand Herald* (New Zealand, 9 October 2018) at B004, and Direct Animal Action “Celebrations as Tegel Mega-Factory Scrapped by OIO” (press release, Scoop Media, 1 October 2018.)

already been adequately dealt with under the framework, and that if they have not, that they *can* be. The degree to which animals are protected under the AWA will be discussed in later chapters alongside an examination of movement engagement in that context, but suffice to say, the ability of AWA to adequately deal with all animal welfare-related issues is a problematic assumption.

The Hazardous Substances and New Organisms Act 1996

When decisions made under the HSNO framework are examined, they reveal a very similar line of reasoning and treatment of animal welfare concerns to those made under the RMA. The purpose of the HSNO is to “protect the environment, and the health and safety of people and communities by preventing or mitigating the adverse effects of hazardous substances and new organisms”.²⁷⁷ The core decision-making body under the HSNO framework is the Environmental Risk Management Authority (ERMA). Part of ERMA’s role is to consider applications for field trials or applications that involve the release of new organisms, including genetically modified animals. Public notification is required under s 53 of HSNO whenever applications are received to import, release or field test new organisms. In theory, this provision provides for much broader public participation in the decision-making process in comparison to that of the RMA. However, in practice, the ERMA has very narrowly construed the legislative provisions in place under the HSNO, so that very few lines of argument made by submitters qualify.

For the ARM, the most significant limitation arises from ERMA’s refusal to consider animal welfare concerns as relevant. The most explicit articulation of this position was made in 2002 following an application by AgResearch to genetically modify cows by inserting a human gene in order that they could produce milk containing a human protein. The research project was a ‘field-test’ since it required the gestation of genetically modified embryos inside surrogate cows, in the field rather than in a contained laboratory setting.²⁷⁸

ERMA’s Decision on GMD02028 (2002)

When ERMA publicly notified AgResearch’s application under HSNO to field-test genetically modified cattle in 2002, the Authority received 863 public submissions. Animal welfare and ethical concerns formed a major theme of most submissions and several animal rights

²⁷⁷ Section 4.

²⁷⁸ A summary of the application is discussed in *Bleakley v ERMA* [2001] 3 NZLR 213, this case arose as the result of an appeal under s126 of the HSNO Act against ERMA’s decision to grant approval of AgResearch’s application.

organisations, including SAFE, made substantial submissions.²⁷⁹ The animal welfare concerns were justified. According to ERMA's own annual reports, a previous similar study that had been undertaken saw sixty embryos implanted in cows, with only eight calves surviving to full term. An examination of the calves that died before term showed that they "were severely deformed" with "no urinary tract or digestive system" and lungs that could not inflate.²⁸⁰

The ERMA evaluation and report that was produced as a result of the submissions concluded that the "HSNO Act is not the legislative framework for the evaluation of animal welfare issues. Even though animal welfare was a major issue in submissions, we do not discuss these issues in this report".²⁸¹ This position mirrored that of AgResearch, who had argued in their application that any animal welfare issues arising were already being addressed through oversight of their AEC, operating under the AWA.²⁸² However the assumption that the AWA can deal with these ethical issues is itself a misconception since a regulatory gap exists in this area.

The definition of 'animal' under s 2 of the AWA does not cover mammalian foetuses in the first half of their gestation, since at that stage in their development there is little capacity to suffer so welfare to protect. The experimental procedures necessary to produce genetically modified animals take place at a point so early in their development that the embryos being used do not qualify as animals.²⁸³ Even where it is known that a genetic modification is likely to create animals that will suffer from significant disease or deformity, because that suffering does not occur at the time of the manipulation, only as a later consequence of it, the manipulation is not captured under the ethical framework. The corollary of this is that the breeding of transgenic animals requires no welfare assessment no matter how significant the welfare issues arising from that work might be. Current policy suggests that the impact of introducing a new gene into animals "should be considered" by AEC's and investigators "should" inform their AEC of potential negative impacts on the parent animal or its offspring, but unless researchers wish to

²⁷⁹ For a review and discussion of the submissions see Priya Kurian and Jeanette Wright "Science, Governance, and Public Participation: An Analysis of Decision-Making on Genetic Modification in Aotearoa/New Zealand" (2016) 21(4) *Public Understanding of Science* 447.

²⁸⁰ Bleakley C (2002) "Submission 3541" in ERMA application GMD02028. Wellington: ERMA.

²⁸¹ ERMA "Evaluation & Review Report: Application GMD02028 for Approval to Develop in Containment Genetically Modified *Bos Taurus*" (Wellington, 2002).

²⁸² AgResearch Ruakura "GMD 02028 Application to ERMA for approval to develop in containment any genetically modified organism" (Hamilton, 2002).

²⁸³ Ministry of Agriculture and Forestry *Good Practice Guide for the Use of Animals in Research, Testing and Teaching* (Wellington, April 2010), see section on 'Experimental Manipulation of Animals Genetic Material at 25.MAF, (April 2010) *Good Practice Guide for the Use of Animals in Research, Testing and Teaching* see 6.4.2.1 'Experimental Manipulation of Animals Genetic Material at page 25.

actively experiment on the foetus in the second half of its gestation, the AWA does not apply.²⁸⁴ The AWA operates once the animals have been born, requiring that their needs are met and that they are humanely destroyed if their suffering cannot be alleviated, but it does not operate at the crucial point where the decision to genetically manipulate them is made. Neither the AWA or HSNO take into account the potential or even inevitable suffering that will result as a consequence of genetic experimentation.

What was also not acknowledged by the ERMA was that the framework for regulating animal experiments under the AWA is essentially closed. Research applications are not notified and there is no mechanism to allow for public submissions, even on the most controversial tests.²⁸⁵ AECs are institutional committees made up primarily of persons attached to the relevant research facility.²⁸⁶ Each AEC must contain three external members, a veterinarian, a member of an animal welfare group and a lay member nominated by the relevant territorial or regional council;²⁸⁷ however, these members sit in an individual capacity rather than as representatives of the wider community.²⁸⁸ There is no mechanism for public opinion to be canvassed or for the views of the wider community to be formally incorporated into decisions. The processes are not in place.

For all practical purposes, the ERMA decision to leave animal welfare concerns to AECs under the AWA represents the closure of a channel of communication, and it leaves no other mechanism for the submitters' concerns on animal welfare to be heard or incorporated into the

²⁸⁴ Ministry of Agriculture and Forestry *Good Practice Guide for the Use of Animals in Research, Testing and Teaching* (Wellington, April 2010), see section on 'Experimental Manipulation of Animals Genetic Material' at 25.

²⁸⁵ Companies and institutions using animals for research, testing or teaching purposes are required to establish their own Animal Ethics Committee (or use that of another body) that is responsible for approving animal use at their facility. See Animal Welfare Act 1999 s 98 and 99.

²⁸⁶ There is at present no limit on the size of AECs and members of the committees are appointed by the chief executive of the organisation in question or their nominee (section 101(2)). No safeguards are in place to prevent stacking of committees with internal members and committees determine their own procedures, including establishing their own quorum and voting requirements.

²⁸⁷ Section 101.

²⁸⁸ The Ministry's guide to Part 6 states that the intention of including the council nominee is to ensure that "this person should bring the perspective of a member of the public" to the Animal Ethics Committee (Ministry of Agriculture and Forestry, *The Use of Animals in Research, testing and teaching Users Guide to Part 6 of the Animal Welfare Act 1999. Policy Information Paper 33* (May 2000) 25). At present the council member simply puts forward their own personal perspective on applications to use animals in research and testing. Properly supported however the presence of a council nominee on each animal ethics committee could be used to open up a channel of communication between the wider community and local research organisations, if rather than offering a personal view these members were required to *represent* the public view. At present there is no mechanism to facilitate this; councils do not develop public policies on specific animal testing issues or canvas public opinion and in fact the identity of council nominees is usually confidential. For a more detailed discussion of the issues relating to the composition of Animal Ethics Committee and the role of the Council nominee see: Deidre Bourke *The regulation of animal use for research, testing and teaching purposes under Part 6 of the Animal Welfare Act 1999* (Masters thesis, University of Auckland, New Zealand, 2005) at 40 - 70.

decision-making process on these applications. It is also clear from the large number of submissions, that this limits not only engagement with law by the ARM but also limits the engagement of environmental groups, Maori, and the wider community, since animal rights advocates are not the only persons who wish to have a say in how animals are treated in this regard.

Despite the ERMA position that animal welfare was not relevant to their consideration, the Authority did make explicit reference to animal welfare in their decision on the application. The ERMA accepted that there “may be adverse effects on animal welfare and the significance of these effects is subject to considerable uncertainty”, and they also accepted that the magnitude of that impact was likely to range from minimal “to morphological, physiological, or behavioural abnormalities or in severe cases premature death of animals”.²⁸⁹ However, they concluded that these adverse effects were of minimal significance on the basis that they would “only affect the animal itself”.²⁹⁰ This perspective highlights the clear anthropocentric perspective adopted by decision-makers operating under HSNO. Indeed the wording of the HSNO Act repeatedly refers to the need to prevent or manage the adverse effects *of* new organisms *on* ‘people or the environment’ or on ‘human health and safety’. That there may also be adverse effects on the organism itself is not recognised within the framework. When animals are classified as ‘new organisms’ under the Act, they are converted to ‘objects’ rather than ‘subjects’ within that framework and no longer have interests that are recognised.

Animal rights organisations making submissions on the application attempted to challenge the anthropocentric perspective adopted. SAFE argued that the animals had “intrinsic worth” and that their value was in part “rooted in the integrity of the animal genome”. SAFE also stated that these animals were “more than a set of physical traits or capacities. They require dignity” and that dignity was “related to the wholeness of the living being”.²⁹¹ Similarly, Ngai Tahu argued in their submission that “(a)ll species have their own Mauri” and that in their culture “human beings are seen as in no way superior to other living things”. They posited that the “mixing of the life force of one species with another by human beings is not tika [correct] and will adversely affect all of us”.²⁹²

²⁸⁹ *Environmental Risk Management Authority Decision: Application GMD02028* (2002).

²⁹⁰ *Ibid.*

²⁹¹ SAFE “Submission 3464’ in ERMA application GMD02028” (2002).

²⁹² Ngai Tahu “Submission 3424’ in ERMA application GMD02028” (2002).

By relegating animal welfare concerns out of scope, a significant element regarding the ethics of the experiments was also rendered silent. The ERMA was able to conclude that the ethical concerns were not overly prominent, which also was also voiced by AgResearch. In their submissions, AgResearch asserted that the field-study raised no ethical issues regarding the use of animals.²⁹³ Kurian and Wright have argued that AgResearch’s classification of risks, costs and benefits “constructed a storyline” where scientific and economic interests were validated while more subjective ethical considerations were sidelined.²⁹⁴ They also argue that the ERMA struggles to respond to the ethical challenges of these sorts of assessments “in the face of seemingly more tangible scientific risk analysis” provided by applicants.²⁹⁵

Several scholars have argued that this recurring tendency of frameworks to prioritise objective ‘real’ risk over subjective ‘perceived’ risk has deeply institutionalised roots within modern risk management culture.²⁹⁶ It is a modern presentation of the ‘facts’ versus ‘values’ or ‘reason’ versus ‘emotion’ binary. This framing sustains existing power-structures and institutional cultures around GMO innovation, development, regulation and exploitation.²⁹⁷

Ultimately, the ERMA determined to grant AgResearch’s application. Submitters appealed against the decision to the High Court under s126 of the HSNO alleging twenty-three errors of law. Animal welfare concerns were not raised in the case except for the court’s noting that the ERMA had been satisfied these concerns were covered by the AWA.²⁹⁸ The appellants in *Bleakley v ERMA* did, however, argue that the Authority had in effect created a *fait accompli* for itself through the unregulated initial creation of the embryos and that this had disenfranchised those opposed who wished “to provide for their wellbeing”.²⁹⁹ This had meant that the ethics of creating a transgenic species had been placed beyond the scope of the consideration.³⁰⁰ In this respect, the ERMA agreed; however, they claimed that it was the statutory scheme that had

²⁹³ AgResearch *GMD 02028 Application to ERMA for approval to develop in containment any genetically modified organism*. (Hamilton, 2002) at 2-3.

²⁹⁴ Priya Kurian and Jeanette Wright “Science, Governance, and Public Participation: An Analysis of Decision-Making on Genetic Modification in Aotearoa/New Zealand” (2016) 21(4) *Public Understanding of Science* 447 at 452.

²⁹⁵ At 459.

²⁹⁶ Brian Wynne “Creating Public Alienation: Expert Cultures of Risk and Ethics on GMO’s” (2001) 10(4) *Science as Culture* 445 at 450.

²⁹⁷ At 457.

²⁹⁸ *Bleakley v ERMA* [2001] 3 NZLR 213 [24].

²⁹⁹ At [137].

³⁰⁰ At [136].

produced this result which could not be helped, the scheme was binding and had been followed.³⁰¹ The court found no error of law in the authority's approach.

Like the RMA, the HSNO has also been highly criticised for the degree to which it restricts the nature of public participation in practice. Experiments including genetic modification on animals continue to be approved and to attract significant public submissions. One application approved in 2010, which had the intent of inserting human genes into goats, sheep, and cows, attracted 1,545 public submissions, with over 90% of these arguing against approval.³⁰² No significant progress appears to have been made to halt such experiments despite this opposition since the arguments made are not viewed as legitimate.

However, the regime under HSNO specifically permits broad and open public participation through the notification of applications and intake of submissions, and a wide range of matters should be open for consideration. Section 6 of the HSNO explicitly states that the views and perspectives of Maori and their relationship to flora and fauna, the "intrinsic value" of ecosystems and the social and cultural well-being of communities are relevant. It directs all bodies exercising functions under the Act to take these matters into account. Critics claim that despite this, the approach adopted by the ERMA has entrenched a monocultural and technocratic bias and that the pursuit of science and technology and emphasis on "scientific evidence" in the assessment of applications has rendered ethical, social and cultural concerns peripheral.³⁰³ While they may be considered, they do not compete. Dominant ideologies are therefore not simply reinforced through express legislative provisions and structural barriers that prevent entry of alternate discourse, they are institutionalised and expressed through un-reflexive policy culture.³⁰⁴

Under both the RMA and HSNO, and as seen in the debate on the Psychoactive Substances Bill in the previous chapter, current prioritisation of economic and scientific concerns serves to exclude the consideration of societal values and ethics. Existing legal frameworks operate to entrench the dominance of economic and anthropocentric concerns, and the decision-making processes in place ensure that competing discourse is excluded or delegitimised in comparison. Frameworks are thus insulated against change — even where there is widespread public

³⁰¹ At [142].

³⁰² Above n 297, at 450.

³⁰³ Above n 297 at 460.

³⁰⁴ Brian Wynne "Creating Public Alienation: Expert Cultures of Risk and Ethics on GMO's" (2001) 10(4) *Science as Culture* 445 at 451.

disagreement with the status quo. Current frameworks struggle to respond to changing community values even where channels of communication have deliberately been left open or have been designed to enable external input.

CHAPTER 8

Undercover Investigations and Video Activism - Shining a Light on the Gap between Law on the Books and Law in Practice

The narrative presented by industry and government is powerful: New Zealand has a modern and comprehensive animal protection framework, government works cooperatively with industry to ensure the highest ethical standards, and industry participation ensures ‘buy-in’ and therefore compliance. In the international arena, New Zealand is viewed as a world leader and the system is claimed to provide robust protection for animals and ensure consumer confidence. In fact, in 2014 New Zealand was ranked first equal alongside the U.K., Austria and Switzerland to be awarded an ‘A’ grade on the World Animal Protection Index.¹

Conversely, animal advocates in this country contend that while the legislation appears positive and has assisted to elevate the country’s animal welfare ranking, in practice, animals receive scant protection; the standards in Codes of Welfare are low and not legally enforceable; and they often undermine the intention of the AWA. They argue that the framework operates on trust, and that a lack of monitoring and enforcement has resulted in widespread non-compliance and systemic abuse. The ARM disputes the notion that an “idealised realm of law on the books”² exists; rather, the law represents little more than an empty claim, and one that has been actively constructed as part of a branding exercise.

By 2005, a number of Codes of Welfare had been approved, and despite new provisions in the AWA these standards remained remarkably unchanged. A plethora of controversial practices continued unaffected or were given express exemptions: the use of electric prods and flank straps at rodeos and the confinement of animals on factory farms within battery cages, sow stalls and farrowing crates. Tens of thousands of people had signed petitions and made submissions on codes to no avail. Animal advocates were outsiders in these debates and decisions were invariably negotiated between industry and government with very little external input

¹ World Animal Protection is a non-governmental organisation that releases an independent assessment of the adequacy of animal protection across different countries globally. The organisation has consultative status at the Council of Europe. The ranking relies heavily on an examination of the legislative provisions in place in individual countries and does not incorporate more nuanced considerations as issues degree of law compliance in practice or offending rates for example. A copy of New Zealand’s grading and animal protection indicators can be found at: <https://api.worldanimalprotection.org/sites/default/files/api_new_zealand_report_0.pdf>.

² Alan Hunt *Explorations in Law and Society* (Routledge, New York, London, 1993) at 302.

incorporated. Consultation with and participation by advocates and the public was viewed as perfunctory.

Working *with* existing legal frameworks and decision-making bodies, appeared to be ineffective. As a result, advocates began to employ a new tactic in an attempt to visibly demonstrate the gap between law on the books and law in practice, and disrupt the dominant narrative that animals were well-protected. The intention of engaging a new tactic, video activism, was aimed towards forcing a response and reform. Animal rights advocates began to run extensive undercover investigations documenting conditions on farms in order to demonstrate, visibly, the plight of animals and what prevailing industry standards looked like in practice.

Since the mid 2000s, the ARM has made extensive use of undercover footage. It has targeted have filmed conditions on farms to demonstrate how animals are treated in reality, and have sought to document non-compliance with industry codes to force greater monitoring and enforcement of existing laws. Hidden cameras in particular have been employed to capture overt animal abuse and animal rights investigations have driven a number of high-profile cruelty prosecutions.³ Undercover footage has been used to increase political pressure on government agencies and Parliament; to influence consumers; and to expose the fallacy of the animal production industries claims. It has forced reform in areas where years of lobbying and submissions failed to do so.

Covert filming and the placement of hidden cameras is highly controversial, and advocates have been variously characterised as ‘criminal extremists’ – or an essential ‘industry watchdog’. There is no doubt that advocates sometimes break the law in obtaining footage, but because forced entry is generally avoided, the offences in question tend to be relatively minor trespass-related offences.⁴ There is a distinct absence of law in relation to surveillance and intrusion which is not comprehensively covered under existing legislation.⁵ The Crimes Act 1960 only

³ See: SAFE “Third Prosecution Following SAFE Expose” (press release, Scoop Media 20 September 2018) and Farmwatch “Conviction for Hip Clamp Cruelty Case” (press release, Scoop Media, 27 February 2018).

⁴ Such as trespass (Trespass Act 1980, s 3) or Being found on property without legal excuse (Summary Offences Act 1981, s 29). The one time that an activist has been caught with a camera on private property, a chicken slaughterhouse, she was charged under section 29 of the SOA and successfully defended the charges on the basis that she had no intention of committing an offence. This is a defence available under s 29(2) of the Act. See *Gillespie-Gray v Police* [2010] NZAR 205.

⁵ The Law Commission has recognised this gap in the law and concerns raised by it. See Law Commission *Invasion of Privacy: Penalties and Remedies, A Review of the Law of Privacy* (NZLC IP 14, 2009) at 6.

criminalises very specific acts such as intimate visual recordings⁶ and the interception of private communications.⁷

McCausland and O’Sullivan note that the purpose of undercover filming is to gather information in public policy formation and have argued that it has a core communicative and democratic function.⁸ Employed within this context, they argue that trespass onto farms to film conditions and abuse constitutes a modern form of civil disobedience.⁹ They argue that covert activity is essential if images of injustice behind closed doors are to be captured and disseminated, and that the correctness of the actions must be judged according to the informational needs of citizens in a liberal democracy.¹⁰ They note that, paradoxically, the ‘rule of law’ remains essential, since activists invariably seek to use the information obtained to change or enforce the law.¹¹

This chapter examines the use of undercover investigations and video activism by the ARM in New Zealand, how it is carried out, to what purposes it is employed, and the outcomes gained through its use.

Politicising Animal Welfare Reform: Sow Crates and the Code of Welfare for Pigs

As will be evident from the preceding chapter, the legality of sow crates has been a central matter of debate since the AWA first came into force in 1999. Industry groups had been intractable on this issue. Government agencies accepted that sow crates did not provide pigs with an opportunity to display normal patterns of behaviour and therefore did not comply with the Act, but had been deferring making any decision on the matter. When the Code of Welfare for Pigs had been approved in 2005, it was promised that the issue would be revisited again in 2009. In the lead up to the review of the Code in 2009 it became apparent that the Pork Board remained firmly opposed to any ban. The Board argued that sow crates could not be banned, noting that Britain’s ban had resulted in “lower performance”¹² and government subsidies had been necessary to assist the transition. They claimed that the industry would simply not be able to compete with cheap imported pork if costs were increased.

⁶ Section 216G.

⁷ Section 216A.

⁸ Clare McCausland, Siobhan O’Sullivan and Scott Brenton “Trespass, Animals and Democratic Engagement” (2013) 19 Res Publica 205 at 206

⁹ At 206.

¹⁰ At 209 and 211.

¹¹ At 219.

¹² Owen Hemby “Few Surprises in National’s Farm Policy” *The New Zealand Herald* (New Zealand, 27 October 2008) at C16.

Exposing the Cruelty and True Cost of Retaining Sow Crates

In May 2009, as the code review was placed in motion, animal rights activists gained access to KuKu piggery near Levin, secretly filming the conditions of sows housed in sow crates. The footage, showed pigs kept in stalls so small they were unable to move or turn around, in clear distress, biting and chewing at the bars of their cages, ‘screaming’ and ‘frothing’ at the mouth.¹³ One sow lay dead in her stall.¹⁴ Adding to the scandal and public furore that followed was the fact that well-known comedian and former pork promoter Mike King had accompanied the activists. King described his experiences at the farm as “absolutely harrowing” and espoused his regret at having ever supported or promoted the industry.¹⁵

The action was strategic; it was timed to the code review, and bolstered by the support of prominent personality Mike King. The expose targeted consumers, undermining the industry’s advertising campaign and branding. In addition, the farm selected was not random, but owned by Colin Kay. Until the end of 2008, Colin Kay had served as the Director of the Pork Industry Board. He owned five intensive piggeries and was in the process of establishing a new \$25 million pig farm that would house 45,000 pigs and almost 5,000 breeding sows.¹⁶ He was a core player in the sector and industry figurehead.

The footage was aired on the *Sunday* programme and the public outcry was emphatic. Within 24 hours the MAF had received over 500 emails from outraged viewers,¹⁷ and thousands of letters would follow.¹⁸ Animal rights group SAFE also started receiving a steady stream of complaints and information about *other* farms and encouraged more ‘whistleblowers’ to come forward.¹⁹ Neighbours of the piggery spoke up about the continual stench and noise coming from the farm. Some spoke to the media and started their own protests outside the piggery.²⁰ Most fruitfully for the ARM, the media clamoured for more. SAFE campaign director Hans Kriek took a team of *Close Up* reporters to pig farms in the Wairarapa region and challenged farmers to open up their

¹³ “Comedian Goes Off Pork” *Northern Advocate* (New Zealand, 18 May 2009) at 4.

¹⁴ “Plea to Ban ‘Disgusting’ Sow Stalls” *The Dominion Post* (New Zealand, 19 May 2009) at 3.

¹⁵ “Comedian Goes Off Pork” *Northern Advocate* (New Zealand, 18 May 2009) at 4.

¹⁶ Kay Blundell “Plan to Build Big Pig Farm” *The Dominion Post* (New Zealand, 25 June 2008) at 4.

¹⁷ Independent veterinary report into animal welfare standards on Mr. Kay’s farm, but only after .

¹⁸ Helen Murdoch “Pig Farmers Warned on Stalls” *The Press* (New Zealand, 21 July 2009) at 4.

¹⁹ SAFE “Legal Pig Cruelty Sickens Nation” (press release, Scoop Media, 20 May 2009).

²⁰ Bronwyn Torrie “Neighbours Create a Stink over Piggery Conditions” *Manawatu Standard* (New Zealand, 20 May 2009) at 1.

doors and “show us your happy pigs”.²¹ Pictures of a farmer blocking the road to his farm with tractors and refusing to let the cameras in became a symbol of an industry trying to hide something.²² The Pork Industry Board agreed to walk journalists through two Canterbury pig farms to try and stem the negative publicity.²³ However, journalists were no longer content with these staged visits and some instead elected to start arriving unannounced at pig farms around the country.²⁴

‘Close-Up’ ran stories over three nights which saw activists and industry officials interviewed in televised debates while newspapers also ran daily updates on the story.²⁵ The expose also invoked a consumer backlash. In the wake of the footage being released, pork sales decreased overnight: consumers around the country had started asking where their pork was sourced from and requesting free-range alternatives.²⁶

The action politicised the issue of sow crates in an unprecedented way rendering it difficult for the government to defend existing standards. Prime Minister John Key called the footage “very, very disturbing”²⁷ and said that if it was truly representative of the state of the industry then changes to the code were necessary.²⁸ The Minister of Agriculture David Carter said that he had not been aware of the extent to which pigs were confined.²⁹ He said that in his opinion sow crates were “cruel and unacceptable”.³⁰ He called for an urgent review of the Pig Code and directed NAWAC to make review its “highest priority”.³¹

Despite the encouraging sounds coming out of government systemic pressures against reform remained. The Pork Industry Board warned the public that sow crates were their only means to remaining competitive,³² and that a ban would send the price of pork up substantially: sow crates were needed to ensure consumer choice.³³ Industry also retreated to their claims that more

²¹ Philip Matthews “Let the Light Shine In” *The Press* (New Zealand, 23 May 2009) at 4.

²² At 4.

²³ Eliose Gibson “Minister Orders Review of Welfare Code for Pigs” *The New Zealand Herald* (New Zealand, 21 May 2009) at 4.

²⁴ At 4.

²⁵ Above n 21 at 4.

²⁶ See Owen Hembry “Demand for Free-range Pork Soars after TV Expose” *The New Zealand Herald* (New Zealand, 9 June 2009) and Helen Murdoch “Animal Rights Uproar” *The Press* (New Zealand, 21 May 2009).

²⁷ “Intensive Piggery Owner Named” *Otago Daily Times* (online ed, New Zealand, 19 May 2009).

²⁸ “Changes Needed if Pigs Being Treated Badly” *Otago Daily Times* (online ed, New Zealand, 26 May 2009).

²⁹ “Comedian Goes Off Pork” *Northern Advocate* (New Zealand, 18 May 2009) at 4.

³⁰ (4 June 2009) 654 NZPD 4231 (Questions for Oral Answer).

³¹ Above n 23 at 4.

³² “Comedian Goes Off Pork” *Northern Advocate* (New Zealand, 18 May 2009) at 4.

³³ “Pig Farm Changes Costly” *Daily Post* (New Zealand, 19 May 2009).

research was needed on alternative systems and even argued that sow crates were necessary to ensure pig welfare.³⁴ MPI's advisory board NAWAC backed the Pork Board defending industry practice. When NAWAC's new Chair Dr. Peter O'Hara was asked if pigs were happy in sow stalls, O'Hara said that there was 'no reason to think they were not' and pointed out the cost of a ban.³⁵ NAWAC agreed more research was needed and noted that there was a process in place under the AWA: the Act required two rounds of consultation, one with farmers and another open to the public, before any changes could be made.³⁶ The Minister now backtracked, agreeing that there was a 'process to be followed' and that reform must be based on "science and reason" and "not on blind emotion".³⁷ The processes in place under the AWA were utilised as a means for delaying reform and confining the debate, and redirected negotiations back to the previous path when they began to linger. This also ensured that industry was reinstated in their position of privilege.

When Legal Practice is Not Acceptable Practice

In response to public pressure, the Ministry promised to investigate conditions at the piggery involved, although even activists argued this would be a pointless exercise. Animal rights advocates argued that it was not a rogue farm, but was average and not breaking any laws: this was simply what existing standards looked like.³⁸ The MAF inspection found the farm compliant,³⁹ their report even stated that their standards and stockmanship were "very high".⁴⁰

To underscore their point, advocacy groups obtained a copy of the veterinary report issued as part of MAF's inspection and publicly released this to expose what "very high" equated to in practice. It showed that 15-20% of the pigs had chronic sores on their backs and overgrown toes from their confinement in sow crates.⁴¹ The veterinarian had advised the farmer that although he was under no legal obligation to do so, sow welfare would be enhanced if the farm's group housing facilities were more utilised.⁴² On personal note, the veterinarian had expressed his own

³⁴ Eliose Gibson "Minister Calls for Urgent Review of Sow Crates" *The New Zealand Herald* (New Zealand, 23 May 2009) at A010.

³⁵ Green Party Aotearoa New Zealand "PM Needs to be Prime Mover on Stuck Pigs" (press release, Scoop Media, 26 May 2009).

³⁶ Above n 34 at A010.

³⁷ (4 June 2009) 654 NZPD 4231 (Questions for Oral Answer).

³⁸ "MAF to Investigate Pig Farm Conditions" *Waikato Times* (New Zealand, 19 May 2009) at 4.

³⁹ "Piggery Still Under MAF Review" *The New Zealand Herald* (New Zealand, 20 May 2009) at A003.

⁴⁰ Kay Blundell "Inquiry Clears Piggery Over Welfare Code" *Dominion Post* (New Zealand, 3 July 2009) at 5.

⁴¹ Catherine Woulfe "Vet 'Strongly Welcomes' Review of Pig Welfare Code" *Sunday Star Times* (New Zealand, 19 July 2009) at 8.

⁴² At 8.

view: that the code needed changing.⁴³ As one reporter noted, “legal practice is not always acceptable practice.”⁴⁴

More Footage, More Media, More Funds, More Reform: Unblocking Hegemony

When a memo was leaked to SAFE indicating that the Pork Board was threatening legal action against NAWAC in order to delay changes to the Code,⁴⁵ this provided evidence that despite the apparently united front, internal debate was taking place between NAWAC and the Board. It also prompted further undercover investigations, another expose on *Campbell Live*, and a new round of public debate.⁴⁶ More footage was collected showing pigs with bleeding sores, bloody feet and infections. The ongoing campaign now attracted the support of a wealthy philanthropist who donated \$2 million to SAFE, and SAFE began offering rewards of up to \$30,000 to insiders and farm workers who exposed cruelty that led to a successful prosecution or a significant animal welfare outcome.⁴⁷ The funding opened up more legal options, and SAFE announced their intention to look into their own judicial review proceedings to challenge the Pig Code.⁴⁸

The media attention had refocused the debate on sow crates in an unprecedented way and as a result, it had become politically untenable for the government to condone their ongoing use. Additionally threats of legal action now existed on both sides of the debate, from both the Pork Board and SAFE. In December 2010, the new Code of Welfare for Pigs was approved: it mandated a phase out of sow crates by 2015. Primary Production Minister David Carter said the public backlash over the mistreatment of pigs had played a significant role in the decision.⁴⁹

Overnight, the narrative of the Pork Board changed. They issued a public statement that “industry had listened to public opinion” and “responded to consumers” and in return, asked for consumer loyalty.⁵⁰ The Board said that they wholeheartedly supported the changes and embraced the reform; it would provide them with a competitive edge against overseas suppliers –

⁴³ At 8.

⁴⁴ Michael Cummings “Piggery Practice Legal but Not Acceptable” *Manawatu Standard* (New Zealand, 20 May 2009) at 8.

⁴⁵ “Legal Action Derails Pig Welfare Code” *Otago Daily Times* (online ed, New Zealand, 16 December 2009).

⁴⁶ SAFE “Industry Outed for More Pig Cruelty” (press release, Scoop Media, 3 November 2009).

⁴⁷ “Nats Considering Ban on Sow Crates, Says Key” *Dominion Post* (New Zealand, 9 November 2010) at 7.

⁴⁸ At 7.

⁴⁹ Derek Cheng “Pig Farmers Hope Ban on Sow Stalls Will Buy Loyalty” *The New Zealand Herald* (New Zealand, 2 December 2010) at A004.

⁵⁰ Andrea Vance “Sow-crate Ban Vexes Industry” *The Press* (New Zealand, 2 December 2010) at 5.

the industry was a market leader, moving ahead of reform in Australia, Canada and the United States.⁵¹

More than any other factor, the deployment of undercover footage elevated the visibility of animals in the discussion. Video activism reorientated the focus back onto the welfare of pigs and the cruelty of sow crates. It also served to mobilise and increase the power of the electorate, and in doing so ‘unblocked’ the hegemonic processes at play. The law would now more accurately reflect not what industry wanted, but what 87% of New Zealanders felt was ethically appropriate.⁵² This is an example of the inherently communicative and democratic outcome of the ARM’s covert filming.

Investigations Aimed to Improve Enforcement and Compliance

In addition to attempting to break the deadlock on specific law reform issues where they had high levels of public support, the ARM has also made extensive use of undercover investigations to highlight systemic animal welfare problems and non-compliance with legal standards. Covert filming has been used to challenge the adequacy of the industry’s quality assurance and auditing programmes, and question the legitimacy of leaving animal welfare monitoring to industry groups. It is also used to compel government agencies to enforce existing legal requirements to ensure that animals receive the protection to which they are entitled.

Previous chapters have outlined how neoliberal ideology infuses existing frameworks, and how this has operated to generate low standards and block reform. Neoliberal ideology has also led to a systemic underfunding of monitoring and enforcement agencies, and a regime where industry compliance operates on the basis of trust. In fact, a comprehensive monitoring and enforcement regime has never been implemented in New Zealand to ensure the AWA or code standards are complied with in practice.

The fact that, historically, the “minimum standards” in Codes of Welfare have not been legally enforceable has compounded these issues. Monitoring and enforcement agencies could not prosecute farms even where multiple breaches of their code existed, and were forced to mount

⁵¹ “\$20 million to please pigs, public” *Rural News* (New Zealand, 8 December 2010).

⁵² Colmar Brunton Poll taken in 2002, see RNZSPCA “Sow Stall Ban in Sight” (press release, Scoop Media, 8 February 2002).

often highly technical cases under the very subjective and broad terms employed in the Act.⁵³ Enforcement agencies must establish that there was “unreasonable or unnecessary suffering”⁵⁴ or that needs were not met in accordance with “best practice and scientific knowledge”.⁵⁵ Evidence had to be adduced to establish these beyond a reasonable doubt and expert evidence was typically needed. Prosecutions tended to be avoided since they were both technically difficult and costly. Alternatively, because breach of a code is not an offence and active monitoring does not occur, historically there has been little incentive for industries to implement code standards. This makes industry and governmental claims of high animal welfare standards particularly contentious.

The first real step towards remedying this situation was finally taken in 2018, when the Animal Welfare (Care and Procedures) Regulations were put in place. The regulations make it easier for Ministry and SPCA inspectors to take action against lower level offending by introducing a raft directly enforceable offences and penalties.⁵⁶ In doing so they have also made selective minimum standards in many existing codes legally binding.⁵⁷ While an improved enforcement regime now exists, this is only a very recent development and its effectiveness is still dependant on adequate monitoring taking place.

In 2010, the MAF issued a report entitled *Safeguarding Our Animals, Safeguarding Our Reputation*. In that report the Ministry stated that their policy was to encourage “voluntary compliance” because a formal compliance framework has been held back by lack of resources.⁵⁸ The Ministry revealed that they simply had no capacity to do more than respond to specific complaints and admitted that these only told part of the picture; there was “limited or no information available about animal welfare compliance on the 97.5 percent of farms for which no complaint is received”.⁵⁹

⁵³ The government has now put regulations in place to bridge this gap, introducing a range of new enforcement measures.

⁵⁴ Animal Welfare Act 1999 s 11.

⁵⁵ Section 10.

⁵⁶ The regulations establish a range of infringement offences and fees, as well as strict liability offences for more serious offending.

⁵⁷ Codes of Welfare now highlight which minimum standards have corresponding regulations, making them a binding legal requirement. See for example the Animal Welfare (Dogs) Code of Welfare (1 October 2018) at 11 noting that minimum standard 3 (the requirement to provide access to water) corresponds with Regulation 13 in the Animal Welfare (Care and Procedures) Regulations 2018.

⁵⁸ Ministry of Agriculture and Forestry *Safeguarding Our Animals, Safeguarding Our Reputation: Improving Animal Welfare Compliance in New Zealand* (July 2010) at 11.

⁵⁹ At 6.

At the time of the report, the Ministry noted that they employed only five full time inspectors and seven casual staff for the entire farming population of rural New Zealand at that time, in contrast with the RNZSPCA's 95 inspectors that dealt with welfare issues in urban areas.⁶⁰ With insufficient personnel to even respond to complaints, a memorandum of understanding had been developed to enable RNZSPCA inspectors to be called in to assist in the animal production sector where necessary.⁶¹ MAF admitted to being so stretched that they were unable to increase their education and awareness programmes without compromising their ability to respond to complaints.⁶² MPI articulated that they looked to the private sector to fill the gap, but that this was problematic since the Ministry accepted that existing industry programmes were incomplete and provided inconsistent standards.⁶³ In the 2010 report, the Ministry called on industry to be more active in "establishing and reporting their own animal welfare performance-monitoring programmes" and suggested that those programmes "could be voluntary and be managed entirely by industry".⁶⁴

This approach of deferring to industry and avoiding a 'costly regulatory regime' fell in line with governmental policy directions. The government's statement on regulation at this time emphasises this. With its motto, 'Better regulation, less regulation' government envisaged issues being addressed through "private arrangements" under the rationale that regulation would "impair private property rights" or "market competition".⁶⁵ It also placed an expectation on governmental agencies to recognise the importance of productivity in enhancing the country's economic performance.⁶⁶ For this reason, successive Codes of Welfare have avoided placing any requirements on industry. Even today's Codes of Welfare contain a section on "Welfare Assurance" that sets no minimum standards in this regard but simply *recommends* that records of disease, death or injury are kept and that welfare assurance systems be put in place to assure compliance.⁶⁷

⁶⁰ At 18.

⁶¹ At 9.

⁶² At 8.

⁶³ At 19.

⁶⁴ At 19.

⁶⁵ Government of New Zealand *Government Statement on Regulation: Better Regulation, Less Regulation* (17 August 2009).

⁶⁶ *Ibid.*

⁶⁷ See for example: Animal Welfare (Rodeos) Code of Welfare 2018 at 23. and Animal Welfare (Pigs) Code of Welfare 2018 at 31.

The number of specialist animal welfare inspectors remains low, additional funding increased the number of Ministry inspectors to 17 in 2016,⁶⁸ and a further five inspectors had been appointed by October 2017 bringing the total to 22.⁶⁹ An independent report published in 2019 concluded that ongoing under-resourcing of the animal welfare enforcement system continues to result in “overly selective enforcement, under prosecution, insufficient proactive enforcement and inadequate self-regulation”.⁷⁰ It also noted that both agencies continue to rely on reactive enforcement through public monitoring (complaints) and industry self-regulation.⁷¹

A voluntary and anonymous survey of pastoral, pork and poultry producers was undertaken in 2013 to gain a measure of self-reported compliance. The survey was conducted to check the efficacy of the government’s system which only inspected farms in response to a complaint, and relied on an unverified expectation that “the vast majority of farms will be maintaining adequate welfare standards”.⁷² Although 80% of respondents to the survey assessed their knowledge of the regulatory framework as excellent or above average, when asked about the five basic requirements in place for animals (the ‘five freedoms’) only two of the five requirements were identified by more than half of the participants: the requirements for food/water and adequate shelter.⁷³ Twenty-three percent of respondents were unable or refused to answer the question, and only 14% recalled the opportunity to display normal patterns of behaviour as a basic legal requirement. This was despite the fact that “both the pig and poultry industries had been forewarned” about the survey by industry bodies.⁷⁴ This indicates that in part, compliance issues may arise through a general lack of awareness of the standards in place. Because the standards are not legally binding and compliance is not actively monitored, there is little *need* to be aware of them.

The lack of monitoring has also enabled industry to flout the law. A 2016 report from NAWAC on the pig industry found a host of compliance issues. It discovered that code restrictions on the use of sow crates were being widely ignored since the industry did “not accept or comply” with

⁶⁸ Fisheries officers and veterinarians at meat processing plants are also warranted Animal Welfare Inspectors and able to assist on request. See MPI “Animal Welfare Regulations: Summary report on public consultation April/May 2016. MPI Information Paper No: 2017/02 at 57.

⁶⁹ Marcelo Rodriguez Ferrere, Mike King and Levi Mros Larsen *Animal Welfare in New Zealand: Oversight, Compliance and Enforcement* (Project Report) (2019) at 97.

⁷⁰ At 3.

⁷¹ At 14.

⁷² VM Williams, AB Pearson, GB Jeffrey, RW MacKenzie, LJ Ward and MW Fisher “A Snapshot of New Zealand Farmers Awareness of, and Self-reported Compliance with Animal Welfare Requirements” (2015) 75 Proceedings of the NZ Society of Animal Production 200.

⁷³ At 200.

⁷⁴ At 204.

this requirement.⁷⁵ Similarly, the Code of Welfare for Pigs required that nursing sows be provided with nesting material in their farrowing crates, another recommendation that was also being ignored. NAWAC noted that the industry disagreed with this requirement and did not comply with this minimum standard.⁷⁶ NAWAC also noted that older farrowing crates did not fit today's large sows but were still in use on older farms despite them no longer complying.⁷⁷ No prosecutions followed these findings; instead, NAWAC recommended that the Ministry took follow-up compliance action. As a result, a commitment was made to "inspect all of New Zealand's large production pig farms over the next three years."⁷⁸ This highlights that the ongoing lack of monitoring and enforcement had enabled farmers to flagrantly disregard and refuse to implement code standards.

The undercover investigations of the ARM highlight the *enforcement gap* that exists between law on the books and what occurs in practice. This creates pressure to increase resource allocation in this area and for enforcement agencies to close the gap.

Highlighting the Problem of Private Sector Monitoring

In response to public pressure following the undercover exposes by the ARM in 2010, the Pork Industry Board moved to introduce a new auditing and compliance programme. They committed to conducting an annual compulsory audit of all commercial pig farms. Only those accredited would carry the "100% New Zealand Pork, PigCare Accredited" seal of approval.⁷⁹ This represents the exact type of response that existing regulatory policy prefers: for industry to cover their own compliance costs and to fulfil this regulatory function. However, there are significant conflicts of interest where industry operates to fill this gap. Timoshanko has argued if "values-based issues" are regulated by the market-based approach, as is the case for the welfare of farm animals, "then the subsequent regulation is not reflective of society's *actual* values on the topic of regulation."⁸⁰

⁷⁵ Letter from John Hellström (Chair of NAWAC) to Hon Nathan Guy (Ministry for Primary Industries) regarding the NAWAC review of the use of Farrowing Crates for Pigs in New Zealand (14 March 2016).

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Julie Ash "PigCare labels fail to meet approval of welfare group" *Dominion Post* (New Zealand, 6 November 2010) at 4.

⁸⁰ Aaron C. Timoshanko "Limitations of the Market-Based Approach to the Regulation of Farm Animal Welfare" (2015) 38(2) UNSW L. J. 514 at 532.

This was certainly true in relation to the PigCare scheme. The scheme had been developed in response to public concern over the use of sow crates and farrowing stalls, however, farms utilising these production methods still qualified for accreditation.⁸¹ SAFE suggested that if the Pork Board truly wanted to respond to consumer concerns, they would introduce a product-labelling scheme so that consumers could choose which products to support; however, industry persistently avoided this.⁸² When the Pork Board sought to claim that their scheme had been developed in conjunction with the SPCA, the SPCA responded that the label was not SPCA approved, indeed, they considered the label so misleading that it was likely to be in breach of the Fair Trading Act 1986.⁸³

In 2013, animal rights group Farmwatch decided to investigate conditions on intensive piggeries and in particular, welfare standards on PigCare accredited farms. The standards on the first farm where undercover footage was taken so appalled activists that they immediately contacted the Ministry for assistance. Inspectors visited and found significant non-compliance. The condition of some animals was so poor that they had to be euthanised.⁸⁴ The Ministry promised to undertake regular monitoring of the farm but refused to prosecute, stating that improvements were being made and code compliance was now being met.⁸⁵ However, Farmwatch returned the following year to find the situation had worsened not improved. Their footage showed severe overcrowding, sows in farrowing crates so small newborn piglets were being squashed to death on piggery floors, animals with infected eyes and obvious sores, a dead pig left to rot among living pigs and dozens of rats running over the animals.⁸⁶ This time, they passed the footage on to the *Sunday* programme in the hope of gaining more significant action from government agencies.

It became clear that although the Ministry agreed conditions on the farm were unsatisfactory, they did not consider that a successful prosecution was possible, nor could they establish that an offence had been committed.⁸⁷ The Pork Board assured consumers that no product from the farm had gone into the marketplace because meat supply from the farm had already been stopped.⁸⁸ The Board was aware of issues on the farm, because the farm had failed its annual PigCare

⁸¹ Helen Murdoch “Animal Activists Critical of Pig-Care Code” *The Press* (New Zealand, 27 May 2010) at 10.

⁸² At 10.

⁸³ RNZSPCA “Proposed Pork Labelling Scheme is Misleading” (press release, Scoop Media, 22 June 2010).

⁸⁴ Georgina Stylianou “Exposed Farm’s Pork Banned” *The Press* (New Zealand, 1 July 2014) at 2.

⁸⁵ At 2.

⁸⁶ At 2.

⁸⁷ At 2.

⁸⁸ At 2.

audit.⁸⁹ They said that they did not condone the farm,⁹⁰ and that had notified the Ministry when the farm failed its audit.⁹¹ The Board pointed out that they had no statutory power to force farms to do anything and that enforcement was a matter for the Ministry.⁹²

This situation highlights a number of systemic problems at play. It demonstrates the laxity of the Ministry's monitoring and response to complaints, and their resistance to pursuing formal legal action. A cooperative and supportive approach was preferred over more coercive measures, even where the welfare breaches were significant and ongoing. Even where industry groups did monitor their own farms and report welfare issues, enforcement was unlikely since it relied on action from chronically underfunded and unresponsive governmental agencies. This situation is not only problematic for animals but also elevates the risk to industry: a lose-lose situation quickly evolves.

Highlighting the Need for Legally Binding Welfare Standards

The undercover investigations conducted by animal rights groups demonstrated very clearly how practically unworkable the code framework was. Even farms with significant animal welfare issues were able to comply with code standards, because the standards were drafted to such a low level. Since compliance with a code was a defence to charges under the Act, no prosecution could be mounted.⁹³ Even where farms did breach code standards, the very generally-worded provisions of the AWA created uncertainty as to legal standard in practice. The cost and technical difficulty of mounting a case under the Act meant that MAF avoided pursuing legal action in all but the most serious and clear-cut cases. Low to moderate-level offending, and systemic issues were virtually impossible to address.

Where the primary evidence against a farm consisted of footage obtained by hidden cameras or by activists trespassing onto farms, the legal issues were even more complex. It was possible that the film might be excluded as evidence on the basis that it had been "improperly obtained".⁹⁴ Evidence is not automatically excluded under the Evidence Act 2006 in this type of situation, but argument has to be made as to its admissibility. The court considers whether exclusion is

⁸⁹ At 2.

⁹⁰ "Pig Farm not Condoned by Industry" *Nelson Mail* (New Zealand, 1 July 2014) at 5.

⁹¹ Laura Walters "Pork Pies in Pig Welfare" *Sunday Star Times* (New Zealand, 13 July 2014) at 4.

⁹² At 4.

⁹³ Animal Welfare Act 1999 s 13(c).

⁹⁴ Evidence Act 2006, s 30.

“proportionate to the impropriety”.⁹⁵ The balance struck depends on a number of matters including the extent of the intrusion and the seriousness of the offending.

In *Balfour v R*⁹⁶ for example, the Court of Appeal considered the admissibility of illegally obtained evidence⁹⁷ gathered by SPCA officers that entered the property of a cat and dog breeder, along with a Television New Zealand cameraman, who filmed the search. Large numbers of cats and dogs were found living in filthy conditions and suffering from a range of diseases, some lacked access to water and were dehydrated. Many of the animals had to be destroyed. In the District Court, Judge Garland excluded illegally obtained evidence relating to the Balfour’s home however the observations and photographs of SPCA officers as to the state of the property and animals on it, were deemed admissible.⁹⁸ This was in consideration of the importance of the evidence to the case, the lesser privacy interest in areas other than the Balfour’s home, and that the SPCA officers could have exercised a right of inspection under s 127 of the AWA.⁹⁹ The Balfour’s appealed the decision, arguing that the trial judge was wrong not to exclude all of the illegally obtained evidence, however the Court of Appeal dismissed the appeal, affirming the approach of the District Court. This case demonstrates that illegality alone is not determinative. However the Ministry has long been highly risk adverse, and such considerations provide an additional complexity, and potential cost, to any prosecution.

In 2014, hidden cameras at a Kumeu piggery captured more disturbing footage. This time, the footage recorded a sow’s prolonged suffering as farm workers used a hammer to kill her over an extended period. The footage also showed farm workers kicking and stomping on piglets, kicking a sow in the face, and a piglet lying injured and near death after being crushed.¹⁰⁰ The Farmwatch footage was aired on TV One’s *Sunday* show. The Ministry had two independent veterinarians view the footage, but astonishingly it was considered that there was insufficient evidence to conclude on the basis of the film alone, beyond a reasonable doubt, whether the pigs had suffered “unnecessary pain or distress or ill treatment”, and that there was insufficient evidence for a prosecution.¹⁰¹ In response to a letter from a concerned member of the public, a

⁹⁵ *Balfour v R* [2013] NZCA 429 at [6].

⁹⁶ [2013] NZCA 429.

⁹⁷ Judge Garland in the District Court found that the relevant search warrant was invalid due to delay in acting in information and inappropriate features of the warrant application. See NZ Court of Appeal “*Balfour & Balfour v R*” (press release, 13 September 2013).

⁹⁸ *R v Balfour* DC Palmerston North CRI-2007–010–136, 22 December 2011.

⁹⁹ *Balfour v R* above n 95 at [6].

¹⁰⁰ SAFE “Issues in Pig Farming Deepen with new footage” (press release, Scoop Media, 6 July 2014).

¹⁰¹ New Zealand Ministry for Primary Industries “Piggery Investigations Complete” (press release, 28 November 2014).

Ministry official explained that there remained “considerable issues regarding the admissibility of footage that has been illegally obtained”.¹⁰² When inspectors had visited the farm they did not witness any overt cruelty or non-compliance, so the Ministry had been unable to acquire any independent evidence to substantiate the abuse.¹⁰³

This case was formative in creating change. The Ministry officially recognised that standards needed to be far clearer and more enforceable, and that action needed to be taken to make prosecutions easier. They determined to seek an amendment to the AWA to resolve the problem.¹⁰⁴ Collectively, the undercover investigations had highlighted systemic non-compliance and demonstrated the failings of the code framework. This contributed to the Ministry implementing changes through the Animal Welfare Amendment Act 2015, to provide the Minister with additional powers to issue legally binding regulations where necessary.¹⁰⁵ This provided a mechanism for more detailed and legally binding requirements, in the form of infringement offences, to be put in place in problem areas to ensure standards are clear and enforceable. It was also a cost-saving measure, since it allows the Ministry to avoid prolonged legal debate on the more general and subjective provisions of the AWA. Since the introduction of regulations the number of infringement notices has steadily increased.¹⁰⁶ Legal commentators have suggested this will likely help ensure improved enforcement and have a deterrent effect. Conversely however concern has also been raised that by reducing the penalty level a substitution effect may be created, if agencies preferentially utilise infringement notices in lieu of more expensive court proceedings, while systemic under-resourcing issues remain unaddressed.¹⁰⁷ Ferrere et al notes that while the number of enforcement notices has increased, “prosecution rates remain essentially static”.¹⁰⁸

What is clear however, is that the undercover footage collected by animal rights activists was able to generate sufficient public pressure on government agencies, effectively forcing them to respond to animal welfare concerns in the farming sector, which in turn forced recognition of the inadequacy of code standards and the enforcement mechanisms in place, and driving reform.

¹⁰² Letter from Dean Baigent (MPI Director of Compliance) to Kirsty Wright (12 December 2014).

¹⁰³ New Zealand Ministry for Primary Industries “Piggery Investigations Complete” (press release, 28 November 2014).

¹⁰⁴ Georgina Stylianou “Exposed Farm’s Pork Banned” *The Press* (New Zealand, 1 July 2014) at 2.

¹⁰⁵ Regulations are now able to be made by Order in Council under section 183A of the AWA.

¹⁰⁶ Ferrere above n 69, at 13.

¹⁰⁷ See Danielle Duffield “The enforcement of animal welfare offences and the viability of an infringement regime as a strategy for reform” (2013) NZULR 897 at 926, and Marcelo Rodriguez Ferrere, Mike King and Levi Mros Larsen *Animal Welfare in New Zealand: Oversight, Compliance and Enforcement* (Project Report) (2019) at 13-14.

¹⁰⁸ Ferrere, above n 69 at 14.

Identifying Systemic Welfare Issues in the Dairy Industry

No account of the ARM's use of undercover video footage would be complete without referring to Farmwatch's best-known series of exposes on the treatment of calves in the dairy industry. This led to a number of high-profile prosecutions and triggered the development of legally binding regulations to protect bobby calves. The investigation was initiated after animal rights groups were contacted by farmers and members of the rural community who had concerns over how long calves were being left unattended, without adequate food, water or shelter at gates awaiting pick-up and transport to slaughter, and their rough handling during this process.¹⁰⁹ Calves are considered a by-product of the dairy industry, and surplus to its needs. Bobby calves are generally sent to slaughter at around four days old, so they are particularly young and vulnerable. During the course of the 2015 bobby calf season, the season that Farmwatch monitored, more than 5,000 calves would die prematurely due to "welfare issues" in transit, so commonplace that it was almost effortless to capture footage.¹¹⁰

The footage that Farmwatch obtained showed day-old calves being collected from farms after being left stranded in the sun for hours without milk, dead calves lying in crates, farm workers killing calves, piles of dead animals, and calves being roughly thrown onto transport trucks.¹¹¹ Farmwatch also set up a hidden camera at one of the slaughterhouses that calves were taken to; this would capture highly disturbing footage of a worker's treatment of very young calves. Some were too weak to stand, others were kicked, thrown against walls, and bludgeoned, before being clubbed to death.¹¹² When uncovered, the footage was sent directly to the Ministry but after no response, Farmwatch released the footage to the media and it aired on the *Sunday* show creating an immediate uproar.¹¹³

SAFE's Hans Kriek asserted that the footage underpinned the reality that dairy calves were "just waste products to the industry and treated accordingly" and "left like rubbish, to be picked up at the side of the road".¹¹⁴ Dairy industry bodies were quick to claim that the cruelty was an isolated

¹⁰⁹ "Farmers Tipoff Cruelty Investigator" *Bay of Plenty Times* (New Zealand, 1 December 2015) at A019.

¹¹⁰ In total 5,390 calves died in transit. This figure represents 0.25% of those sent to slaughter. In 2008, the figure was 0.68% so this was a significant decline. Ministry of Primary Industries *Regulatory Impact Statement: Animal Welfare (Calves) Regulations* (July 2016) at 2.

¹¹¹ "Companies Sack Workers for Cruelty to Calves" *Taranaki Daily News* (New Zealand, 2 December 2015) at 6.

¹¹² Florence Kerr "Haulage Firms Sack Employees" *Waikato Times* (New Zealand, 2 December 2015) at 3.

¹¹³ "Calf Cruelty Exposed in Farm Probe" *The New Zealand Herald* (New Zealand, 30 November 2015) at A004.

¹¹⁴ "Companies Sack Workers for Cruelty to Calves" *Taranaki Daily News* (New Zealand, 2 December 2015) at 6.

case and that the practices seen were not indicative of the industry as a whole.¹¹⁵ Farmwatch countered, however, that the rough treatment and abuse of calves was so widespread that eight of the ten transport companies filmed had loaded calves by simply throwing them onto the back of trucks.¹¹⁶ They also said that they had witnessed deliberate cruelty to calves on at least 15 of the 50 farms secretly filmed across the Waikato.¹¹⁷ In speaking to the abuse at the slaughterhouse, Kriek accepted that activists had only placed cameras at one slaughterhouse so could not speak to whether cruelty concerns were more widespread in that area or an aberration, however, it was certainly a concern that the first slaughterhouse activists had filmed at had caught such extreme cruelty happening.¹¹⁸ Activists said they were concerned that the industry was avoiding acknowledgment of the scope of the problems and using those caught on camera as scapegoats.¹¹⁹ Those caught on film certainly felt like scapegoats: the owner of ‘Down Cow’, the slaughterhouse in the video, said that their procedures were “common” on New Zealand’s farms and slaughterhouses, and that there were “other firms doing exactly the same”.¹²⁰

Industry and Ministry Response

Fonterra condemned the footage and said they were happy to meet with both industry representatives and SAFE to discuss steps to ensure the treatment caught on film was dealt with.¹²¹

The Ministry initiated farm visits “to familiarise farmers with their legal responsibilities” and offer support, education and training, and established an anonymous helpline encouraging reporting of any stock mistreatment.¹²² A Bobby Calf Action Group was formed to bring together stakeholders to ensure improved standards were implemented in practice, and MPI committed to closely monitor the sector over the following two seasons so that they could make an assessment of common practice in the industry.¹²³ MPI stated that they were committed to

¹¹⁵ Jonathon Underhill “SAFE Gets the Ear of Fonterra with Bobby Calf Footage” *Business Desk* (New Zealand, 8 December 2015).

¹¹⁶ “Farmers Tipoff Cruelty Investigator” *Bay of Plenty Times* (New Zealand, 1 December 2015) at A019.

¹¹⁷ At A019.

¹¹⁸ Jack Fletcher “Dutch Courage” *Sunday Star Times* (New Zealand, 6 December 2015) at 10.

¹¹⁹ At 10.

¹²⁰ Farmwatch “Slaughterhouse Only the Tip of the Iceberg” (press release, Scoop Media, 21 January 2016).

¹²¹ Fonterra also took immediate steps to try to protect the industry altering their supply agreement with farmers to bar them from leaving bobby calves in pens on the roadside for pickup. Trucks would now have to come onto farms. This would make it easier for farmers to oversee the loading process, but had the additional consequence of making the loading process difficult to see from the road. See Gerald Piddock “Calf Cruelty Shocks Farmers” *Waikato Times* (New Zealand, 1 December) at 1.

¹²² National Animal Welfare Advisory Committee *2015/16 Annual Report* at 18.

¹²³ At 18.

stopping the rough handling of calves and pointed out that the relevant code made it clear calves were not to be thrown or kicked, and required them to be fed with within two hours of transport, and given suitable accommodation... and that using “blunt force trauma” to kill calves was not permitted except in emergency situations.¹²⁴

Again, however, there was a hesitancy to initiate legal action against the slaughterhouse worker. The Ministry claimed to be investigating and ‘building a case’,¹²⁵ although the owner of the slaughterhouse disputed this, saying that they had never been contacted over the matter.¹²⁶

The SAFE Advertisement

In the most controversial move yet SAFE put a paid advertisement in British newspaper *The Guardian* taking the expose to a core export market. They claimed this was necessary to force the Government to respond, they were “sick and tired ... of the Government not doing anything” in response to cruelty complaints.¹²⁷ Despite instant criticism at the highest level, Prime Minister John Key called the ad “economic sabotage”,¹²⁸ the ad did generate a response. Industry groups also began calling for those involved to be prosecuted,¹²⁹ and Dairy NZ began conducting interviews with farmers and managers to identify areas in need of improvement.¹³⁰ There was now general acknowledgement that systemic issues existed, and the Ministry introduced a suite of training programmes. In conjunction with industry stakeholders, including Federated Farmers, the Meat Industry Association, the Road Transport Forum and NZ Veterinary Association,¹³¹ work began towards drafting binding *regulations* for the welfare of bobby calves.¹³² Charges were also finally laid against the slaughterhouse worker caught kicking, throwing and bludgeoning calves, and he pled guilty to 10 charges including wilful ill-treatment and using blunt force trauma.¹³³ The guilty plea meant argument over the admissibility of Farmwatch’s

¹²⁴ Ministry for Primary Industries “MPI Works on Bobby Calf Issue” (press release, December 2015).

¹²⁵ “Companies Sack Workers for Cruelty to Calves” *Taranaki Daily News* (New Zealand, 2 December 2015) at 6. This is another issue with these cases; prosecution is not always easy, and more often than not a single incident caught on video is insufficient to mount a case.

¹²⁶ “Calf Cruelty Exposed in Farm Probe” *The New Zealand Herald* (New Zealand, 30 November 2015) at A004.

¹²⁷ Henry Cooke “SAFE Advert ‘Condemns Majority’” *Manawatu Standard* (New Zealand, 9 December 2015) at 5.

¹²⁸ At 5.

¹²⁹ Jonathon Underhill “SAFE Gets the Ear of Fonterra with Bobby Calf Footage” *Business Desk* (online ed, New Zealand, 8 December 2015).

¹³⁰ Carmen Hall “Farmers’ Feedback Will Improve Calf Treatment” *The Daily Post* (New Zealand, 3 March 2016).

¹³¹ “Grossly Irresponsible” *Rural News* (New Zealand, 15 December 2015) at A016.

¹³² Ministry for Primary Industries “MPI to Launch Investigation Into FarmWatch Footage” (press release, 26 October 2016).

¹³³ *Erikson v Ministry for Primary Industries* [2017] NZAR 1015.

footage could be avoided. The Ministry proudly stated that “mistreatment of animals will not be tolerated” and “when we get information about mistreatment of animals, we investigate”.¹³⁴

Regulatory Reform and Innovation

The first set of regulations introduced by the Minister using his new s183A powers would be the Animal Welfare (Calves) Regulations 2016.¹³⁵ The RNZSPCA, SAFE and Farmwatch were all involved in the pre-consultation discussion on the proposed regulations *prior* to public consultation.¹³⁶ Channels of communication had been opened up to animal advocacy groups. Governmental policy necessitated a strong case be made in order for new regulations to be introduced.¹³⁷ The actions of the ARM had provided this case by exposing the industry to economic risk. This was the trigger *required* for change, possibly the only trigger that existing frameworks were responsive to. The Ministry justified regulation on the basis that it would make prosecution more straightforward and less resource intensive, and that it was required to protect the industry’s reputation and “access to high value markets”.¹³⁸ They assured farmers, however, that the majority of offending would be dealt with through verbal advice and warning. The new enforcement tools would be reserved for farmers whose offending was “frequent or repetitive”.¹³⁹

Despite the new regulations, when Farmwatch monitored standards during the course of the 2016 bobby calf season, the footage revealed that calves were still being thrown onto trucks, and dropped and dragged by transport companies.¹⁴⁰ Both Federated Farmers and Dairy NZ defended the loading protocols followed in Farmwatch’s footage¹⁴¹ and the transport companies claimed that it demonstrated “best practice”.¹⁴² It was argued that loading calves onto trucks required physical handling to lift them up, and that to do the job properly a person would need to be about seven foot tall.¹⁴³ What this had actually highlighted was the need for loading platforms.¹⁴⁴ MPI

¹³⁴ Natalie Akoorie “Secret Video Footage Sees Man Admit Guilt” *The Northern Advocate* (New Zealand, 3 June 2016) at A019.

¹³⁵ These were later incorporated into the Animal Welfare (Care and Procedures) Regulations 2018.

¹³⁶ Ministry of Primary Industries *Regulatory Impact Statement: Animal Welfare (Calves) Regulations* (July 2016) at 16.

¹³⁷ Government of New Zealand *Government Statement on Regulation: Better Regulation, Less Regulation* (17 August 2009).

¹³⁸ Ministry of Primary Industries *Regulatory Impact Statement: Animal Welfare (Calves) Regulations 2016* (July 2016) at 4.

¹³⁹ At 4.

¹⁴⁰ “Calf Abuse on Farms Still Rife” *Northern Advocate* (New Zealand, 27 October 2016) at A025.

¹⁴¹ Sue O’Dowd “Video Shows Only Part of Bobby Calves Story” *Taranaki Daily News* (New Zealand, 27 October 2016) at 3.

¹⁴² At 3.

¹⁴³ Andrew Hoggard “Get Those Ramps Built” *Dairy News* (New Zealand, 8 November 2016).

reiterated that throwing, dropping and dragging calves was unacceptable and announced their intention to introduce regulations requiring farmers to build ramps and provide loading and unloading facilities as well as suitable shelter to the calves before and during transport, and at point of sale or slaughter.¹⁴⁵ They also announced that a number of prosecutions had taken place that season – demonstrating the immediate utility of the new regulations.¹⁴⁶ Monitoring and enforcement was starting to take place and the technical problem complicating the handling of calves had been identified, and progress made towards addressing it. It also led to a reduction in the number of bobby calf deaths on the way to slaughter.¹⁴⁷ Without monitoring mechanisms in place, none of these systemic issues were capable of being identified or addressed. Only the ARM was sufficiently invested in protecting animals to undertake that work and to fill that gap. Their monitoring drove the changes and improved industry compliance with the AWA.

This is, however, unlikely to be the end of the ARM's challenge to industry practice in this area. When regulations were being discussed, advocates warned that they remained problematic, primarily on the basis that the regulatory regime continued to permit calves as young as four days old to be transported over long distances, up to 12 hours, and for food to be withheld for up to 24 hours during this process. This places very young animals under considerable stress, and likely means that significant numbers will continue to die prematurely in the process. They noted that EU standards prohibit calves from being transported if they are less than 10 to 14 days old for this reason. However, a higher standard was not viewed as feasible in New Zealand, since it would increase the on-farm costs.¹⁴⁸

Leveraging Consumer Pressure and Retailer Standards

One final noteworthy context in which video activism has been utilised is in relation to retailers. As is apparent from the previous examples, much of the power of animal welfare investigations and the footage they acquire lies in their ability to mobilise public opinion, and by virtue of this, influence consumers and generate economic risk. Neoliberal policy has placed consumers and consumer choice at the centre of their programmes for public sector reform yet “current policies

¹⁴⁴ Andrew Hoggard “Get Those Ramps Built” *Dairy News* (New Zealand, 8 November 2016).

¹⁴⁵ Gerald Hutching “Fair Priced Bobby Calf Ramps” *The Press* (New Zealand, 20 December 2016) at 14.

¹⁴⁶ Ministry for Primary Industries “MPI to Launch Investigation Into FarmWatch Footage” (press release, 26 October 2016).

¹⁴⁷ Gerald Hutching “Numbers of bobby Calves dying while transported falls” *Stuff* (New Zealand, 27 October 2018).

¹⁴⁸ Ministry of Primary Industries *Regulatory Impact Statement: Animal Welfare (Calves) Regulations 2016* (July 2016) at 23.

and debate about governance have evolved around a narrow conception of the consumer, imagined in neoliberal terms as a rational, self-maximising economic individual.”¹⁴⁹ In practice, however, contemporary practices and discourses related to consumption and consumerism are saturated in moral significance.¹⁵⁰ People do care about the way that their food is produced and animal welfare does influence consumer choice.

Where industry and government agencies refuse to respond to changing consumer demands, the ARM has increasingly sought to bypass formal regulatory frameworks and directly target the market. The egg industry is the best example of this. The overwhelming majority of egg producers use cage-based systems and the EPF, who was responsible for drafting the industry’s Code of Welfare, has proven to be the proverbial immovable object refusing any and all pressure to move towards non cage-based systems. The current Code of Welfare for Layer Hens plans for the industry to move from conventional cages to colony cages. These are larger cages, contain more hens and increase the space allocation from 550cm² to 750cm² per bird. They also allocate 15cm of perch space per bird, and contain a scratch pad and small more secluded area. The code refers to this as a ‘nest area’ although no nesting materials are provided.¹⁵¹ Because birds will now be able to display some natural behaviours such as perching and scratching, these cages are considered to comply with the AWA. The Code of Welfare for Layer Hens requires a transition from conventional cages to colony cages starting from the 1st of October 2018, with the transition complete by the 1st of January 2023.¹⁵²

Animal rights advocates have argued that these changes do not go far enough and that the public, and therefore consumers, do not support caged-based systems.¹⁵³ It is evident that civil society desires more substantive reform and movement towards free-range and barn eggs. In 2016, activists entered and documented conditions at one of the new “colony cage” intensive farms to visibly demonstrate conditions in the new system. The footage showed hens living in

¹⁴⁹ Mark Bevir and Frank Trentmann (2007) ‘Introduction: Consumption and Citizenship in the New Governance’ in Mark Bevir and Frank Trentmann (eds) *Governance, Consumers and Citizens: Agency and Resistance on Contemporary Politics*. (Palgrave Macmillan, Hampshire, New York, 2007) a at 1.

¹⁵⁰ Alice Malpass, Clive Barnett, Nick Clarke and Paul Cloke, “Problematizing Choice: Responsible Consumers and Sceptical Citizens” in Mark Bevir and Frank Trentmann (eds) *Governance, Consumers and Citizens: Agency and Resistance on Contemporary Politics*. (Palgrave Macmillan, Hampshire, New York, 2007) 231 at 252.

¹⁵¹ Animal Welfare (Layer Hens) Code of Welfare 2018.

¹⁵² At 34.

¹⁵³ Animal rights advocates point to a number of public opinion polls on this issue, including a 2011 Horizon Research poll that 85% of the public supported a ban on battery cages within 5 years, and that even the new colony cage system was opposed by two-thirds of New Zealanders (SAFE “New poll reveals universal opposition to cages” (press release, Scoop Media, 27 September 2011).

overcrowded cages, with several dead hens lying stuck in the bars of their cage.¹⁵⁴ Activists said they saw wings and heads lying on the floor. It appeared as if birds were getting stuck in the cages and that when workers pulled them from the cages, limbs were being ripped off.¹⁵⁵ Activists said that it took them at least 20 minutes to rescue just one of the trapped hens; they felt it was unlikely that workers had that much time or concern to spend assisting individual birds.¹⁵⁶

A complaint was laid, and MPI made an unannounced inspection. MPI confirmed that standards were not being met, and determined to take corrective action rather than prosecute.¹⁵⁷ This time, however, the activists' goals were not to try to obtain a prosecution or even call for the industry to reform, but to put pressure on retailers. Activists released the footage and called on supermarkets not to purchase eggs from colony cages. Countdown supermarket chains responded to consumer pressure, removing all eggs sourced from the farm from their shelves to reassure shoppers.¹⁵⁸ Both Foodstuffs and Countdown reminded their egg suppliers that they had to adhere to standards of animal welfare. Further pressure resulted in Countdown supermarkets announcing all home-brand products would go cage-free, but when SAFE threatened to release an ad campaign using footage of colony caged eggs in association with the supermarket, the store agreed to institute a ban on stocking *any* caged eggs by 2022.¹⁵⁹ SuperValue and FreshChoice stores followed suit with a plan to ban all cage eggs by 2025.¹⁶⁰ Today all major supermarket chains have committed to being cage-free by at least 2025, and combined, they are at present responsible for purchasing more than half of the country's caged-eggs.¹⁶¹

In a modern market-driven environment, new governance structures exist that can be leveraged to achieve systemic reform. Retail supply agreements and standards also drive change. When supermarkets announced their policy on caged eggs, the announcement sent shock waves through the egg industry which had been investing heavily in the new colony cage system. A spokesperson for the Egg Producers Federation complained that the transition towards colony cages had already begun and this "decision by supermarkets five years later, in 2017, to change their purchasing behaviour was done with limited notice and knowing many longstanding

¹⁵⁴ Catherine Harris "MPI Won't Prosecute Poultry Farm" *Dominion Post* (New Zealand, 8 April 2016) at 3.

¹⁵⁵ At 3.

¹⁵⁶ At 3.

¹⁵⁷ At 3.

¹⁵⁸ At 3.

¹⁵⁹ "An Advert They Won't Want You To See" *Sunday Star Times* (New Zealand, 5 March 2017) at 2.

¹⁶⁰ Chloe Winter "'Pivotal Moment' As Supermarket Chains Join Cage Egg Exit" *The Press* (New Zealand, 24 February 2018) at 16.

¹⁶¹ Ewan Sargent "The Cost of Free Range" *The Dominion Post* New Zealand, 17 July 2018) at 14.

suppliers had spent millions of dollars converting to colonies".¹⁶² This type of reform places industry groups at significant risk. When retailers and corporate entities alter their purchasing behaviour and supply requirements, these changes may be rapidly introduced without consultation with industry, lengthy negotiating processes, or consideration of the impact on producers. When industry standards lag significantly behind consumer expectations, they place themselves at severe financial risk.

Despite the legality of 'colony cages', all major supermarket chains and a large array of companies, including McDonald's, Subway, Nestle, Burger King, Pepisco, Kraft, Wendy's and many large international hotel chains have now committed to a complete phase-out of caged eggs.¹⁶³ The transformative power of consumer-directed initiatives is clear, and undercover exposes are an incredibly powerful tool in this regard. Bevir and Trentmann have argued that "choice and consumers offer a fresh resource for reinvigorating democratic culture"¹⁶⁴ offering a more direct form of engagement with policy and more interactive process of governance.¹⁶⁵ Campbell posits that "the classical vision of State, Civil Society and Economy has limited relevance in the world of reflexive modernity, risk, consumption politics and dispersed sites of governance".¹⁶⁶

Yet, the very responsiveness of the market to animal welfare concerns in itself suggests that the subject matter *is* inherently political. Neoliberal ideology advocates that "the state should concentrate on making policy decisions rather than on delivering services".¹⁶⁷ The public response to animal welfare matters indicates is that animal protection is a *policy* and not service issue, and as such it is inherently problematic to leave to market forces to determine standards. While many activists are heartened at the efficacy of consumer and market-orientated campaigns, others have questioned the approach, warning that it constructs the 'animal problem' as a private rather than public concern. Balluch argues that this "totally ignore(s) the political side of the animal issue and reduces it to a personal lifestyle or consumer choice, or simply to being a good private person reducing suffering by helping others".¹⁶⁸ He contends that this sends

¹⁶² At 14.

¹⁶³ SAFE "Wyndham Hotel Group Commits to Cage-Egg Free Globally" (press release, Scoop media, 26 October 2017).

¹⁶⁴ Bevir and Trentmann above n 149 at 18.

¹⁶⁵ At 18-19.

¹⁶⁶ Hugh Campbell "Consultation, Commerce and Contemporary Agri-Food Systems: Ethical Engagement of New Systems of Governance Under Reflexive Modernity" (2006) 6(2) Integrated Assessment 117 at 128-9.

¹⁶⁷ Bevir and Trentmann above n 149, at 4.

¹⁶⁸ Martin Balluch "Critique of the Political Aspects of CEVA Workshops" (30 March 2018) <<http://www.martinballuch.com/critique-of-the-political-aspects-of-ceva-workshops/>>.

a message that it is not a political issue of liberation and may ultimately undercut more progressive structural change.¹⁶⁹

Timoshanko notes that research actually points to individuals being more inclined to act selflessly in the political sphere than in the market.¹⁷⁰ If this is true, then the fact that the market, in New Zealand at least, has proven *more* responsive to reform than the State. This problematically demonstrates how blocked and unresponsive current democratic processes have become.

Video Activism as a Tactic

The preceding examination of the ARM's use of undercover investigations and video-based activism demonstrates the capacity of this tactic to reinvigorate the democratic process. The instances where the tactic is deployed invariably use public opinion to leverage reform, and operate not to *undermine* law but to *uphold* it. Indeed, the vast majority of the work that activists have done revolves around improving monitoring and enforcement of existing legal standards: the ARM is intervening *against* illegal activities. The tactic is being used to relatively conservative ends.

When responding to a question regarding the work of SAFE and Farmwatch in gathering evidence on animal abuse, former Associate Minister for Agriculture Meka Whaitiri answered: "Cruelty to animals is not accepted by any New Zealander across the country. I want to *thank* those animal advocate groups who have stepped up".¹⁷¹ When Australian activists filmed the slaughter of sheep exported to the Middle East in ways that contravened Australian standards, a representative from the Australian Federal Department of Agriculture expressed a similar sentiment saying that "having these independent reports from third parties such as Animals Australia is one of the ways in which we make sure that the system is actually working".¹⁷²

Advocacy groups which use this tactic do so to disseminate information on the effects of legislation, to inform the decision-making process and to hold decision-makers to account in the

¹⁶⁹ Ibid.

¹⁷⁰ On the importance of effective consumer choice see Aaron C. Timoshanko "Limitations of the Market-Based Approach to the Regulation of Farm Animal Welfare" (2015) 38(2) UNSW L. J. 514 at 531.

¹⁷¹ (4 July 2018) 730 NZPD (Questions to the Minister, Meka Whaitiri).

¹⁷² Australian based undercover expose "Sheep Export Bans Ignored" (Lateline, Australian Broadcasting Corporation, 6 September 2012). The expose is also discussed in; Clare McCausland, Siobhan O'Sullivan and Scott Brenton "Trespass, Animals and Democratic Engagement" (2013) 19 Res Publica 205 at 2011.

court of public opinion. They are morally motivated, and do not wish to be divisive or generate more conflict since conflict is viewed as one of the barriers to reform. Throughout their campaigns, Farmwatch has reiterated that their wish is not to demonise farmers or the industry, but to ensure widespread and systemic problems are tackled.¹⁷³ When MPI prosecuted the slaughterhouse worker responsible for abusing calves, he was initially sentenced to 10 months home detention.¹⁷⁴ MPI appealed the decision to the High Court, on the basis that the sentence did not reflect the seriousness of the offending, and a two year jail sentence was given.¹⁷⁵ Conversely, a Farmwatch spokesperson said they would have preferred a restorative justice sentence. They considered that prison was not a good environment for rehabilitation and that the problem lay not with one man but with a system which fostered widespread animal abuse.¹⁷⁶ Indeed, on appeal Erikson's sentence was reduced in consideration of the "deeply invidious situation" he had been placed within, which included his personal inexperience as a slaughterman, poor training, the provision of inadequate equipment, a lack of supervision and care, not having been informed of the legal requirements and relevant codes of welfare, and the "workplace culture" created by the employer.¹⁷⁷ These issues are systemic ones. It is the system, the power enclaves that control it, and the hegemonic processes at play which need to be held to account.

Australia's Justice Kirby, in considering a case involving animal rights activists who had trespassed at a possum slaughterhouse and installed a hidden camera, has stated that:

[C]oncerns about animal welfare are clearly legitimate matters of public debate across the nation. So are concerns about the export of animals and animal products. Many advances in animal welfare have occurred only because of the public debate and political pressure from special interest groups. The activities of such groups have sometimes pricked the conscience of human beings.

Parliamentary democracies, such as Australia, operate effectively when they are stimulated by debate promoted by community groups. To be successful, such debate

¹⁷³ Farmwatch Cameraman speaks to the footage shot by the group in 2014 in *Dairy News* (online ed, 8 December 2015).

¹⁷⁴ *Ministry for Primary Industries v Erickson* [2016] NZDC 15760.

¹⁷⁵ *Ministry for Primary Industries v Erickson* [2016] NZAR 1553.

¹⁷⁶ Gerald Hutching "Farmwatch Unhappy at Prison Sentence for Animal Abuser" *Stuff* (online, New Zealand, 8 November 2016).

¹⁷⁷ *Erikson v Ministry for Primary Industries* [2017] NZCA 271 at [65]. The sentence of two years six months was quashed and substituted for a sentence of eighteen months.

often requires media attention. Improvements in the condition of circus animals, in the transport of live sheep for export, and in the condition of battery hens followed such community debate.¹⁷⁸

The injunction was lifted. This reflects the fact that even where footage has been illegally obtained, it is frequently accepted that disclosure is in the public interest. In New Zealand, the Broadcasting Standards Authority has identified the public interest to include a range of matters including exposing or detecting crime, public health and safety, misleading claims, exposing serious or harm conduct and “matters of politics, government or public administration”.¹⁷⁹

In an article in MPI’s *Welfare Pulse* publication canvassing the utility of American style ‘Ag gag’ legislation criminalising farm trespass and covert filming, animal welfare scientist Emily Patterson-Kane has argued that “the general necessity for selectively tolerating non-destructive but sometimes deceptive collection of on-farm video is to be seen in the outcomes”.¹⁸⁰ In New Zealand, the outcomes include the implementation of a popularly supported ban on sow crates, the introduction of regulations enabling legally-binding animal welfare requirements to be made, the identification of systemic welfare issues in the dairy industry, regulatory reform to ensure calves receive greater protection, improved monitoring and compliance by government agencies and a reduction in caged-egg production, leveraged upon public/consumer opinion. In addition, investigations have resulted in a number cruelty prosecutions. These results speak to where the public interest lies.

¹⁷⁸ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 at [217]

¹⁷⁹ See *Balfour v Television New Zealand Ltd.* [2005-129] at [63]. These standards mirror those adopted by the Australian Communications and Media Authority, and the United Kingdom’s Ofcom. The Broadcasting Standards Authority discussed the overseas decisions and standards in *Balfour* at [59].

¹⁸⁰ Emily Patterson-Kane “Ag-Gag Laws in the United States” (2013) 15 *Welfare Pulse* 9.

CHAPTER 9

Civil Disobedience

“(T)hinking how we should respond, we decided let’s do an open rescue; let’s go into one of these farms, let’s take the hens, let’s film it. Let’s show the public what is going on and let’s stand up and say to the police, to the Court: Yes, we did it. We think we did the right thing, we think the law is on our side, we think this should be banned and we think it is the farmer that is breaking the law, not us” ...

”We entered, not to commit a crime, but to prevent a crime; the crime being animal cruelty as defined by the Animal Welfare Act and as passed by Parliament... battery cages are cruel and they do not meet the requirements of the Act.¹

~ Mark Eden, Open Rescue Collective.

Appearing before Judge J E MacDonald in the Palmerston North District Court.

Like almost all social justice movements, activists in the ARM have long undertaken civil disobedience actions. In New Zealand, animal rights activists have chained themselves to the doors of a dolphinarium,² to sow crates inside intensive piggeries,³ and occupied the offices of animal researchers unfurling banners from the window.⁴ They have locked themselves to the entrances of intensive egg farms,⁵ and trucks carrying wild horses to slaughter.⁶ They have filled barrels with concrete and formed a human blockade at the site where an industrial scale ‘mega-farm’ housing nearly one million battery hens had been proposed,⁷ and scaled and occupied silos at factory farms.⁸

What makes these acts and instances of lawbreaking stand apart from the vast majority of ‘criminal’ offending is that they are not conducted out of self-interest, but to progress a cause, inherently political and motivated by conscience. At their most basic, they may do no more than

¹ *R v Eden* DC Palmerston North CRI-2007-031-964 (13 October 2008).

² “Judge Discharges Dolphin Protesters After Trespass” *The Press* (New Zealand, 11 October 1997) at 22.

³ “Four in Chains Arrested over Sow Crates Protest” *Waikato Times* (New Zealand, 7 December 2001) at 18.

⁴ *R v Murray* [1997] DCR 199.

⁵ “Poultry-Police” *Radio New Zealand Newswire* (New Zealand, 25 July 2012).

⁶ See “Arrests rise to 13 in Wild Horse Protests” *The Dominion* (New Zealand, 26 May 1997) at 6, and John Saunders “Muster Starts, Demonstrators Arrested” *The Evening Standard* (New Zealand, 20 May 1997) at 1.

⁷ “Four Arrested in Battery Hen Protest” *The Press* (New Zealand, 7 June 2000) at 6.

⁸ *Darroch v Police* HC Hamilton CRI-2010-419-80, 5 May 2011.

simply aim to disrupt and operate as an amplified form of protest, and at their most complex, they be undertaken in order to come before the courts mounting complicated test cases and novel lines of argument.

This chapter examines the ARM's use of civil disobedience and explores the types of actions that have taken place and the purposes to which it has been put. The type of actions undertaken have changed over time, in response to the political environment, and as the movement has experimented with new forms of action and modified its approach. Four different contexts where civil disobedience has been employed are discussed and the first is arguably the most complex. It examines the ARM's use of the necessity defence following arrests for trespass. Both cases in this area took place in 1997 and this demonstrates that the movement was testing a range of legal arguments in the courts at this time. The movement's use of civil disobedience following the introduction of the AWA is also explored. After the Act was introduced, civil disobedience was utilised as a means of increasing pressure on the Government and to mobilise the public, calling on them to make submissions on industry codes. This took the emphasis away the courts and formal legal argument, as the actions came to serve a more communicative function. Lastly, consideration is given as to whether 'animal rescue' actions should be viewed as a movement-specific form of civil disobedience, particularly given the development of an open rescue movement in New Zealand. The final context considered is the movement's use of civil disobedience as a form of disruption and part of pressure-based campaigns. This is arguably the most problematic use of civil disobedience from a rule of law perspective.

1. The Necessity Argument

In the late 1990s, the ARM's use of civil disobedience was spread across a range of diverse issues. Activists were more likely to use the courts as an additional forum for raising their concerns and to experiment with novel lines of legal argument. Court cases following actions were also used as a way to hold opponents to account, to get them on the witness stand where their actions could be questioned and admissions of wrongdoing obtained in a public forum. In particular, activists in this era were attempting to use the necessity defence in relation to charges of trespass under the Trespass Act 1980. Section 3(2) of that Act states that:

It shall be a defence to a charge under subsection (1) if the defendant proves that it was necessary for him to remain in or on the place concerned for his own protection or the

protection of some other person, or because of some emergency involving his property or the property of some other person.

Two cases were defended on this basis, *R v Murray*⁹ and *R v Reese*¹⁰

*Challenging the Safety of Animal testing: R v Murray*¹¹

On the 30th of August 1996, four activists barricaded themselves inside the office of head Cancer Society researcher, Dr. Bruce Baguley, on the Society's annual fundraising day, 'Daffodil Day'. They secured the doors, hung a banner from the window that read "Animal Research Kills Humans and Animals"¹² and chained themselves together and to office furniture.¹³ The four activists were charged with trespass and in response they argued under s 3(2) of the Trespass Act that it had been "necessary" for them to remain for "the protection of some other person".

The activists were aware that the Cancer Society was in the process of testing a new drug; DMXAA; which had so far only been tested on animals, but was about to go into the first stages of clinical trials.¹⁴ They argued that the clinical trial would put people at risk since animal test data was misleading and unreliable. The NZAVS had been attempting to raise scientific arguments against animal testing for many years. Anti-vivisection activists had made a number of petitions and submissions to Parliament on the issue, calling for a ban on animal tests on the grounds that they endangered human health and safety. These arguments had been continually rejected out of hand with no substantive consideration of the evidence and often, to much ridicule (see chapter 3). Debate on the science had been a closed discourse. This case was an attempt to see whether the argument could be raised in court and how the courts would respond where other avenues for raising it had failed.¹⁵

By arguing that they had trespassed because people's health and safety was endangered, the activists were able to call expert evidence, and were also able to cross-examine professor

⁹ [1997] DCR 199.

¹⁰ DC Napier, 8 October 1997. The full judgment in this case was not available as it was no longer held by the court, however SAFE, the organisation that participated in this action, was able to supply a court transcript of the "Evidence Heard Before Judge M. E. Sharp".

¹¹ [1997] DCR 199.

¹² "Group Reports" *Liberate!* (New Zealand, November 1996) at 4.

¹³ *Police v Murray* above n 9.

¹⁴ *Ibid.*

¹⁵ I was personally involved in this action and developed the legal strategy and argument used in the case. The goal was to formulate a line of argument that would make the scientific arguments against animal research the central focus of the case, so that they became impossible for either the court, or the media reporting on the case, to avoid.

Baguley regarding the efficacy of animal testing. The case would run for three days, and because the case turned on argument regarding the scientific basis of animal testing, by necessity, media reports were bound to directly discuss this.

In court, a research assistant from the British Anti-Vivisection Society outlined examples of a number of drugs that had been safety tested on animals but had gone on to cause harm to humans. Her view was that the drug DMXAA posed a potential risk.¹⁶ When cross-examined professor Baguley agreed that:

(E)xperiments on animals are not necessarily the same as tests on human beings... one could not extrapolate from animals to humans. There were obvious physical, physiological and metabolic differences between animals and human beings.¹⁷

Judge Kerr noted that “the professor accepted there had been cases where drugs which had been tested on animals that had proved dangerous for humans and instanced in cross-examination the tragedies from the use of thalidomide. He accepted, as I infer, that there may be a danger arising for human beings from the drug which successfully treated an animal disorder.”¹⁸ This acknowledgment was a validation for the activists. It was a confirmation, in a very public forum, that the movement’s science based argument against animal testing was not an unreasonable one, and that they were raising a legitimate and recognised concern. In addition, the ability to put an animal researcher on the stand and have them answer and defend animal testing was also very empowering and significant to those involved. In the animal rights magazine *Liberate*, the activists argued the importance of taking issues through to trial, calling it an “essential part of the process of highlighting your cause”. Arguments had been validated, their opponents had been called to account, and the issue remained in the media all week.¹⁹

Judge Kerr acknowledged that they were clearly opposing views on the issue but also that he was not sufficiently qualified to weigh them. In any case, he ruled that the necessity defence could not hold in such circumstances. It could not be applied to save “unknown and unspecified” persons or future members of the human race. The argument was too broadly raised. The judge also, however, demonstrated some sympathy for the activists; he accepted entirely the protesters’

¹⁶ *Police v Murray* above n 9.

¹⁷ *Ibid* at 4.

¹⁸ *Ibid*.

¹⁹ Deidre Bourke “From Trespass to Trial: Using Civil Disobedience” *Liberate!* (New Zealand, March 1997) at 24-26.

sincerity of belief on the matter and even recollected that George Bernard Shaw too had been an anti-vivisectionist.²⁰ Having said that, he noted that they were protesters and while they were entitled to protest, that protest must be within the law, and that the law must exact “such punishment as seems appropriate”.²¹ The protesters were convicted and discharged with no further penalty or fine. Kerr J noted that the protesters “may consider that a conviction is a badge of honour for your particular protest, I don’t know”, but a conviction at least, was necessary as they needed to bear the responsibility of breaking the law, although they protested in a genuine fashion.²²

The judge’s sentiments and the sentence handed down reflects how differently law breaking arising from civil disobedience has been viewed by the judiciary in New Zealand, in contrast to other criminal offending. The defendants were not framed as troublemakers and a degree of respect was even displayed. A caveat must be issued, however, since the activists’ account shows that initially the judge had been “hostile and dismissive” telling them that if they were there to argue about ‘rights for rats’ that line of argument would get them nowhere.²³ The view of the activists and their positioning changed over the course of the trial. The activists noted the judge’s and police’s surprise in court when they came to understand the defence being raised, that the activists were prepared with expert witnesses, and to find that several of them had postgraduate science qualifications.²⁴

The framing of legal arguments in court is an especially significant factor in determining the judicial response, since the court cannot accept an argument as legitimate if there is not some legal basis for it. This is often a barrier for movements whose discourse is not recognised by current legal frameworks. By turning to NZAVS’ arguments about human safety, the activists were able to hang the legal argument on a recognised defence to trespass. The case also shows how activists often use highly innovative legal arguments in order to locate a legal path on which to travel.

Despite their trespass convictions and the failure of their line of argument, the activists were pleased with the outcome. It reinforced their view that if you are sincere, and practiced non-violent protest like civil-disobedience, the court system would not ‘treat you like a criminal’ and

²⁰ *Police v Murray* above n 9 at 4.

²¹ At 7.

²² At 7.

²³ Deidre Bourke “From Trespass To Trial” *Liberate!* (New Zealand, March 1997) at 24.

²⁴ At 26.

could even provide a less partisan and more objective forum for hearing an argument than Select Committees and other legislative processes.²⁵

Highlighting the Plight of Captive Dolphins: The Marineland Lockdown

A second case took place that year that also attempted to use the s 3(2) defence to trespass. In July 1997, four animal rights activists took part in a ‘lockdown’ at Marineland in Napier on World Day for Captive Dolphins. The activists padlocked the main doors shut and then locked themselves to the doors. Each wore the name of a dolphin held at the facility around their neck; the signs read “Free Selina” “Free Shona”, “Free Cassana” and “Free Kelly”.²⁶ The activists were arrested and charged with trespass.

In the court case that followed, the activists used a modified version of the defence trialled in *Murray*, arguing that it was necessary to remain in order to protect persons but also to protect the “property” of another: that property being the dolphins.²⁷ This represented an interesting line of defence for the animal rights activists to select, since the status of animals as property in law has long been contested by the movement.²⁸ This case sits as an example of activists testing whether the property classification could be used in a novel way to *protect* the animals in question.

Marineland had been running a ‘Swim with the Dolphins’ programme for which Department of Conservation (‘DoC’) had issued a permit and placed a range of safety requirements in place. Animal rights group SAFE had been approached by concerned members of the public who had participated in the programme and felt that it was not being adequately supervised and that the safety of those involved was being put at risk. They were prepared to testify to this in court. When a copy of the DoC permit was obtained it became clear that the swim programme had been pre-emptively started before all the terms and conditions in place had been met. It also became clear that DoC was aware of this and not was enforcing the terms of the permit.

²⁵ At 26.

²⁶ Deidre Bourke “4 Arrested After Lockdown at Marineland” *Liberate!* (New Zealand, 7 November 1997) at 10.

²⁷ Trespass Act 1980, s 3(2) provides that it is a defence where a defendant proves it was necessary to remain for his own protection; the protection of some other person; because of some emergency involving his property; or the property of another person.

²⁸ Several texts have dealt with this subject, see as examples Majorie Spiegel’s *The Dreaded Comparison: Human and Animal Slavery* (Mirror Books, New York, 1988), and Gary Francione *Animals, Property and the Law* (Temple University Press, Philadelphia, 1995).

In court the activists raised their concerns in relation to two main areas: the first was that condition 15(f) of the permit, which required dolphin swims be “directly supervised by an experienced dolphin trainer” who was “present at all times during the swim sessions” was not being met.²⁹ The activists argued that there had been numerous overseas accounts of people being injured in such swim programmes, particularly where the programmes involved wild caught dolphins such as those at Marineland. They argued that experienced trainers were needed in order to spot early signs of distress in the animals and to supervise swimmers’ interactions with the dolphins. SAFE’s witnesses would testify that swimmers were left unsupervised and the activists produced a copy of a report written by Marineland that stated that “once the participants are settled in it is not necessary for the supervisor to be pool side at all times”.³⁰

The second line of argument was a health one. Because there are a number of diseases that can be shared between dolphins and humans, condition number 15(k) of the permit required that people with respiratory diseases or on medication that suppressed the immune system or with open sores not be permitted to participate in the programme. Marineland was also required to install a shower system so that swimmers could shower before entering the pool to reduce the health risk to persons and dolphins. In response to questioning on this matter, the director of Marineland Gary MacDonald admitted that “DoC are aware that these things are not constructed overnight and that they are being built at the moment”.³¹

The activists argued that Marineland was not complying with the terms of the permit and that the ‘Swim with the Dolphins’ programme was operating illegally, and as run recklessly endangering both dolphins and persons participating. On this basis, it had been necessary for them to trespass to prevent people entering to swim with the dolphins. Marineland countered that incidents of aggressive dolphins and overseas incidents related to much larger bottle-nosed dolphins, and theirs were native common dolphins, which were considered smaller and more placid.³² Mr MacDonald said that there had never been any incident or problem in this area in the 25 years that the facility had been operating.

In addition to the two lines of argument regarding safety concerns, the defendants also took the opportunity to force some key admissions out of Marineland’s manager while he was on the

²⁹ *R v Reese* DC Napier (8 October 1997) Evidence Heard Before Judge M. E. Sharp at 2.

³⁰ At 3.

³¹ At 3.

³² At 6.

witness stand. Mr MacDonald admitted that to obtain the four dolphins currently held at the facility more than 67 others had also been captured, and had died in the process.

Judge Sharp found that there was insufficient evidence to support the necessity defence. She did not believe that the primary reason for the protest had been to protect human or dolphin safety, but to protest the capture and captivity of dolphins by Marineland.³³ Although Judge Sharp found the protesters guilty, activists report that she appeared shocked at the number of dolphin deaths at Marineland,³⁴ and expressed personal sympathy for the protesters' views about dolphins in captivity.³⁵ Despite being found guilty, the judge felt discharge without conviction was the more appropriate way to deal with the protesters.³⁶ This also reflects that when serious matters of concern are raised, the courts are often accommodating of this, taking the wider context into account in sentencing.

As in *Murray*, the protesters here also considered the case a success; there had been no convictions and Marineland had been forced to publicly admit to the large number of dolphins that had been killed, and their failure to meet the safety conditions in their Swim with the Dolphins Programme. These admissions had been extensively reported and discussed in the media, with several articles making the front page of local newspapers.³⁷ The DoC's role in issuing permits to catch wild dolphins had also been highlighted and this served to ensure greater accountability going forward. Although Marineland attempted for many years to obtain more dolphins, SAFE continued to lobby hard against this and DoC did not grant any further permits. DoC subsequently adopted a policy banning the import or capture of dolphins and when Marineland later sought to import captive bred bottlenose dolphins, Parliament's Local Body and Environment Select Committee upheld that policy.³⁸ Shona, Kelly, Selina and Cassana would be the last four captive dolphins held in New Zealand.

The success of these two cases cannot be measured solely by the legal outcome. These cases were both strategic and experimental, and promoted discussion in the ARM as to how the necessity defence might be creatively employed in other ways. Activists overseas have also been

³³ "Judge Discharges Dolphin Protesters After Trespass" *The Press* (New Zealand, 11 October 1997) at 2.

³⁴ Bourke above n 26 at 10.

³⁵ "Judge Discharges Dolphin Protesters After Trespass" *The Press* (New Zealand, 11 October 1997) at 2.

³⁶ At 2.

³⁷ See: "Judge Discharges Dolphin Protesters After Trespass" *The Press* (New Zealand, 11 October 1997) at 2, "Four in Court Following Dolphin Swim Protest" *Daily Telegraph* (New Zealand, 9 October 1997) at 6, and "Arrests Follow Dolphin Protest" *Daily Telegraph* (New Zealand, July 5 1997) at 1.

³⁸ Bernard Carpinter "Marineland Loses Last Hope for New Dolphins" *Dominion Post* (New Zealand, 20 May 2008) at 8.

drawn to necessity-based argument and its potential to be utilised as a defence to protect animals.³⁹ It is also clear from the protesters' accounts that they viewed the courts as a far more reasonable, objective and non-partisan forum in comparison to their dealings with government departments and select committees; the courts had been open to hearing their argument.⁴⁰ What these cases demonstrate is the importance, in a democracy, of having a complaints mechanisms that allows grievances to be aired in a non-partisan way, and providing means for conflicting viewpoints to be heard, recognised, and acknowledged. Where this can occur, then even if the specific argument is lost, the conflict is diffused and parties are heard.

2. Civil Disobedience Actions Against Factory Farming

The way that civil disobedience actions were used changed markedly after the introduction of the AWA. The legislation had driven a review of standards across a range of industries, and the code review process, which involved taking submissions from the public, both focused and mobilised the ARM. Standards in the intensive farming sector were the first up for review, and the Codes of Welfare for pig, broiler chickens and layer hens had already been identified as potentially in breach, as they did not provide animals with sufficient opportunity to display normal patterns of behaviour. The movement's campaigns and protests were now firmly focused on one issue: factory farming. Almost all of the movement's civil disobedience actions from 2000 onwards have taken place either in or outside of factory farms, and have aimed to call public attention to and promote participation in the code review process.

Battery Cages, the EPF and Mainland Poultry

The civil disobedience actions that have taken place in relation to the battery cage issue have tended to target one company in particular: Mainland Poultry. This focus stems from the fact that they are the most influential producer in the egg industry: by 2000, there were approximately 2.8 million layer hens in New Zealand and more than a million of these were housed on farms owned by Mainland Poultry.⁴¹ With voting rights within the EPF allocated by the number of hens held, the company wielded significant power in the industry. The EPF was also the body responsible for drafting the industry's code. From the outset, the ARM was concerned that the

³⁹ See for example Jenni James "When is Rescue Necessary? Applying the Necessity Defense to the Rescue of Animals" (2014) 7 *Stan. J. Animal L. & Pol'y* 1.

⁴⁰ Bourke above n 26 at 10.

⁴¹ Perry Spiller "RIP – The Demise of Free-range Eggs" (2004) 63(5) *Organic New Zealand* 26.

egg industry was preparing to fight against reform to the bitter end. These concerns were driven home by the actions of Mainland Poultry who appeared to be continuing to invest heavily in caged egg production. In 1998, they had spent \$10 million establishing the country's largest battery hen farm. Based in Waikouaiti just north of Dunedin, the facility housed 270,000 birds, and produced more than seven million eggs each year.⁴² The industry did not look to be moving away from battery cages but to be investing more into that form of production and expanding their operations.

The issue of factory farming had been specifically discussed in the House when the AWA was being introduced. The initial wording in the Animal Welfare Bill had required standards to be set on the basis of "established practice". However, when it had become clear from their submissions that industry groups assumed the new Act would "sanction existing practices such as battery hens" the wording was changed to "good practice" to ensure this was not the intent.⁴³ Despite this, there was no evidence to suggest that the sector was concerned that changes might be coming; they continued to operate as if it was business as usual. Indeed, as the new AWA was being introduced, Mainland Poultry was filing a new set of resource consent applications to *expand* their Dunedin plant. In March of 2000, Mainland Poultry was granted initial resource consent to build the largest battery hen facility in Australasia: the farm would house over a million hens and render the company the largest egg producer in the Southern Hemisphere, making it an even more dominant player in the industry.⁴⁴

The first civil disobedience protests that took place in 2000 were aimed at preventing that expansion by calling on the local council to reconsider the consent, raising public awareness of the code review and the public's ability to make submissions. In May 2000, three activists locked themselves on to machinery at Mainland Poultry's packing and distribution depot in Dunedin.⁴⁵ The protest forced the depot to temporarily close. This disruption was also part of the aim, as one activist noted, one of the only ways to get Mainland's attention was to target them in "their pockets" since that seemed to be the only thing they would listen to.⁴⁶ This shows that the protest was not just focused on the public or government, but also focused directly on the industry, since they were the drafter of the code.

⁴² "Hens Lay First Eggs at Huge Poultry Farm" *The Daily News* (New Zealand, 6 August 1998) at 18.

⁴³ (16 June 1999) 578 NZPD (Animal Welfare Bill (No.2) - Consideration of Reports of Primary Production Committee. John Luxton).

⁴⁴ "Chickens Galore" *Evening Post* (New Zealand, 10 March 2000) at 16.

⁴⁵ Claire Havell and Finn Croucher "Mainland Poultry Campaign Escalates" *Action for Animals* (New Zealand, Summer 2000) at 3.

⁴⁶ At 3.

If the activists' aim was to appear before the courts they were denied this initially. Police were called and cut the locks off protesters, but no charges were laid for the trespass: the activists were simply escorted off the premises. At this point, a larger group of protesters sat down in the entrance blocking trucks from coming in or out of the facility. Although six people were eventually arrested they were also released later without charge.⁴⁷

The following month the protesters returned even more determined. This time they blockaded the only access point to Mainland Poultry's Waikouaiti farm with the help of three large concrete-filled barrels fitted with lock-boxes that protesters could attach themselves to.⁴⁸ Access was blocked for three hours and four activists were charged with obstruction of a public way: they were later found guilty and received a fine of \$480 each.⁴⁹ Unfortunately, the court case was not officially reported and the case record is now long destroyed. While the first protest had not made it into mainstream media, this action did, and activists were able to discuss the proposed battery farm expansion. The company defended that the farm complied with animal welfare standards, while activists asserted that despite being legal, battery cages were "against moral law".⁵⁰ The development still went ahead but the action helped to generate widespread public opposition to the expansion, and the resource consent process would prove to be a lengthy and was hotly contested one.⁵¹ The fact that large-scale battery farming ventures were still being approved, despite the debate over the legality of battery cages, became a matter of significant controversy.⁵²

The following code review would generate a similar response and Mainland Poultry would once again become the target for protest. The next Draft Code of Welfare for Layer Hens was released in 2011. By this time, industry accepted that public opposition to battery cages made them untenable going forward and instead proposed a transition towards 'colony cages': these cages would have a perch and scratch area and provide more space.⁵³ Mainland Poultry's core role in

⁴⁷ At 4.

⁴⁸ "Four Arrested in Battery Protest" *The Press* (New Zealand, 7 June 2000) at 6.

⁴⁹ Havell and Croucher above n 45 at 4.

⁵⁰ "Four Arrested in Battery Protest" *The Press* (New Zealand, 7 June 2000) at 6.

⁵¹ It would lead to a battle that lasted more than two years in the Environment Court, see "Poultry Farm Obtains Approval to Expand" *Radio New Zealand Newswire* (New Zealand, 25 October 2001).

⁵² "Hen Farm Expansion Horrifies" *The Evening Post* (New Zealand, 29 October 2001) at 3.

⁵³ Draft Animal Welfare (Layer Hens) Code of Welfare 2011 at 21-22.

the code development process was underpinned by the fact that Mainland Poultry's large Waikouaiti site was the industry's 'trial site' for the new colony cage system.⁵⁴

This time, activists set up eight metre-high tripods made from scaffolding rod across the entrance to the farm and two protesters padlocked themselves to the top of these while another was chained to the main gate.⁵⁵ The activists said that they were protesting against the new Code which would allow a colony cage system to be introduced, stated that the industry was "making a mockery out of the Animal Welfare Act", and called on the Government to ban all cages.⁵⁶ Mainland Poultry said they respected the protesters and appreciated that they were not being aggressive but "well-behaved", but defended that there was "no perfect way of producing eggs". They said if they moved to free range they would price themselves out of the egg market.⁵⁷ Police used a cherry picker to remove the women from the tripods and although they were initially charged with obstructing a public way the charges were later dropped.

A similar action took place at an Auckland battery farm around that time, with two woman scaling seven metre high silos at the farm and chaining themselves to these.⁵⁸ These activists specifically criticised the EPF, declaring that "a cage is a cage no matter how the Egg Producers Federation tries to spin it" and that if you put a picture of a colony cage up beside a battery one the public would say it makes no difference.⁵⁹ The EPF in return claimed that colony cages would comply with the Act as they provided a perch and area for scratching, and would also ensure eggs remained affordable.⁶⁰ No charges were laid. Interestingly in this cases, the activists emphasised that the action was not directed at that specific farm "but at the entire egg industry".⁶¹ Police arrived to remove the activists but no charges were laid.

What these examples demonstrate is how difficult it is for activists participating in civil disobedience actions to get to court. It is likely that the industry did not want charges to be laid and thus actively sought to avoid the publicity that might result from any subsequent court case. These actions also provide evidence that protests are aimed not only at generating publicity in an

⁵⁴ "Animal Rights Activists Block Biggest Poultry Farm" *Radio NZ Newswire* (New Zealand, 25 June 2012).

⁵⁵ Timothy Brown "Poultry Protest Bought to Earth" *Otago Daily Times* (online ed, New Zealand, 26 June 2012).

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Campaign Against Factory Farming "Activists Chain Themselves to Battery Hen Farm" (press release, Scoop Media, 20 February 2011).

⁵⁹ "Battery Farm Protesters to Spend Night on Silos" *Otago Daily Times* (online ed, New Zealand, 20 February 2011).

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

attempt to mobilise the public and put pressure on the Government for reform, but also to critique industry. These protests speak directly to industry, in particular the EPF and the largest producer Mainland Poultry, with awareness of the influence these bodies have over the decision-making process. The protests sought to force a public response from industry, to make them defend the indefensible, and thus hold industry to account in the court of public opinion.

As governance in the agricultural sector has been largely divested to industry groups, activists by necessity have sought to apply pressure directly on industry bodies. Scheuerman has argued that contemporary civil disobedience actions must be considered in light of the changing governance structures and political context: the nature of such protests, how they are framed and who they target to influence is changing with deregulation and greater privatisation of state authority.⁶² The conflict is increasingly constructed as an argument not between movement and state, but movement and industry. As the ARM increasingly seeks to appeal not to ‘the electorate’ but to ‘consumers’, this dynamic is likely to strengthen further.

*A Response to the “Systemic Inertia of Institutional Politics”*⁶³

Civil disobedience actions also took place in response to reviews of the Code of Welfare for Pigs. The first actions were carried out in 2001 as the draft Code was being released for public discussion, and again in 2010 when it was revised. This reflects the deployment of civil disobedience as a tactic to regulatory reform. When the Code of Welfare for Pigs was released in 2001, four activists chained themselves to sow crates on a Cambridge pig farm, and issued a press release to media, including television networks. This protest was conducted inside the sheds where the pigs were housed and made the animals visible in their crates. The activists said their intention was to be arrested, and that the action was to highlight the injustice of the housing and express “solidarity” with the pigs locked inside the tiny cages.⁶⁴ They endeavoured to highlight “the Governments review of the Code of Welfare for Pigs” and “encourage the public to write submissions to the NAWAC expressing their disgust at the present use of the sow crate”, where pigs were so confined they could not even turn around. The activists claimed the stalls went against the AWA and were therefore illegal, the animals were “suffering unnecessarily”

⁶² Scheuerman argues against a strict definition of civil disobedience based on Rawl’s state-centred conception: William Scheuerman “Civil Disobedience in the Shadows of Post-nationalization and Privatization” (2016) 12(3) J. Int. Polit. Theory 237.

⁶³ Jürgen Habermas *Between Facts and Norms* (William Rehg translator, Polity Press, Oxford, UK, 1996) at 383.

⁶⁴ See “Four in Chains Arrested Over Sow Crate Protest” *Waikato Times* (New Zealand, 7 December 2001) at 18, and Hamilton Animal Rights Defense “Activists Chain Themselves to Sow Crates” (press release, Scoop Media, 6 December 2001).

and that the practice needed to stop.⁶⁵ The activists were charged under s 29 of the Summary Offence Act 1981, being found on property without lawful excuse, but were able to successfully defend the charges on the basis that they had no intention to commit an offence, a defence available under s29(2). It is not clear why that charge was laid rather than trespass, again the case was unreported and is no longer held by the court.

The civil disobedience action in 2010 also coincided with the code review taking place at this time. An activist scaled a silo at an intensive piggery calling on the Minister for Primary Industries to “fix loopholes” in the AWA and argued that the Code of Welfare for Pigs “legalised” cruel confinement systems where pigs were unable to display normal patterns of behaviour.⁶⁶ A press release was issued that asserted that the government was ignoring public submissions and called for a ban on sow stalls and farrowing crates. The activist also made it clear that the protest was not aimed at the specific farm but “at an industry which is inherently cruel, and a government which refuses to act.”⁶⁷

The court case that took place as a result of this action; *Police v Darroch*,⁶⁸ shows that the activist was found guilty of trespass and fined \$330. What this case also reveals is that Mr Darroch did not actively seek to bring the issue before the courts, he had agreed to leave the farm when asked but had been unable to do so because the keys to his padlock were being held for safekeeping by a fellow activist. In fact Mr Darroch appealed the conviction to the High Court on the basis that he had not refused to leave when asked. Lang J held that where someone intentionally trespasses they must be prepared to leave immediately when asked to do so by the occupier, while exceptions might be made where it was impossible to do so through no fault of their own. Mr Darroch had created the circumstances that prevented him leaving immediately.⁶⁹

All of the civil disobedience actions discussed here appear to have been purely focused on drawing attention to an issue of concern and to generate pressure on the government and industry to act and reform the law. The court cases that did take place appear to have been relatively straightforward. They are classic examples of politically motivated law-breaking that attempts to

⁶⁵ Hamilton Animal Rights Defense “Activists Chain Themselves to Sow Crates” (press release, Scoop Media, 6 December 2001).

⁶⁶ James Ihaka “Pig Farm Practices Have Vegan in Chains” *The New Zealand Herald* (New Zealand, 12 April 2010) at A002.

⁶⁷ New Zealand Open Rescue “Civil Disobedience Shows Factory Farming Cruelty” (press release, Scoop Media, 11 April 2010).

⁶⁸ DC Hamilton CRI-2010-419-80, 10 September 2010 (unreported).

⁶⁹ *Darroch v Police* HC Hamilton CRI-2010-419-80, 5 May 2011 at [17].

appeal to the “sense of justice of the majority of the community”.⁷⁰ Habermas has argued that this “communicative function” is what differentiates them from other criminal acts. They represent a response to the “systemic inertia of institutional politics” and constitute “an attempt to prevent the political system from detaching itself from civil society.”⁷¹ These civil disobedience actions were just one of many devices utilised by the ARM to keep the issue live and place pressure on the Government.

3. *A New Form of Civil Disobedience: Animal Rescue*

In addition to the more traditional civil disobedience actions, it is useful to consider another, more movement-specific type of lawbreaking undertaken by some animal rights activists: theft, or ‘animal rescue’. Over the years, animal rights activists have rescued/stolen thousands of animals, most from factory farms. Activists get them veterinary care and treatment, and secretly re-home them in backyards across the country. This is the underground railroad of the animal rights movement and this work remains covert by necessity—if not, the animals would be seized, put back into their cages, and crates or sent to slaughter. There is debate as to whether the *covert* nature of such actions disqualifies them as ‘civil disobedience’, whether the goal is simply to rescue animals, and if the actions lack sufficient ‘communicative’ quality to meet the criteria. Some political theorists such as Cohen have argued that the abolitionist Underground Railroad movement was a “borderline” case of civil disobedience,⁷² and on that basis, Milligan asserts that if this is accepted then “*some* non-violent and suitably structured instances of covert animal rescue “ may also qualify.⁷³

The way that the ARM conducts animal rescue actions has fundamentally changed over the past 20 years. Where their actions were once a ‘borderline’ case of civil disobedience it is now arguable that most actions now qualify as overt civil disobedience. This is because the movement has strategically altered how animal rescues are undertaken in order to re-frame them.

Initially ‘animal rescue’ was a core activity of underground activists and the Animal Liberation Front (ALF). The ALF was formed in 1974 and operated under a strict set of guidelines. The goals of ALF activists were to:

⁷⁰ John Rawls *A Theory of Justice* (2nd ed, Belknap Press, Cambridge, Massachusetts, 1999) at 320.

⁷¹ Habermas above n 63, at 383.

⁷² Carl Cohen *Civil Disobedience: Conscience, Tactics, and the Law* (Columbia University Press, New York, 1971) at 18-19.

⁷³ Tony Milligan “Animal Rescue as Civil Disobedience” (2017) 23 Res. Publica 281 at 295.

1. To liberate animals from places of abuse and place them in good homes to live out their lives free from suffering;
2. To inflict economic damage on those profiting from the misery and exploitation of animals;
3. To reveal the horror and atrocities committed against animals behind locked doors by performing non-violent direct actions and liberations; and
4. To take all necessary precautions against harming *any* animal, human and non-human.⁷⁴

Any vegetarian or vegan activist that abided by these guidelines when undertaking direct action can claim to have been operating under the ALF's banner.

The ideological argument in support of this strategy is perhaps best articulated in the following anonymous quote:

If we are trespassing, then so were the American soldiers who broke down the gates of Hitler's death camps. If we are thieves, then so were the members of the Underground Railroad who freed the slaves from the South. And if we are vandals, then so were those who destroyed forever the gas chambers of Buchenwald and Auschwitz.⁷⁵

The early animal rescues that took place in New Zealand were invariably claimed under the ALF banner. These early actions were not so much acts of civil disobedience but simply focused on rescuing animals and if they were reported at all it was only within the pages of animal rights publications.⁷⁶ The actions were covert and arguably non-communicative, certainly in terms of any law reform agenda or appeal for public support. In addition, the actions were often accompanied by small acts of property damage, most commonly graffiti in the form of spray-painting an ALF slogan or message on the wall; 'Free the Animals'. The early close association between the ALF and property damage gave many of the actions an inherently 'uncivil' character. Milligan has argued that whatever the argument or merits of the approach, it became

⁷⁴ These guidelines are replicated in all of the radical animal rights magazines including *Underground: the Magazine of the North American ALF Press Office*, and the *ALF Supporters' Group* (United Kingdom) newsletter.

⁷⁵ Animal Liberation Front (Anon). See Animal Liberation Front Supporters Group *ALF SG Newsletter* (April 2003) at 4.

⁷⁶ Accounts of the early animal rescues by the New Zealand ALF are recorded in *This is the ALF #2* (New Zealand, 1994) at 13 and *Animal Info* (New Zealand, April 1996).

increasingly out of step with prevailing political realities and “utterly untenable in the aftermath of the attacks of 9/11”.⁷⁷

As well as constituting an ‘image problem’ for the movement, the covert nature of ALF animal rescue raids was also inherently limiting. Activists could not talk about the cruelty and conditions that they saw on factory farms or of their joy at watching the animals they had taken recover from their injuries and confinement, and adapt to a life of freedom outside of cages. The anonymity kept the animals safe but also gagged activists and their experiences. The activists considered that their actions were morally and ethically justified, and wanted to emerge from behind their masks to own their actions.

Open Rescue

In 1993, a new approach was pioneered by Australia’s Patty Mark of the group Animal Liberation Victoria, she called it “Open Rescue”.⁷⁸ Open Rescue involves activists trespassing on to spaces of animal exploitation, usually intensive farms, to document conditions and provide assistance to sick or injured animals. Animals that require urgent veterinary attention are taken for treatment and then re-homed. Activists contact authorities to let them know what has taken place, lay complaints for any breaches of the law identified, and issue extensive media releases showing the state of animals rescued and conditions on the farm. They also submit themselves to whatever legal consequences follow from these admissions and defend their actions on the basis that they were acting to protect animals.

Liebman notes that the tactic is fundamentally different from ALF actions in three ways.⁷⁹ Firstly, there is no property destruction or damage. Secondly, while the animals are still taken in secrecy, in order to protect them from being returned, the activists do not wear masks or hide their identities. They assert that they have nothing to hide because they have done nothing wrong, and willingly face any charges against them as a result. Lastly, because of this openness, videos can be made documenting the actions as they take place. The footage shows activists assisting and rescuing the animals. The animal’s condition, injuries and recovery can be captured

⁷⁷ Milligan above n 73 at 284.

⁷⁸ For a discussion of the concept and development of Open Rescue in Australia see Gonzalo Villanueva “The Spectacle of Open Rescue” in *A Transnational History of Australian Animal Movement, 1970 - 2015* (ebook ed, Palgrave Macmillan, 2018) at 141.

⁷⁹ Matthew Liebman “I Fought the Law: A Review of Terrorists or Freedom Fighters? : Reflections on the Liberation of Animals” (2005) 1 *Animal L.* 151 at 156.

and the animal's story documented. This provides a powerful narrative. The approach transformed animal rescues into a more openly symbolic act of resistance against the exploitation and commoditisation of animals, and to their status as property.

The First Open 'Chicken Heist'

The first open rescue action in New Zealand took place following a national animal rights conference in 2001. Veteran open rescue campaigners from Australia, Patty Mark and Diana Simpson were at the conference.⁸⁰ After the conference, a protest was held outside Golden Gate Poultry, a battery hen farm in Pauatahanui. Police were present throughout but the protest, which was described as peaceful, progressed without incident and no arrests were made.⁸¹ However, at some point during the protest, a small group of activists had managed to secretly enter a shed, recording conditions inside and removing ten hens. Shortly afterwards, these activists confirmed in the media that they were part of an "animal rescue team" and had rescued several sick and injured birds.⁸² The activists admitted to taking the birds and claimed that the "thefts were illegal but morally right", they said they would happily face any charges in court.⁸³ The activists told media the hens had been taken to a veterinarian for medical treatment for wounds on their bodies, respiratory problems, overgrown claws and badly mutilated beaks from poor debeaking procedures, and most, but not all, were expected to recover and the birds would be re-homed.⁸⁴ A formal complaint was laid against the farm for breaches of the AWA was also made.⁸⁵ The activists argued they were doing no wrong, only enforcing the law, and providing sick animals with medical attention.

The open style of the protest and their focus on law enforcement made it more difficult for the media and authorities to portray the activists as criminals. It also enabled the activists to openly talk about the motivation for their actions. Most media reporting regarding the animal rescue was light hearted. The action was labelled "the great chicken heist", with news reports declaring that the chickens had 'flown the coop' and activists were "keeping the fugitive hens identities secret"

⁸⁰ Wellington Animal Action "10 Hens Rescued by Animal Activists" (press release, Scoop Media, 18 April 2001).

⁸¹ "Anti-battery Farming Protesters Snatch Chickens" *The Dominion*, (New Zealand, 16 April 2016) at 3.

⁸² "Anti-battery Farming Protesters Snatch Chickens" *The Dominion*, (New Zealand, 16 April 2016) at 3.

⁸³ Kevin Norquay "Hard-Line Activists Close in on Quarry" *Waikato Times* (New Zealand 24 April 2001) at 6.

⁸⁴ "Battered Hens Recovering" *The Evening Post* (New Zealand, 18 April 2001) at 3.

⁸⁵ The action received significant media attention. See: Grant Fleming "Farmers Cry Fowl After Chicken Heist" *The Evening Post* (New Zealand, 16 April 2001) at 1 and "Battered Hens Recovering" *The Evening Post* (New Zealand, 18 April 2001) at 3.

having relocated them to “secret safe houses”.⁸⁶ Follow-up stories were even run with updates on the hens’ condition and recovery.⁸⁷ The farmers were uncertain about whether to lay a complaint and the police initially told media they would not be investigating the matter.⁸⁸ Despite an eventual complaint and investigation no charges were laid.⁸⁹

R v Eden.⁹⁰ *The “Defiant Chook Rescuer”*⁹¹

The next open rescue action would not occur until 2006 when formal ‘Open Rescue’ groups were established in Auckland, Wellington and Christchurch.⁹² Following the release of the Code of Welfare for Layer Hens in 2005, the ARM had mounted a formal legal complaint with the RRC. It was accepted that battery hen cages did not meet the requirements of the Act, however, the Government had provided the industry with an exemption from compliance, and advocates argued that in doing so decision-makers had made unusual or unexpected use of their powers under the AWA. The RRC agreed and had recommended the Government provide for a time frame for the industry to transition away from battery cages as required by the legislation.⁹³ The Government had flatly refused to do so, and it was that announcement that appears to have triggered the formation of the Open Rescue movement here.

In November 2006, animal rights activists conducted an open rescue at Turks battery hen farm in Foxton. This was a very strategic choice of farm. Turks Poultry was owned by Ron Turk, a Committee member on the EPF.⁹⁴ The activists found a number of dead hens on the farm which had been left in their cages forcing live birds to live alongside the bodies of their rotting cage mates. The activists rescued twenty hens that they found in particularly poor health, taking them to a veterinarian, and made a complaint to MPI’s Animal Welfare Compliance and Enforcement

⁸⁶ Grant Fleming “Farmers Cry Fowl After Chicken Heist” *The Evening Post* (New Zealand, 16 April 2001) at 1

⁸⁷ “Battered Hens Recovering” *The Evening Post* (New Zealand, 18 April 2001) at 3.

⁸⁸ See Radio NZ Newswire: “Action Group Says Not Expecting Action” *Radio New Zealand Newswire* (New Zealand, 17 April 2001) and “Police Not to Investigate Poultry Removals” *Radio New Zealand Newswire* (New Zealand, 15 April 2001).

⁸⁹ “Battered Hens Recovering” *The Evening Post* (New Zealand, 18 April 2001) at 3.

⁹⁰ *R v Eden* DC Palmerston North CRI-2007-031-964, 13 October 2008.

⁹¹ Taken from Caitlin McKay “Defiant Chook Rescuer in Court” *Manawatu Standard* (New Zealand, 19 January 2008) at 3.

⁹² See: Animal Activists “Activists Break Into Foxton Factory Farm” (press release, Scoop Media, 7 November 2006).

⁹³ Regulations Review Committee “Final Report on Complaint about Animal Welfare (Layer Hens) Code of Welfare 2005” (9 May 2006).

⁹⁴ See Animal Activists “Activists Break Into Foxton Factory Farm, Taking Twenty Hens” (press release, Scoop Media, 7 November 2006) and “Trail of Guts Led to Illegal Dump” *The Dominion Post* (New Zealand, 19 October 2006) at 8.

Group for what they considered “numerous breaches of animal welfare regulations”.⁹⁵ They also notified police of the action and provided them with their contact details if they wished to lay charges over the matter. Activist Mark Eden was subsequently arrested and charged with Burglary under s 231 of the Crimes Act 1961, an offence carrying a potential sentence of up to 10 years jail. Mr Eden opted for a jury trial.

A copy of the notes of evidence in relation to this case was obtained from the court. It records the argument made by Eden before Judge MacDonald in the Palmerston North District Court, and the evidence given by the witnesses that were called, including the farm owner Mr Turk.⁹⁶

Mr Eden told the court in his view the AWA was “actually very good” but that industry had drafted the codes and the codes undermined the Act.⁹⁷ He held up a copy of the RRC report saying that battery hen farming did not comply, and was illegal. He stated that the movement had been campaigning for more than 20 years against battery cages. When the Act had been introduced they thought they had won, and then again following the RRC decision, but that the Minister had determined not to act on the recommendations and had “carried on like nothing had happened”. Mr Eden explained that this was why he had determined to “shake things up a bit”.⁹⁸ Mr Eden also added that the Egg Producers Federation persistently claimed the farms they showed footage of were not typical, so the ARM intentionally picked a big farm connected to the EPF to remove this defence.⁹⁹ Eden stated:

We cannot save all the hens but we are going to save as many as we can and use open rescues to put pressure on the Government and the industry.

We didn't do this to protest an unjust law. The law was actually fair. The law says you must give animals freedom to express natural patterns of behaviour and we think that is a good law. We weren't there to protest this unjust law. We were there to say this law is not being enforced and this unjust industry is breaking the law.... It's a very important difference.¹⁰⁰

⁹⁵ Open Rescue Collective “Eggs Laid Next to Rotting Corpses” (press release, Scoop Media, 17 December 2006).

⁹⁶ *R v Eden* DC Palmerston North CRI-2007-031-964, 13 October 2008. Notes of Evidence Taken Before Judge J E MacDonald at 61.

⁹⁷ At 58.

⁹⁸ At 60.

⁹⁹ At 61.

¹⁰⁰ At 61.

When the prosecution began to question Eden in order to establish that he had taken the hens, Eden said “I did it” and explained that the whole process was “about openness and honesty. To say we did this and why we did it” because they were not being “covert or sneaky or criminal”.¹⁰¹

It took the jury less than 15 minutes to determine the outcome. The judge accepted the sincerity of Mr Eden’s intentions but said he could not take the law into his own hands. Eden was found guilty and fined \$180 (\$9 per chicken) and ordered to do 150 hours community service. Mr Eden considered the sentence light and declared to the media that so long as the hens were away from that farm “safe, well and happy... They’re going to live long happy lives”.¹⁰²

What the notes of evidence also reveal is that the court process had allowed Mr Eden to cross-examine the owner of the farm, Mr Turk, in detail. Eden brought a copy of the Code of Welfare for Layer Hens into court and pointed out breaches of the code that they had found on the farm. Mr Turk admitted that he kept no record of chicken mortality, and of the impossibility of physically checking the health of all the hens daily on a farm of that size, as required, especially with multiple birds in each cage and cages stacked three layers high.¹⁰³ Mr Turk reiterated several times during questioning that he felt like he had been the one on trial. The footage from the rescue was shown in court before the judge and jury, and this appeared to rattle Mr Turk in particular. Following the video, he recounted how he used to be a milkman and have six chickens in his backyard and how much he had really loved those chickens. He explained to the jury that now he had 100,000; “I still love them and I look after them” but conceded that “it is all about being commercial” and “you know, the way you see them down there, you have to feed them antibiotics otherwise they die... and... it was just a hobby... that’s how it started” ... “but how could you make a living out of that”.¹⁰⁴

Jenni James has argued that open rescue does not “challenge an unjust law or public policy” so is not direct civil disobedience. She posits that it is an attempt to affect social change rather than a political outcome.¹⁰⁵ However, in New Zealand, open rescue has taken on a far more overtly political nature in contrast to other countries, arising in its current form during the debate on the Codes of Welfare. Since most activists here consider the AWA to be ‘good law’, the claim of the

¹⁰¹ At 74.

¹⁰² Kelly Burns “Saviour Says Hens Now Happy” *Dominion Post* (New Zealand, 16 October 2008) at 8.

¹⁰³ *R v Eden* above note 96 at 19.

¹⁰⁴ At 29.

¹⁰⁵ Jenni James “When is Rescue Necessary? Applying the Necessity Defense to the Rescue of Animals” (2014) 7 *Stan. J. Animal L. & Pol’y* 1 at 11.

ARM is also different from the debate that exists elsewhere. Activists here argue that the law is not unjust, but that it is being manipulated and undermined.¹⁰⁶ This had led activists to claim that it is the movement that seeks to uphold the law and others who are acting illegally to prevent the law from operating.

Mr Eden is the only activist ever to have been taken to court following an open rescue, although at least twenty other similar actions have taken place. This reflects the hesitancy of authorities in pursuing these actions. It is in neither the Government nor industry's interests to draw more attention to the issue by taking matters to court. In addition, the fact that relatively few birds are taken at open rescue actions and those that are already sick and injured (so inherently less valuable) also means it is generally not financially worthwhile pursuing activists.

Open Rescue created opportunities that did not exist previously and has been used in a number of creative ways. In 2007, an open rescue raid was undertaken on Easter; the footage of the rescue showed an activist dressed as the Easter Bunny rescuing battery hens. Farm workers were left with vegan Easter eggs and a Happy Easter card explaining the reasons for the rescue. The activists said that "while eggs are traditionally a symbol of new life, this symbol has been perverted as eggs laid by hens in battery cages are the product of a lifetime of suffering and deprivation" and called for a consumer boycott of caged eggs.¹⁰⁷ Ten hens were taken and rehomed.¹⁰⁸

There appear to have been very few Open Rescue actions since 2012 when the movement's focus shifted to collecting undercover footage. One of the factors that may have reduced the utility and need for illegal animal rescue arises from the fact that it is far less personally risky to simply rescue animals through legal means. So cheap and abundant are animals in an agricultural country like New Zealand, that many farmers are willing to give away animals to activists who want them, particularly where a mass cull of hens is planned and new younger animals are being

¹⁰⁶ In *R v Eden* the activists reiterated that the "law was actually fair" and that they were not protesting "unjust law" but that the law was not being complied with or enforced. Similarly, lawyer Peter Sankoff of the Animal Rights Legal Advocacy Network argues that the AWA had provided animals with certain fundamental rights but that the government's advisory board NAWAC, and industry Codes, undermined and denied animals those protections in practice. (See "Animal Welfare Act Neutered by NAWAC" *Rural News* (New Zealand, 26 July 2005). It is the position of animal rights advocates that the Animal Welfare Act is not being upheld so that "we have illegal systems in place sanctioned by our government." (Campaign Against Factory Farming "Activists Chain Themselves to Battery Hen Farm" (press release, Scoop Media, 20 February 2011).

¹⁰⁷ Open Rescue Collective "Easter Bunny Rescues Battery Hens" (press release, Scoop Media, 6 April 2007).

¹⁰⁸ A photo of this action is online at <<http://img.scoop.co.nz/stories/images/0704/41e91f8b4c72fa925517.jpeg>>.

brought in as replacement.¹⁰⁹ In addition, far greater numbers of animals can be rescued through legal channels than can be carried out by activists sneaking into a battery hen farm at night. ‘Legal’ animal rescues however, do not hold the same symbolic power that open rescues assert, so although more animals are likely being rescued today, an important political narrative of the movement is being lost.

4. A Note on ‘Disruptive Protest’

Any chapter on the movement’s use of civil disobedience would not be complete without a brief note on its use as a means to cause disruption as an element of hard-hitting pressure-based campaigns. The clearest example of the tactic used in this way was Auckland Animal Action’s ‘Fur Free Auckland’ campaign, run in the early 2000s. In a media interview, one of the activists explained their strategy to a *New Zealand Herald* reporter: when a store was identified as selling fur, AAA would send the owners a letter and information on the cruelty of fur farming. They followed this up with a phone call and if the store owner refused to stop selling fur and return all merchandise to their supplier, regular protests would begin outside their shop.¹¹⁰ If the protests proved insufficient, civil disobedience actions would ensue where activists would chain themselves to the doors and physically prevent customers entering the stores.¹¹¹ AAA’s fur campaign involved frequent protest and civil disobedience actions focused on a single target, applying maximum pressure until the shop yielded to demands. The campaign was controversial, since it was also accompanied by a significant criminal offending, with the shops frequently becoming the target of vandalism.¹¹² Some of the protests also became aggressive and activists were charged with intimidation for harassing shop workers.¹¹³

What limited information exists on the legal cases associated with these civil disobedience actions comes from the activists’ own newsletters. This is because the cases took place at the District Court level and the results were not reported on the official record. By the time this

¹⁰⁹ In the week that this chapter was completed for example activists in Auckland rescued and rehomed 1,416 ex-battery hens, the birds were destined to be killed at 18 months of age to make way for younger more productive hens. The farmer willingly gave them to activists when asked. The Animal Sanctuary “Final Hens Will Be Saved” (Facebook, 26 November 2018).

<<https://www.facebook.com/74575466763/photos/a.101382231763/10156822215151764/?type=3&theater>>.

¹¹⁰ Janet McAllister “Animal Rights Fight Not Chicken Feed” *The New Zealand Herald* (online ed, New Zealand, 8 May 2005).

¹¹¹ Ibid.

¹¹² Matthew Lowe “Stores Targeted by Anti-fur Protesters” *Sunday Star Times* (New Zealand, 6 April 2003) at 7.

¹¹³ For example, arrests were made after activists followed shop workers back to their cars, making the protest inherently more personal and threatening. See *Police v Carey & Ors* DC Auckland CRN4004038605, 29 September 2005; and *Gillespie-Gray v Police* HC Auckland CRI 2006-404-123, 22 September 2006.

thesis was written they were too historical and the court longer had a copy of them on file. The activists reported that one protester that had locked herself to the shop was charged with disorderly behaviour and trespass and banned from the Central Business District as a condition of bail. They also claim that police attempted to have her removed from her home and placed in Weymouth, a centre for young offenders.¹¹⁴ Another woman was sent to youth court and ordered to apologise to the shop owner for disrupting his business, ordered to do 100 hours community service and to pay a \$250 fine to the fire service (who had cut her from the shop door).¹¹⁵ Two others were given diversion as it was their first offence.¹¹⁶ The wider ‘uncivil’ context appears to have coloured police view of the protests, led to heightened policing and for the matters to be constructed as ‘criminal’ rather than political in character.

This framing had an impact on how police dealt with all matters associated with the group. At one demonstration, a camera person from a different organisation, ‘MeatFreeMedia’, was arrested for ‘breach of the peace’ while simply filming the protest. The cameraman was held for several hours and released without charge, however, his cell phone and camera were seized and held for several months.¹¹⁷ Protesters found themselves arrested on ever more tenuous grounds. These instances invariably saw the charges dropped prior to court or the case rejected by the judge. For example, one activist was charged with disorderly behaviour at a protest when she refused to stop using a megaphone. She was found not guilty. The judge noted that there was no obligation on activists “not to annoy” or “cause irritation” in exercising their right to protest.¹¹⁸ When demonstrators were charged with intimidation by “loitering” at another protest, the judge in that case noted that in fact the defendant’s conduct at the protest was the very “antithesis” of lingering idly or aimlessly.¹¹⁹

The aim of the civil disobedience actions here was to disrupt and increase pressure on specific shop owners to stop stocking fur. The media did not report the civil disobedience actions and it is unclear whether activists sought them to do so. This form of protest arguably fails to meet the traditional communicative function of civil disobedience since the actions were directed against their target, the fur shop, rather than to highlight the issue in the public sphere. Neither did the group seek any higher-level law or policy change, so there was no overtly political motivation.

¹¹⁴ “Action Against Fur in Aotearoa” *Action for Animals* (New Zealand, Spring 2001) at 9.

¹¹⁵ “Legal News” *Action for Animals* (New Zealand, Winter 2004) at 17.

¹¹⁶ At 17.

¹¹⁷ At 17.

¹¹⁸ *Rees v Police* HC Auckland, CRI 2006-404-000260, 20 December 2006 at [13].

¹¹⁹ *Rees v Police* [2007] DCR 9 at [38].

Civil disobedience carried out within this context pays least respect to the rule of law and comes close to utilising the tactic as a form of directed harassment.

The framing by police, and inability to disentangle the various overt versus covert-offending taking place within the wider campaign, was concerning. It led to very ordinary protest actions, including the group's civil disobedience actions, being treated by police as if they were criminal acts. What this example also demonstrates is that where 'civil disobedience' is employed simply as a means to increase pressure and is stripped of its more communicative and law reform aspects, the 'civility' of the law-breaking becomes increasingly questionable. Where the tactic is taken a step further and is employed as part of a hostile or militant campaign, it is possible that it may cross a line and transform into "uncivil disobedience".¹²⁰ Practically, however, the use of civil disobedience as part of a broader pressure-based campaign *was* effective, and Auckland Animal Action reported that between October 2000 and February 2006 over 50 Auckland stores agreed to stop selling fur.¹²¹ The question is whether in the broader scheme the gains to the ARM were outweighed by the costs either in terms of adverse public opinion that may have been generated or the personal impact on activists from the increased risk of arrest and targeting by police.

Effective Power

Civil disobedience is one mechanism that enables social movements to mobilise their 'effective power'.¹²² Where the views of the mainstream public align with those of the movement, civil disobedience can be a powerful tool to activate public opinion and increase pressure on resistant political actors to respond. It can assist in ensuring bargaining continues, and provoke a response from government and industry actors: to make them defend and justify their position. This is especially useful where the public at large is unlikely to approve of that positioning.

In this way, response from the relevant authority can "lead to a heightened sense, on the part of the public as a whole, that the authority needs to be reformed or replaced".¹²³ This is also the normative check on the power of civil disobedience: it is only effective where public sympathy

¹²⁰ William Scheuerman "Civil Disobedience in the Shadows of Post-nationalization and Privatization" (2016) 12(3) *J. Int. Polit. Theory* 237 at 249.

¹²¹ Aroha Awarau "Fur Fury Fuels Fear" *Central Leader* (New Zealand, 22 February 2006).

¹²² Edward Glaeser and Cass Sunstein *A Theory of Civil Disobedience* (Harvard University, Harvard Kennedy School, Research Working Paper Series 2015) at 4-5.

¹²³ At 2.

or support already exists. Where a group undertakes a civil disobedience action on an issue seen as trivial or they themselves appear too radical in their positioning, the action will invariably backfire: this is one reason that the tactic is selectively employed.¹²⁴

As Glaeser and Sunstein note; “disobedients” must “find the “sweet spot” in which their action is sufficient to provoke either widespread sympathy or a forceful response.¹²⁵ In turn, government and industry must find theirs by either responding or ignoring the disobedience. The lack of reaction by authorities and industry to many factory farming and open rescue actions likely reflects a concern not to further fuel the issue. Conversely, where activists persistently agitate and push that line too far, a response is necessary to prevent the matter escalating. This was no doubt the reasoning of police, in relation to AAA’s fur campaign.

This ‘balance’ is also what drove the change in the framing of animal rescue actions. The open rescue movement is an attempt to de-radicalise animal theft/rescue and increase the communicative power of the acts by adjusting how the tactic is employed. Compliance with the rule of law has been increased,¹²⁶ since unlike ALF actions, property damage is not condoned and activists submit themselves to the court and agree to stand to account for their actions. This makes the actions more public, principled and symbolic;¹²⁷ and more capable of being tolerated by society at large. It also makes it more difficult for authorities to act against them without themselves appearing unreasonable in contrast. The framing permits greater free speech and in so doing, awards activists more discursive power.

Civil disobedience is a valuable tool for responding to hegemony where existing frameworks no longer reflect societal values. It assists by resetting the balance, by mobilising the public and

¹²⁴ Advocates are concerned first and foremost with being as effective as possible. There has always been strategic discussion within the movement over how best to employ civil disobedience and the framing and messaging created by different actions and campaigns. Articles on these issues abound within grassroots animal rights publications and fill the timetables at national gatherings and conferences. In the 1990s for example *Liberate!* magazine regularly carried articles on issues such as the use of civil disobedience (see “Civil Disobedience” *Liberate!* (New Zealand, March 1997) at 10), emphasising the importance of choosing the right target and considering media strategy.

Concern about messaging and framing has come even more to the fore following the September 11 terrorist attacks in the United States and the arrest of a number of overseas activists associated with the Stop Huntingdon Animal Cruelty (SHAC) campaign against Huntingdon Life Sciences: a highly controversial pressure based campaign.

¹²⁵ Edward Glaeser and Cass Sunstein *A Theory of Civil Disobedience* (Harvard University, Harvard Kennedy School, Research Working Paper Series 2015) at 3.

¹²⁶ Acceptance of punishment, the role that an action plays in political discourse, concern to highlight the illegality of government or to ensure enforcement of the law all strengthen compliance with the rule of law. For further discussion see Matthew R. Hall “Guilty but Civil Disobedient: Reconciling Civil Disobedience and the Rule of Law (2007) 28 *Cardozo L. Rev.* 2083 at 2084.

¹²⁷ Cohen and Arato emphasise these three features in their definition of civil disobedience, see Jean Cohen and Andrew Arato *Civil Society and Political Theory*. (MIT Press, Cambridge, Massachusetts, 1992) at 587.

democratic processes. The actions also provide a mechanism for expressing conflicting ideological perspectives and challenging the accepted orthodoxy. In essence, civil disobedience encourages society to keep thinking, questioning and evolving.

CHAPTER 10

Conclusion

*“All animals are equal,
but some animals are more equal than others.”*

~ George Orwell

In 1996 law professor Gary Francione published a detailed critique of the ARM’s engagement with law observing that;

Despite an ostensible acceptance of the rights position, the modern animal protection movement has failed to translate the theory of animal rights into a practical and theoretically consistent strategy for social change.¹

Francione argued that, on a practical level, the modern animal rights movement was still embracing theories of animal welfare and that the adoption of welfare-based argument will only result in a continuance of the status quo: that expecting change from this strategy was “like expecting rain without thunder”.²

What this study of the movement’s engagement with law provides is an explanation of sorts, as to why the ARM does not employ rights discourse when it engages with law: because it cannot. It is likely that advocates adopt animal welfare-based argument neither by preference nor by design but by necessity, and that they have very little choice in this matter – if they wish to engage. Where explicit prohibitions have been sought for animals, it has evoked a response from politicians and decision makers alike so defensive it has positively stalled reform. The debate over tail docking dogs (discussed in chapter 4) is an example of how controversial measures are when they are seen to have rights-based implications. Even where there is little to no cost associated to reform and a measure is widely supported in theory, there is a hesitancy to change the ‘intent’ of the Act by moving away from the welfare model. The very structure and purpose of existing laws operates as a barrier to more substantive reform, insulating the status quo and protecting against the slippery slope, so that only highly incremental measures, measures that are similar in kind, can succeed.

¹ Gary Francione *Rain Without Thunder: The Ideology of the Animal Rights Movement* (Temple University Press, Philadelphia, 1996) at 3.

² At 3.

When the AWA was being debated in 1999 a small group of animal advocates and scientists from the Great Ape Project made a specific submissions calling for rights based protections to be granted to all non-human hominids: chimpanzees, orangutans, gorillas and bonobos.³ The specific rights they sought were: a right to life, freedom from cruel and degrading treatment and freedom from experimentation.⁴ New Zealand was perceived as an ideal location to push this reform since there were only thirty-four non human-hominids in the country and none of them were being used for experimentation. However like the tail docking discussion this became a matter of significant debate, since despite considerable sympathy in the House for the project, the rights based proposals were seen as inappropriate; they would “change the intent and approach of the bill from welfare to rights”.⁵ In the end a compromise was brokered by Green Party MP Jeanette Fitzsimmons who, agreeing that “by giving them human rights we are being invited to draw a boundary in a different place from where it is now”, instead suggested an alternative measure, phrased as a restriction rather than ban on their use in experiments.⁶ One of the advocates involved in the initiative later wrote that for reforms sake it was crucial for the Great Ape Project to detach and differentiate itself very clearly from any alignment with “animal rights” since this was ‘obstacle number 1’.⁷

Similarly when activists came before the court following arrest at a protest against animal testing in the case of *R v Murray*,⁸ discussed in chapter 9, the initial reaction of the judge was to promptly inform them that rights arguments “had not worked for the anti-abortion movement in relation to foetuses and they would certainly not work in relation to mice”.⁹ The unfortunate reality for the movement is that rights based argument is currently ineffective and advocates are forced to be more creative and strategic in the way they approach issues. Commentators, such as Lovvorn, have reminded activists that “law does not change society, society changes law. And no one ever said social change was an easy job. I do not pretend to suggest we can use existing legal frameworks to end all animal suffering. But I refuse to accept that our hands are tied until

³ See Paula Brosnahan “New Zealand’s Animal Welfare Act: What is its Value Regarding Non-Human Hominids?” (2000) 6 Animal L. 185.

⁴ For details of the projects full manifesto see Paola Cavalieri and Peter Singer *The Great Ape Project: Equality Beyond Humanity* (St Martin’s Press, New York, 1993).

⁵ Animal Welfare Bill (No.2) 1998 (209-2) (commentary, as reported from the Primary Production Committee) at xx.

⁶ (16 June 1999) 578 NZPD (Animal Welfare Bill (No 2.) - Consideration of the Reports of the Primary Production Committee, Jeanette Fitzsimons). A restriction on the use of non-human hominids now exists under section 85 of the AWA.

⁷ Rowan Taylor “A Step at a Time: New Zealand’s Progress Toward Hominid Rights” (2001) 7 Animal L. 35 at 41.

⁸ [1997] DCR 199

⁹ Reported on the 6pm News on Television 3 (New Zealand, 15 January 1997).

we overhaul the system”¹⁰ especially where there is still so much “hard work in the trenches trying to push courts and legislatures to close the gap between public opinion and public policy”.¹¹

Law as Privileging Specific Interests

What the restriction on the ARM’s discourse demonstrates is the discursive power of law. Existing legislation was drafted with specific objectives in mind and excludes argument that is not framed within the current terms of reference. It remains difficult to raise animal welfare issues outside of existing animal protection frameworks, even where animals are directly impacted by the decisions being made. Similarly, argument *within* existing animal protection frameworks is strictly confined to the welfare model, which accepts that animal suffering is a legitimate concern but assumes their continuing use and exploitation, and permits no discussion or debate regarding the value of animal’s lives. This framing is a powerful barrier to the movement’s engagement with law, since it operates to discount any approach that does not prioritise human and economic interests over animals.

Marx labelled the dominant ideological perspectives entrenched in law the “ruling ideas” in recognition of the power they have to control the means of ‘mental production’ in society.¹² In order to engage with existing legal frameworks advocates must employ the concepts and models already in place, this is the mechanism by which the legal system generates ‘spontaneous consent’. It is via this process that law obtains its self-replicating, self-legitimizing capacity; this is the mechanism that insulates and protects existing frameworks (so ideologies) from challenge, it is Gramsci’s hegemony actively at work reifying the prevailing ideology.¹³ Advocates’ strongest lines of argument are those most closely aligned with current standards and norms. Advocates that choose to work *with* law are drawn to make ideological compromises from the outset, to accept the rules of engagement.

Neoliberal Ideology

¹⁰ Jonathon Lovvorn “Animal Law in Action: The Law, Public Perception and the Limits of Animal Rights Theory as a Basis for Legal Reform” (1996) 12 *Animal L.* 133 at 149.

¹¹ At 143.

¹² Karl Marx and Frederick Engels “The German Ideology” in *Marx & Engels Collected Works Vol. V* (ebook ed, Lawrence & Wishart, 2010) at 59. Cited and discussed in Alan Hunt “Getting Marx and Foucault into Bed Together!” (2004) 31(4) *J. L.* 592 at 600.

¹³ Antonio Gramsci *Selections From the Prison Notebooks* (Quintin Hoare and Geoffrey Nowell-Smith (translators and eds) Lawrence & Wishart, London, 1971) at 12.

What the preceding examination of the movement's engagement with law also demonstrates is the extent to which neoliberal ideology has come to be infused into every aspect of the legal system. Neoliberal ideology infiltrates the framework and structures in place, permitting industry to set the starting point for discussion, in terms of drafting their own Codes and standards, and providing commercial stakeholders with procedural mechanisms that can be leveraged to extend the negotiation process. Industry bodies themselves are often statutorily directed to prioritise financial concerns, or structurally constituted so that commercial agribusiness interests dominate and control the decision-making bodies within each sector. And regulatory policy directs that a 'hands off' approach is taken so that corporate actors are left to self regulate where possible and active regulation requires explicit justification and cost benefit analysis.

Industry groups sit in a privileged position in comparison to other actors and interest groups, not simply by virtue of the financial and resource advantage they hold, but for the systemic preference their views and concerns are given. By virtue of the economic revenue they bring to the country corporate actors already hold significant practical power and political influence, neoliberal policy and the incorporation of those interests into law reifies that power making it difficult for other interests and values to compete. Habermas has argued that providing private actors with such power is inherently problematic, since the subjects of private law, have "prior to all association" ... "not yet learned to 'take the perspective of the other'".¹⁴ Indeed in their freedom they have seldom encountered any factual resistance, they had never needed to compromise or mutually constitute the rules under which they operate.¹⁵ They are particularly combative and resistant actors and this fact in particular is demonstrated in the current study.

The privileging of economic considerations has a practical effect. Neoliberal values, as soon as they emerged, served to automatically disqualify any reforms that had costs attached to them. They framed not only the problems to be solved but constrained the solutions as well. Responses to concerns are constructed on the basis of locating the most economically efficient mechanisms to address any problem, and there is an in-built presumption that these are also the 'most effective' solution. What the current study demonstrates is that the most cost effective solution frequently means either no regulation or deference to industry, and what this has resulted in is low standards of animal welfare and a systemically underfunded and inadequate monitoring and enforcement regime. In the long run this approach has been shown to be beneficial neither to

¹⁴ Jürgen Habermas *Between Facts and Norms* (William Rehg translator, Polity Press, Oxford, UK, 1996) at 92.

¹⁵ At 92.

animals nor to industry, but to place industry at significant risk when the failings of existing frameworks are revealed.

What this also means is that proprietary interests tend to prevail over other kinds of interests and concerns. Because owners have an inherent right to use their animal property, prohibitions against use are virtually impossible to secure and wide leeway is given over how that animal property is treated. In this way the prohibition of tail-docking dogs was framed as a trespass on the rights of their owners. Under the RMA who qualifies as an ‘affected party’ is also frequently determined according to whether a person has a proprietary interest at stake.

The Denigration of Competing (non-economic) Values

What the elevation of the economic serves to do in practice, is result in a corresponding sidelining and expulsion of other values. It narrows the scope of the discussion and the priority accorded to other concerns. It is not simply that non-economic interests are less overtly recognised in statute or policy in the same way, it is that *other* concerns are constructed to be inherently faulty, irrational and unreasonable in contrast to the rational and practical, economic concerns of corporate actors. Throughout the various studies of the ARM’s engagement with law, concern for animals and their welfare is frequently framed as being an overly emotive, impractical and sentimental line of argument. This denies entry to values based upon empathy or compassion.

The denial of emotion is also an attempt to deny animal suffering. Feminist animal care scholars have argued that “sympathy logically precedes justice; that is, there must first be the experience of sympathy before there can be any justice claims. Indeed, it is sympathy that determines who is to be included under the umbrella of justice.”¹⁶ This is because it is this sympathetic response to animals is what makes them part of the moral community.¹⁷ For animal care advocates discussion, presentation and testimony on animal suffering, the experience of bearing witness, is an inherently political act, and emotion has an important political function.¹⁸ It is informative that existing frameworks work so hard to exclude animal advocates argument from emotion,

¹⁶ Josephine Donovan “Attention to Suffering: Sympathy as a Basis for the Ethical Treatment of Animals” in Carol Adams and Josephine Donovan (eds) *The Feminist Care Tradition in Animal Ethics* (Columbia University Press, New York, 2007) at 183.

¹⁷ At 183.

¹⁸ See Kathryn Gillespie “Witnessing Animal Others: Bearing Witness, Grief, and the Political Function of Emotion” 2016 31(3) *Hypatia* 572.

argument that might provoke a sympathetic response. The generation and growth of sympathy towards animals represents possibly the biggest threat to those who seek their continue to use and exploit them.

It should also be noted that in others areas, the legal system clearly does incorporate “compassion’s information”,¹⁹ in making assessments in the health-care sector, child custody, sentencing in criminal law, the granting of immigration visas.... The personal impact on individuals is frequently a consideration across a large array of areas and concerns, and matters such as quality of life’ and ‘well-being’ are central to many determinations. Far from irrational, such considerations *inform* the balance struck and *enable* a reasoned approach to be taken.

What the current study also reveals is that where there are few costs associated to a reform and the centrality of the economic is less pervasive, reform is more likely to be capable of being informed by sentiment. This is evidenced in the greater legal protection accorded to non-production animals such as cats and dogs, the concession given in relation to experiments on Great Apes, and in the way that, in relation to the Psychoactive Substances Bill discussed in chapter 6, as soon as psychoactive substances were ostensibly banned, it could finally be admitted that animal testing was not ethically justified simply for the purposes of developing new recreational drugs. Only once the economic framing of concerns has been lifted are other values permitted entry.

Structural and Procedural Barriers that Narrow the Consideration

Competing values are not simply framed as impractical and unreasonable they are also excluded in practice. This exclusion can operate at a purely practical or policy level, where decision makers actively seek the opinions and advice of specialists, experts or industry representatives before determining to pursue a matter or what course to take. This bias or preference to consult with specific actors over others is not always legally constituted but happens as a matter of course. Throughout the study animal rights advocates struggled to figure out the complex relationships that existed between industries, state, advisory bodies and private sector actors and it was frequently unclear who was in the ‘inner circle’. Even more unclear was how to penetrate that inner circle and establish who was being consulted for what purposes and on what basis

¹⁹ Martha Nussbaum *Upheavals of Thought: The Intelligence of Emotions* (Cambridge University Press, Cambridge, 2001) at 438-440. For a general discussion see chapters 7 “Economic Thought: Welfare and Development” and 8 “Legal Rationality: Equality, Criminal sentencing”.

policies and decisions were being made. Animal rights groups were forced to use the OIA in order to discover what was being discussed between government and industry bodies, and to ensure they had sufficient information to fully participate in the discussion and refute any claims being made.

Decisions regarding the welfare of animals frequently involves technical or scientific considerations, and specialist advisory bodies are therefore heavily involved in the decision making process. The delegation of matters to ‘expert advisory’ bodies inherently depoliticises the determinations, transforming matters of policy into matters of science, simultaneously narrowing the terms of reference and rendering their decisions incredibly resistant to challenge. Seldom are clear lines drawn between matters of science and ethics, between the technical and the political. This is troubling since without these clear lines Nowotny has argued that specialist advisory committees and experts frequently overstep.²⁰

An additional concern raised by the delegation of core decisions to advisory bodies is that this effectively restricts the wider democratically driven debate. Under the AWA provision for public submissions on standards within industry Codes is provided, the forums appear open, but in practice core determinations that form a part of the decision-making processes are closed and lie beyond that wider debate. On this basis Habermas has argued that the deferral of decision making to experts marginalises lay people and inherently reduces their influence.²¹ Those that attempt to contest the decisions of specialist advisory bodies, are told to leave the technical matters to the experts. However this denies that there are also experts outside of formal advisory boards with important contributions to make, that the science is often contestable, and that decisions regarding who sits on those bodies is itself a political determination. The line between the technical and political is also often incredibly blurred.

Science, Formality and the Narrowing of Ethical Determinations

Many of the decision making processes in place under the various legislative regimes that exist are highly proscriptive and set out a range of criteria to be considered. In determining to recommend that a Code be approved under the AWA the NAWAC must go through a very

²⁰ Helga Nowotny “Democratising Expertise and Socially Robust Knowledge” (2003) 30(3) *Sci. Public Policy* 151.

²¹ See Jürgen Habermas *Toward a Rational Society: Student Protest, Science, and Politics* (Jeremy J. Shapiro (translator), Beacon Press, Boston, Massachusetts, 1970) in particular the discussion of technology and science as ideology in chapter 6 at 81-83.

specific consultation process. NAWAC must consider the science, the available technology, the economic impact of reform, the cost transitioning to new practices, existing industry practices, public submissions... and within each of these categories are still more highly detailed policies. In fact NAWAC has developed more than 10 separate guidelines for dealing with specific aspects of the Code approval process,²² from how they consider the science,²³ to the ethical values and public opinion,²⁴ the competing needs of animals,²⁵ to how non-complying practices are to be dealt with.²⁶ More policy is generated at this level and several of the guidelines incorporate additional economic considerations into the process at this point.²⁷ This provides another space for economic considerations to be more broadly construed and the ethical components narrowed.

In fact it has been argued that the more formulaic the process the narrower the true ethical consideration will be. Delgado asserts that “once we authoritatively decide that the only ethical issues are A, B and C” then someone who persists in demanding or condemning D can be portrayed as irrational.²⁸ He argues that “(f)or an environmentalist, a factory that is polluting a river is an abomination. To the factory, however, the only thing that matters is following the rules related to the type, quantity, and time of the permitted discharge. If the factory is in compliance with the relevant code of conduct, it is apt to see the environmentalist as an impossible person, someone who is never satisfied... and care nothing about jobs and economic development.”²⁹

In this same way we see, in chapter 7, how where Councils determine resource consents under the RMA it is accepted that a farm’s claim to compliance with a Code of Welfare constitutes a ‘positive effect’. Compliance operates as proof of animal welfare, the law reifies the claim so that it becomes an indisputable fact and those attempting to contest it appear to have no basis for doing so. Similarly under the HSNO Act where an application is made to genetically modify an

²² NAWAC has also published guidelines explaining how the committee works. NAWAC has produced 14 guidelines and these are available from the Ministry for Primary Industries website at:

<https://www.mpi.govt.nz/protection-and-response/animal-welfare/national-animal-welfare-advisory-committee/>.

²³ NAWAC Guideline 05: Role of Science in Setting Animal Welfare Standards.

²⁴ NAWAC Guideline 07: Taking Account of Society’s Ethical Values, Technical Viewpoints and Public Opinion.

²⁵ NAWAC Guideline 08: Balancing Animal Needs.

²⁶ NAWAC Guideline 02: Dealing with Practices which might be inconsistent with the Spirit of the Animal Welfare Act.

²⁷ For discussion see Arnja Dale “Animal Welfare Codes and Regulations – The Devil in Disguise” Peter Sankoff and Steven White (eds) *Animal Law in Australasia* (Federation Press, Sydney, 2009) 184 at 189.

²⁸ Richard Delgado “Norms and Normal Science: Toward a Critique of Normativity in Legal Thought” (1991) 139 U. Pa. L. Rev 933 at 952.

²⁹ At 953.

animal, even where there are likely to be high welfare impacts on any animals that make it to full-term, because the modification occurs at a point where the animal is still an embryo (not an ‘animal’) no ethical issues can be considered. Delgado argues that whenever ethics are reduced to a system of rules “one need not make choices, but merely mechanically follow the rules” and in a very practical sense this gives permission to ignore suffering.³⁰

Implications for ‘Law’

The preceding discussion raises implications for the rule of law. The rule of law asserts that all persons and institutions, public and private, including the state are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated. However in practice this is clearly not the case. What is too easily forgotten is that the law in question was constituted for a specific reason and to serve certain ends and interests. Not all actors hold the same political power, and what laws are promulgated for what purposes is itself a political determination. The object of a law, the bodies it provides powers to and the processes put in place invariably preference some actors over others.

The model employed under the AWA is akin to one of enforced self-regulation in many ways; where regulation is primarily undertaken by industry but is subject to governmental structuring and oversight.³¹ The framework under the AWA significantly advantages industries, particularly in the code development process. Government also relies heavily on industries to be responsible for their own monitoring and enforcement. Even those that advocate such a role for industry, such as Ayes and Braithwaite, recognise that such frameworks divest significant powers to private actors push the principle of legality to its limits.³² Legal scholars often talk about such framework as creating a type of “fuzzy legality” since such regulator regime are prone to capture and the lines of accountability and responsibility frequently become unclear.³³

When neoliberal policy was adopted and a range of legislative changes made, the new regulatory framework was applied equally to all but did not impact on all equally. It drove hundreds of

³⁰ At 953-4.

³¹ See R Baldwin and M Cave *Understanding Regulation Theory, Strategy and Practice* (Oxford University Press, New York, 1999) at 39.

³² Ayes and Braithwaite note that a weakness is that such frameworks risk the danger of arbitrary, particularistic privately written rules. See Ian Ayres and Jon Braithwaite *Responsive Regulation: Transcending the Regulation Debate* (Oxford University Press, New York, 1992) at 123. See also Jan Freigang “Scrutiny: Is Responsive Regulation Compatible with the Rule of Law?” (2002) 8(4) *Euro. Public L.* 463.

³³ For further discussion see Margit Cohn “Fuzzy Legality in Regulation: The Legislative Mandate Revisited” (2001) 23 (4) *Law & Policy* 469.

small-scale farmers out of the market who simply did not have the economies of scale to compete with larger intensive vertically integrated holdings. The ideology that drove the law and policies placed a high value on productivity and efficiency, and a low value on the impact of those whose livelihood was affected as a result. This was a value judgment, an assessment was made that the economic benefits outweighed the social costs to small-scale producers... and the welfare costs to animals as a necessary corollary of that.

In the same way, the AWA was constructed primarily to protect New Zealand's largest export sector, pastoral farming, providing them with modern animal welfare legislation comparable to that seen in Europe, to attach their Codes to, and that could facilitate their access to those premium European markets. The AWA was not developed with the needs of the pork and poultry producers in mind; these industries supplied the smaller New Zealand market and so were not as economically important. The new requirements placed these industries between a rock and a hard place. For them market forces were driving intensification but the legislation had now made the legality of those practices questionable. At the same time since the processes under the AWA were crafted *for* industry the legislation gave them significant leverage to delay reform. This was a recipe for disaster, and created highly combative and resistant actors.

Law as Constituted

Acknowledging the multitude of barriers that clearly exist and which operate to preference some actors over others, to elevate and prioritise industry concerns, and exclude alternative discourse; can law still be said to be something which is 'actively constituted'? Or is the game rigged and the result predetermined?

Robert Gordon notes that the primary power exerted by the law consists less in its coercive force than "in its capacity to persuade people that the world described in its images and categories is the only attainable world".³⁴ Law's power lies in its ability to convince us to "see ourselves as the law sees us" so that "we participate in the construction of law's 'meanings' and its representations of us even as we internalise them, so much that our own purposes and understandings can no longer be extricated from those meanings."³⁵ Silverstein reminds us however that although the legal meanings promulgated within current frameworks and which are

³⁴ Robert Gordon "Critical Legal Histories" (1984) 36 Stan. L. Rev. 108.

³⁵ Austin Sarat and Thomas Kearns "The Cultural Lives of Law" in Austin Sarat and Thomas Kearns (eds) *Law in the Domains of Culture* (University of Michigan Press, Michigan, 1998) at 7 - 8.

articulated by law makers, institutions and even the courts, are powerful, “the articulation of written law is rarely unequivocal”.³⁶

Despite tight control of the terms of reference, there *has* been significant debate over the provisions in the AWA. Debate over what the requirement to provide animals with an “opportunity” to display “normal patterns of behaviour” means in practice has occurred. In fact it is almost impossible to prevent, since industry and government cannot contain public discourse: the debates that take place outside of the traditional decision making processes. Jasper has argued that the meanings of animals have changed in modern societies and that “credibility (a.k.a. resonance) arises from the compatibility of new arguments with existing expectations”.³⁷

When the NAWAC and industry groups asserted for example that cages providing hens with 450cm² of space each did not comply with the Act, but ones providing 550cm² suddenly did, that assertion was rejected by animal advocates and society at large. As a result the Code was changed yet again on review, providing for a transition to ‘colony cages’. Will the addition of a perch and scratch pad now suffice, or will that interpretation, that narrative, also fail? The egg industry has taken the narrow view that these new cages provide sufficient opportunity for hens to do some normal hen behaviours, so that there is now compliance. But what then, if society considers an indoor caged system is inherently unable to allow ‘hens to be hens’, and the popular interpretation is a broad one? What the law requires is far from clear, and meaning *is* being actively constituted.

Silverstein underscores that ‘users of the law’ must recognise that “changes in the law and alterations of predominant legal meaning occur, if at all, at the margins, in the gaps and cracks of the prevailing legal edifice.”³⁸ The legal recognition that animal’s have behavioural needs that must be met and the provision of a public submissions process constitute cracks in the framework, spaces where debate is now possible. This is because legal meaning is constituted not just by legislators and judges but by lawyers, lobbyists, media, and the public, and that all participate in that process. This “reconstruction” then “reverberates back through state institutions where meaning is continually constituted and reconstituted”.³⁹ Legal meaning is

³⁶ Helena Silverstein *Unleashing Rights: Law, Meaning, and the Animal Rights Movement* (University of Michigan Press, Ann Arbor, USA, 1996) at 7.

³⁷ James Jasper “Recruiting Strangers and Friends: Moral shocks and social networks in Animal Rights and Anti-Nuclear Protests” (1995) 42(2) *Social Problems* 493 at 496.

³⁸ Silverstein above n 36 at 13.

³⁹ At 8.

something that continually evolves. It is conceded that “not all perceptions of legal meaning carry the same weight or power. Some perceptions will be privileged since “some perceptions will have the authority of the state behind them, and some will be widespread and accepted, and some will be marginalised.”⁴⁰ But that is not the same as being set and incontestable.

Video and photographic imagery of the real life living conditions and treatment of animals provide the clearest rebuttal to industry claims of high welfare standards. It also makes a strong and convincing argument from emotion, appealing to peoples empathy and connection with animals and mobilising public concern (and outrage) over their suffering.⁴¹ What the ARM’s use of undercover video demonstrates is the power of public discourse to influence the balance struck.

Incorporative Hegemony

While the incorporation of the animal welfare model into legislation may have been a concession made by industry in order to gain access to markets where welfare was a priority, the new provisions also increased the public’s expectations. Animal using industries must live up to their claims of high animal welfare or lose the public’s (and consumers) trust. The introduction of a public submissions process within the AWA also created new expectations, and those participating in that process expect to have their voices heard and for the issues to be genuinely up for debate. The very large number of submissions received on the Codes, especially the Layer Hen and Pig Code demonstrate the extent of those expectations. While critics may proclaim that animal protection frameworks were put in place simply in order to regulate animal use and secure market access, they are not labelled as such. The law in this area was not called the “Agricultural (Regulation of Animals in Farming) Act” but the “Animal Welfare Act”; the very title proclaims that animal’s interests are the central subject of consideration. The risk to industry, in framing the legislation as being made *for* animals, is that it gives rise to an expectation that it will operate in their interests, and primarily so. As Dyzenhaus observed in his study of “wicked legal systems” and the engagement that takes within them:

⁴⁰ At 10.

⁴¹ For discussion of the ARM’s use of visual imagery to generate moral shock see James Jasper “Recruiting Strangers and Friends: Moral shocks and social networks in Animal Rights and Anti-Nuclear Protests” (1995) 42(2) Social Problems 493.

...if wicked legislators make their intentions plain ... they condemn themselves as immoral. This leaves them in a dilemma. They do not want to state explicitly that the purpose of a statute is wicked. But if they are not explicit about what they want, they leave some space.⁴²

The space they leave open, is a space where the “quest for justice in the law” can be fought.⁴³ It is in this space that animal advocates attempt to work.

Assertions of law and legal meaning can also operate as levers for social movements to mobilise and promote social change “to redistribute power”.⁴⁴ One of the ways the movement has done this is by shining a light on the gap between law on the books and law in action. This operates on two levels, firstly it has been used to highlight that putting in place a legal standard does not mean that the legal standard is met in practice. This requires monitoring and enforcement and without this the law becomes meaningless. Secondly, it highlights the gap between the industry and government’s narrative, which asserts that high standards of animal welfare exist, and what the actual conditions on farms look like in practice.

Part of the role that civil disobedience actions and video activism play is to provoke a response, to force officials to defend the status quo and make claims which society at large knows to be false. Anderson notes that when child labour laws were debated, parliamentary hearings were filled with “industry witnesses who testified about the healthy living conditions for children in the factories, despite widespread knowledge to the contrary”.⁴⁵ Similarly, slavery advocates also “argued that many Africans enjoyed better living conditions working on sugar plantations in America than they would face at home”.⁴⁶ When industry is made to justify the unjust, the lie is revealed and the integrity of the speaker undermined. In this way when the Chair of NAWAC Peter O’Hara proclaimed that there was no reason to believe that pigs in sow crates were not happy, this was one of many factors that assisted to strengthen the public call for reform and raise concerns about the objectivity of NAWAC in relation to the matter.

⁴² David Ludovic Dyzenhaus *Hard Cases in Wicked Legal Systems* (Doctoral thesis, Keble College, England 1988) at 317 – 318.

⁴³ At 318.

⁴⁴ Silverstein above n 36 at 13.

⁴⁵ Jerry Anderson “Protection for the Powerless: Political Economy History Lessons for the Animal Welfare Movement” (2011) 4 *Stan. J. Animal L. Pol’y* 31.

⁴⁶ *Ibid.*

Despite significant public support on issues like sow crates and battery cages reform has been incredibly slow and incremental. In the pig industry opposition to sow crates was first responded to by the introduction of a time restriction over how long pigs could be kept in the crates. While sow crates were eventually banned, farrowing crates remain legal and the discussion regarding how to move the industry towards farrowing pens is only just beginning. Similarly in the egg industry, cage first went from providing 450cm² space per hen to 550cm² to the adoption of colony cages. This is the inertia built into a legal system that values stable, reliable standards and reform by degree rather than kind. The inability of the legal system to respond more rapidly and substantively, to changes taking place in the wider community, and to technological and environmental change, is perhaps one of its most significant flaws. The sheer pace of change and increasingly pluralist nature of modern society today is now serving to highlight more than ever the inadequacy of the legal system in this respect.

It is also significant that much of the change that did occur as a result of the movement's action, was triggered by initiatives outside of the official channels and processes. Indeed had the movement confined its actions to purely working *with* law the barriers in that forum were simply too restrictive to permit progress from proceeding. What Sankoff has highlighted however is that the reforms achieved here, as moderate as they made be, sit in contrast to the progress made Canada and the United States, and posits that what progress *has* been made *is* due to the AWA, and in particular the Code development process which permits public submissions to be made.⁴⁷ Sankoff has argued that in other countries it remains a battle simply to get animal concerns on the legislative agenda where they must compete for attention against a host of other concerns.⁴⁸

When the AWA was first introduced the Act not only provided for a public submissions process, under s78(1) of the AWA it also gave the Codes a limited lifespan as they had to be reviewed every ten years. Sankoff argues this was key; review would take place as a matter of course and given the number of Codes that exist, this constituted an average of two Code reviews per year.⁴⁹ Decision makers could no longer strategically avoid discussion of animal welfare, and the review process mobilised the movement in an unprecedented way, it focused the debate. In this way Sankoff argues that the Code process 'simultaneously failed' yet also succeeded'.⁵⁰

⁴⁷ 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 L. 281 at 304.

⁴⁸ At 303.

⁴⁹ At 304.

⁵⁰ At 304.

The opening up of a channel of communication, in terms of a public submissions process, enabled activists to appeal more directly for public involvement and support. There was something that the public could do, they were not powerless, there was a mechanism for their view to be heard, and the sheer number of submissions received by NAWAC demonstrate how keenly this channel was used. This new AWA elevated not just the expectations of the ARM but of society at large.

Unfortunately, and perhaps in recognition of the level of public debate the Code review process was generating, the ten year sunset clause attached to Codes was removed by amendment in 2015.⁵¹ NAWAC retains the power to initiate a code review but such a review occurs at their discretion and is no longer mandatory.⁵² Section 73(3) was also amended to make it clear that in considering the content of Codes NAWAC “may” take into account “practicality and economic impact”, this strengthened the express reference to practical and economic factors in the consideration. Given the new powers of the Minister to make legally binding standards in the form of regulations, it is generally envisaged that a move will be made away from the Code process towards regulations in any case,⁵³ however it remains to be seen how these more recent changes impact on the wider public debate.

What this study of the ARM’s engagement with law highlights, is the complexity of the relationship between law, ideology and movement. Engagement *with* the legal system comes at an ideological and practical cost - the movement is prevented from employing its own ‘rights’ discourse and this places inherent restrictions on the types of reforms that can be sought. It forces animal rights advocates to adopt the ideas and constructs already in place and work within the existing terms of reference. However it would be wrong to assume that co-option works in one direction only. If change is to occur, animal rights advocates must attempt to reconstitute the legal meaning of existing provisions, and colonise them in return, to use them to their own ends. This struggle over legal meaning is at the heart of the struggle for change.

The ‘animal welfare’ model has been the focus of much criticism by animal rights advocates, who claim that it is an inherently flawed approach, and that it is utilised to facilitate animal use

⁵¹ Section 78(1) of the Animal Welfare Act 1999 originally required Codes of Welfare to be reviewed at intervals of not more than 10 years. This provision was repealed by section 34(1) of the Animal Welfare Amendment Act (No. 2) 2015 (2015 No.49).

⁵² Section 78(1) of the AWA now simply provides that NAWAC “may at any time review the whole or any part of any code of welfare”.

⁵³ See discussion in Ministry for Primary Industries *Animal Welfare Bill: Report of the Ministry for Primary Industries* (February 2014) at 20.

while providing little practical protection to animals.⁵⁴ There is no question that the model has significant limits; for example it places no value on the lives of animals and is only concerned with preventing suffering. Yet it is also true that the adoption of the animal welfare model represents a compromise, a concession made by government and industry groups in response to public pressure for reform and more robust protection. What it also constitutes is a crack, a weak point, in a system ordinarily strictly focused on economic concerns. Even where it does not currently provide it, the animal welfare model's promise of more robust protection for animals raises societal expectations. What the later chapters in this study demonstrate is how susceptible to direct challenge, in the public arena, current constructions of 'animal welfare' are. While it has proven difficult to contest legal meaning while working within existing frameworks, that is not the only forum, or even the primary forum, where legal meaning is constituted.

⁵⁴ Francione for example has argued that animal welfare laws operate in practice to facilitate animal use and legitimate current practices, see Gary L. Francione, "Reflections on *Animals, Property, and the Law and Rain Without Thunder*" (2007) 70:1 Law & Contemp Probs 9 at 12 – 13. While Francione argues that the animal model itself is inherently flawed, other argue the it is simply too easily captured. For example White and Dale have challenged the effectiveness of existing animal welfare frameworks in Australasia noting that the interests are animals are too frequently 'traded off' in favour of economic considerations that prioritise the needs of animal industries. See Steven white and Arnja Dale "Codifying Animal Welfare Standards: Foundations: Animal Protection or Merely a Façade?" in Peter Sankoff, Steven White and Celeste Black (eds) *Animal Law in Australasia: Continuing the Dialogue* (Federation Press, Sydney, 2013) at 151. However the value of the animal welfare model has also been defended by some, for a good summary of the issues and debate see Gary L. Francione and Robert Garner *The Animal Rights Debate: Abolition or Regulation?* (Columbia University Press, New York, 2010).

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