Putting the Chicken *Before* the Egg:

The Potential for the *Australian Consumer Law* to Advance Food Animal Welfare Initiatives

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A thesis submitted for the Degree of Doctor of Philosophy
(By Publication)

at the

Australian National University

Submitted for Examination in July 2012.
Basis of Submission

This is a thesis by publication submitted for the degree of Doctor of Philosophy pursuant to rules 2.3(3) and 2.3(4) of ANU Research Awards Rules 2010 ('the Rules'). The Rules relevantly provide:

2.3(3) The Delegated Authority may admit a person to a program as a candidate for the degree of Doctor of Philosophy under this Division if the person has been, for not less than 3 years during the preceding 10 years, employed as a staff member of the University (whether or not the person is currently so employed).

2.3(4) The ground for admission under sub-rule 2.3(3) is that the person has made a substantial contribution to scholarship, in a relevant discipline, by published work of which the person is the author or joint author and which is to be incorporated into the thesis.

The Rules provide for a minimum enrolment period of 6 months full-time or 12 months part-time for the purposes of the Staff PhD. Rule 2.3(5) provides:

2.3(5) Unless otherwise approved by the Delegated Authority, the person admitted under sub-rule 2.3(3) must be enrolled for a minimum of 6 months full-time or 12 months part-time to prepare the work for submission and examination of the thesis, under supervision.

Accordingly, the substance of this thesis is composed of re-worked material that I have previously published and that satisfies r 2.3(4) of the Rules. The thesis was written during my full-time candidature from 29 December 2011 – 29 June 2012 in compliance with r 2.3(5) of the Rules.
Statement of Originality

To the best of my knowledge and belief, the work presented in this thesis is original and derived from my own published work, except as acknowledged in the text. The work presented in this thesis has not been submitted in whole or in part for a degree at this or any other university.

[Signature]
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Acknowledgements

Six months did not seem like much time in which to write a PhD thesis. Even though I had been kindly invited to undertake this PhD 'by publication', and to re-work existing publications into a coherent thesis, it still seemed a tall order to do so in the six month time-frame prescribed by the Rules.

This thesis is therefore a testament to the relentless encouragement and support of my family, friends and colleagues. My supervisors, Professor Tom Faunce, Professor Clive Hamilton and Mr Lynden Griggs quickly read all of my drafts and offered very insightful and kind comments. Professor Tom Faunce, my 'older brother in the Dharma' particularly gave me the confidence to express some of my more unorthodox thinking in relation to animals and our relationship with them.

My parents, Robert and Margaret, brother Matthew and sister Kythe provided endless encouragement and love as I worked on this thesis into the cold Canberra winter. I must thank my friends, colleagues and neighbours Dr Heather Roberts and Dr Rado Faletic for providing me with DVDs when they saw that I was becoming a bit too intense as I worked. I owe a huge debt of thanks to my friend and colleague Dr Kath Hall for guiding me through the doubts, frustrations and existential angst associated with compacting 5 years of research and writing into 6 months!

Finally, I must thank my colleagues at the ANU College of Law and my friend, mentor and Dean, Professor Michael Coper. I count myself blessed to teach, research and work with such wonderful people and under the inspirational intellectual leadership of Professor Coper. It is to him and to my colleagues at the ANU that I dedicate this thesis.
Abstract

This thesis explores whether and to what extent the theoretical and legal foundations of competition and consumer law can advance food animal welfare initiatives and address welfare issues associated with the religious slaughter of animals. By ‘food animals’ I mean the millions of chickens, cows and pigs processed and slaughtered in Australia each day for human consumption.

This exploration proceeds, as an example, through an evaluation of the prohibition against misleading or deceptive conduct in section 18 of the new *Australian Consumer Law* (‘the ACL’). ¹

Since mid-2011, the welfare of food animals has assumed a level of urgency in Australia. Disturbing evidence of Australian export cattle being abused by Indonesian abattoir workers as the cattle were slaughtered according to Islamic ritual ignited a national outcry, resulting in the Commonwealth government suspending the entire live export trade for a period of time. Similar abuses were filmed at two Australian abattoirs in 2012.

Although the question posed by this thesis is narrow in its focus, the answers it anticipates, and that are explored throughout, have much wider significance for the universal task of improving the welfare of animals generally and food animals particularly. This is because in answering the central question, the thesis interrogates the normative assumptions, both philosophical and religious, that for millennia have informed the Western characterisation of animals as exploitable property.

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¹ Effective from 1 January 2011 and found in Schedule 2 to the *Competition and Consumer Act 2010* (Cth). Section 18 relevantly prohibits a person, in trade or commerce, engaging in conduct that is misleading or deceptive or likely to mislead or deceive.
It explores the most promising contemporary philosophical challenges to this characterisation, discusses their limitations and identifies theoretical gaps that might be exploited by future scholarship for the benefit of animals.

The thesis questions the protection of freedom of religious practice in democratic societies when those practices involve the slaughter of other sentient beings. It explores the difficulties experienced by governments in increasingly multicultural United Kingdom, European Union and New Zealand, in navigating this highly controversial issue.

With neo-classical economic principles driving contemporary Western markets, the thesis demonstrates the incoherency experienced by governments as they pursue regulatory agendas that bring into conflict the efficient and profitable development of primary industries on the one hand and the welfare of food animals on the other.

However, if an underlying cause of food animal suffering lies in market dynamics informed by neo-classical principles of efficiency and profit-maximisation, then perhaps one indirect solution may also emerge from those same principles. Accordingly, the thesis investigates the theoretical and legal potential for consumer protection and competition policy to empower consumers in ways that will advance food animal welfare. And, it evaluates the outer limits of consumer protection jurisprudence, in the form of the prohibition against misleading or deceptive conduct in ACL s 18 in doing so.
In fact, this is precisely the intention of the Commonwealth government. In its 2011 *Labelling Logic Report* into national food labelling, the Commonwealth government has stated its intention to *indirectly* regulate these food animal welfare issues through market forces underpinned by competition and consumer policy.

Food animal welfare concerns and religious slaughter practices are characterised by the *Labelling Logic Report* as ‘consumer values issues’ best regulated by preventing suppliers from making misleading or deceptive claims, such as ‘free range’, in marketing their food animal products.³

In an increasingly competitive food product market, it is anticipated that demand for ethically produced food animal products will signal producers of consumer preferences for food animal welfare practices. In safeguarding this consumer demand, the Commonwealth government intends the ACL to play a key role in preventing suppliers from exploiting consumer demand for welfare-friendly food animal products by preventing misleading or deceptive marketing claims.

Through the analytical device of hypothetical litigation commenced by the ACCC against a large national retailer of food animal products alleging misleading or deceptive conduct in food animal welfare representations associated with those products, the thesis demonstrates how case law enables the ACL to prevent ‘positive’ but misleading claims. However, it also explores legal difficulties associated with conceptualising silence as misleading or deceptive conduct potentially compromising the ability of the ACL to address welfare issues associated with the religious slaughter of animals.

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³ Ibid 97 [6.3].
In these circumstances, if it is seriously intending to support consumer values issues associated with food animal welfare, the Commonwealth government will need to supplement the general provisions of the ACL with more specific legislative reforms empowering consumers to make accurate and informed purchasing decisions in expressing their demonstrated concern for food animal welfare.

Of course, reliance upon the ACL or labelling specific consumer legislation does not absolve Western societies of the larger imperative to develop a coherent philosophy of animal welfare that commands general acceptance. With that imperative in mind, and although this is a legal and not a philosophical thesis it nevertheless proposes a re-definition of the social contract to include all sentient beings based on an 'ethic of bioinclusiveness'; a philosophical framework created by this thesis in describing a new animal welfare ethic grounded in **sentience** and the fundamental **interdependence** of human, animals and the environment.

However, until an adequate philosophy of animal welfare has been created and generally accepted, the thesis concludes that consumer demand, protected by the ACL and underwritten by strategic enforcement through the ACCC, has the potential to permit at least partial advances in food animal welfare.
Introduction

This introduction explains the significance of the issues to be explored by this thesis and five principal questions those issues provoke.

Throughout history, humans have demonstrated a distressing tendency to subjugate and exploit entire classes of sentient beings considered of 'lesser' worth or status in the sight of the dominant social ruling class; typically a patriarchal hierarchy supported by military forces. The roll-call of these unfortunates includes indigenous peoples, people of colour, ethnic minorities, women, children and of course, animals.4 At one time or another each of these classes of sentient beings were characterised as property, available to be exploited by the stronger, ruling majority.

With the passage of time, various social justice movements called attention to these more unredeemed aspects of society and initiated the gradual emancipation of slaves, women and indigenous peoples. Animals have largely remained beyond the scope of these social reforms and to this day remain some of the most exploited sentient beings within society.5

Nevertheless, this thesis explores several of the difficult philosophical, legal and regulatory issues that must be addressed in anticipating the next social justice movement involving the gradual expansion of human wisdom and compassion to enfold non-human animals.6

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6 Professor David Weisbrot, former Chair of the Australian Law Reform Commission, has called this the 'next great social justice movement'; Reform, (2008) Issue 91, Australian Law Reform Commission, 2.
In the pursuit of this next social justice movement, there is an abundance of literature devoted to challenging the philosophical characterisation of animals as 'property' as a means of advancing animal welfare. There is also an abundance of literature inspired by Western philosophical schools of thought advocating for animal rights and welfare.

However, there is a fundamental inconsistency that these Western schools of thought either have not or cannot seem to resolve to the detriment of animal welfare. That inconsistency manifests as a willingness to include intellectually disabled or severely compromised human beings within the scope of the social contract while systematically excluding other sentient beings such as animals from that same contract. Essentially, all Western philosophical systems are alleged to be anthropocentric, privileging the interests of humans over animals.

Although this is not a philosophical thesis, it nevertheless proposes a normative framework for a new 'ethic of bioinclusiveness'. Emphasising sentience and the interconnectedness of humans, animals and the environment, an ethic of bioinclusiveness provides a reasoned basis for including both intellectually compromised human beings and animals within the larger social contract. It functions as a calibration device against which proposed legal and regulatory initiatives involving animals and their welfare can be evaluated. Because an ethic of bioinclusiveness incorporates human and environmental concerns, it is wider in its scope than an ethic solely focused on animal welfare. In this way, it can more readily address allegations of anthropocentrism.

Because this is a legal thesis, its principal focus is not on developing a new philosophy of animal rights but exploring the extent to which the very same economic and legal forces by which food animals are exploited might be suborned, judo-like, to the cause of advancing food animal welfare.\(^8\)

Accordingly, the principal issue explored by this thesis is whether, and to what extent an existing regulatory regime in the form of the new Australian Consumer Law (‘the ACL’)\(^9\) and the economic forces of informed consumer demand that it protects, can be employed to advance food animal welfare initiatives and to address practices associated with the religious slaughter of animals.

Adequately regulating food animal welfare practices and the religious ritual slaughter of animals has recently assumed a certain level of urgency in Australia. In May 2011, the Australian Broadcasting Company current affairs program ‘Four Corners’ revealed a pervasive culture of abusive and cruel handling practices associated with Australian beef cattle exports to Indonesian abattoirs.\(^10\)

Of particular distress were images of cattle being abused while being slaughtered according to Islamic religious ritual.

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\(^8\) In the sport of Judo, the force and strength of your opponent is turned against him or her. In this way the very force intended to defeat you is used to defeat your opponent. The use of the principles of Judo in litigation has been explored; Allen M. Leung, ‘Legal Judo: Strategic Applications of Re-examination Versus an Aggressive Adversary’ (2002) 84 Journal of the Patent & Trademark Society Office 471, 476.

\(^9\) On 1 January 2011, the relatively fragmented landscape of consumer protection and product liability law in Australia fundamentally changed. The Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (ACL Act) completed a process of reform that had been gaining momentum since the early 2000s, which culminated in the creation of a single, nationwide consumer protection and product liability regime known as the ACL. The ACL replaced 17 generic consumer protection laws that existed across States and Territories with a single national consumer law. It is the largest reform of Australian consumer protection laws ever undertaken.

Ordinarily, animals are required to be stunned prior to slaughter in order to render them insensible to pain. However certain Islamic and Jewish religious requirements prohibit the prior stunning of animals. These animals are fully conscious when their throats are cut and permitted to exsanguinate.\(^{11}\)

The disturbing footage of Australian exported cattle being abusively treated by Indonesian abattoir workers, and the national condemnation it generated, convulsed the Commonwealth government into suspending the entire live export trade on 7 June 2011 while it developed and implemented an Export Supply Chain Assurance System intended to prevent future animal welfare abuses.\(^{12}\)

Although live cattle exports were ultimately resumed, yet another review into the export industry by the Commonwealth Department of Agriculture, Forest and Fisheries ('DAFF') and released in May 2012, revealed systematic beaches of the new scheme by Australian export companies North Australian Cattle Company and International Livestock Export.\(^{13}\)

The heightened awareness of food animal welfare issues also resulted in evidence emerging in 2011 of gross animal welfare abuses at Australian abattoirs LE Giles in Victoria and in 2012, in the Hawkesbury Valley in New South Wales.\(^{14}\)

Of particular sensitivity in multi-cultural Australia is the issue of the religious slaughter of animals.

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Several Australian abattoirs have entered into arrangements with the Commonwealth government to secure exemption from the general requirement that animals be stunned prior to slaughter.

Although it is aware of the animal welfare issues associated with the religious slaughter of animals, at its October 2011 meeting, the Commonwealth Primary Industries Ministerial Council ('PIMC'), now the Standing Council on Primary Industries ('SCoPI'), avoided these difficult issues. Instead, it opted for 'continued discussions' in the search for 'an applicable risk management framework', whatever that might mean.15

These international and domestic animal welfare scandals have prompted fierce criticism from animal welfare groups such as Animals Australia and the Royal Society for the Prevention of Cruelty to Animals ('the RSPCA'). However, arguments between animal welfare advocates and the food animal industry or religious representatives tend to degenerate into intractable conflicts between human rights claims versus uncertain animal rights or interest claims resulting in significant legal and regulatory confusion and inaction.16

The debates concerning animal 'rights' is all the more confusing because despite a growing awareness of the legal and ethical complexities associated with human exploitation of animals, most people in Western societies do not accept that animals possess rights that can or should be legally protected and enforced over and above human rights claims, interests, preferences or freedom of religious practice.17

In Australia, this view is reinforced by a legal system that characterises animals as property able to be exploited by their owners with few limitations. The way in which society exploits animals for entertainment, pleasure and consumption therefore raises profound moral, ethical and legal issues. Accordingly, 'ethical animal welfare, the protection of animals for their own sake as sentient beings with a capacity for suffering, is no doubt one of the basic values of modern western states'.

However, it is very difficult for Western states generally and Australian governments particularly, to develop these values when those same states and governments pursue primary industry policies permitting the industrial exploitation of animals-as-property while simultaneously professing a commitment to improving the welfare of animals. This is particularly so of the millions of animals processed and slaughtered each day to become food for humans.

This difficulty is an inevitable result of what appears to be an inherent regulatory conflict between the Commonwealth government through the PIMC / SCoPI, facilitating primary industry exploitation of food animals as an economic resource and to preserve religious slaughter practices on the one hand, while simultaneously encouraging the protection of animal welfare on the other.

Satisfactorily navigating these inconsistent regulatory objectives is fraught with difficulty because doing so calls into relief deep cultural norms, religious beliefs and vested economic interests.

18 Attorney General (SA) v Bray (1964) 111 CLR 402.
20 Alex Bruce, Animals and Cruelty, Chapter 8 in Animal Law in Australia: An Integrated Approach, (LexisNexis Butterworths, Sydney, Australia, 2012) 197.
21 Alex Bruce, Animals as Food, Chapter 9 in Animal Law in Australia: An Integrated Approach (LexisNexis Butterworths, Sydney, Australia, 2012) 221.
Western societies largely accept that meat products form a natural part of human dietary requirements; ‘children have traditionally been brought up to regard consuming the flesh of other animals for food as both normal and desirable’.\(^{23}\) Indeed, sociologist Pierre Bourdieu asserts that meat eating is part of Western society’s ‘habitus’, an unquestioned principle of everyday life.\(^{24}\)

However, the reality of this social ‘habitus’ is that most of the animals in Australia that are slaughtered for their meat or farmed for their eggs do not see the sun or feel the earth, they do not socialise with other animals, they are not able to express their natural instincts but are confined in mass-factories before being slaughtered or their eggs harvested.

This gulag-inspired process of factory farming is described as:

> a system of raising animals using intensive production line methods that maximise the amount of meat produced while minimising costs. Industrial animal agriculture is characterised by high stocking densities and / or close confinement, forced growth rates, high mechanisation and low labour requirements.\(^{25}\)

Producing animal meat or harvesting eggs using these intensive production line methods is perfectly legal in Australia. Commonwealth *Model Codes of Practice* (‘MCOPs’) relating to beef cattle, poultry and pigs permit the industrial processing of animals for human consumption. These MCOPs were issued by the PIMC / SCoPI, whose stated objective is ‘to develop and promote sustainable, innovative and profitable agriculture, fisheries / aquaculture and food and forestry industries’.\(^{26}\)

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Accordingly, MCOPs permit the use of profit and efficiency-enhancing animal husbandry practices that would otherwise be characterised as acts of cruelty under State and Territory Animal Welfare Acts. These same Animal Welfare Acts also exempt certain methods of slaughter of animals for religious purposes from established cruelty offences.27

On the other hand and despite the pervasiveness of meat-based diets in Western societies, there is also evidence that consumers are becoming increasingly sensitive to the ways in which food animals are treated; sensitivity reflected in a willingness on the part of consumers to pay a price-premium for food animal products from suppliers who have implemented welfare-friendly animal husbandry practices.28

In response to this consumer demand, suppliers of food animal products are seeking to differentiate their products on the basis of animal welfare-friendly practices. Product labels promoting 'free-range', 'free-to-roam', 'organic' or cruelty-free animal husbandry practices are used by suppliers to influence consumers who, for example, 'seek out free range eggs as a matter of principle, hoping to advance the cause of animal welfare by so doing'.29

Recent attempts by governments in the European Union, United Kingdom and in New Zealand to negotiate similar issues, generated by the regulatory conflict identified earlier, have largely failed.

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27 For example, s 24(1)(b) of the Prevention of Cruelty to Animals Act 1979(NSW) creates a defence against allegations of cruelty in relation to animals slaughtered for food consumption.


29 Australian Competition and Consumer Commission v C.I & Co Pty Ltd [2010] FCA 1511, [31].
Legislative initiatives such as the Food Labelling (Halal and Kosher Meat) Bill (UK) introduced in May 2012 and Amendment 205, proposed in 2010 by the European Parliament, that would have achieved similar aims, have been defeated by well-co-ordinated campaigns criticising governments for contravening rights of freedom of religion and religious practice guaranteed by treaty or statute.\textsuperscript{30}

In Australia, the Commonwealth government apparently does not intend to directly regulate for food animal welfare or mandate certain slaughter practices for the religious slaughter of animals. Indeed, the lack of an express power in the Constitution means that animal regulation in Australia is not principally the responsibility of the Commonwealth government.\textsuperscript{31} Instead, regulatory responsibility for animals throughout Australia is shared across Commonwealth, State, Territory and Local governments through a complex and often confusing co-operative regime.\textsuperscript{32}

However, the Commonwealth government indirectly influences food animal regulation by assuming lead responsibility through the SCoPI / PIMC framework for developing MCOPs and Welfare Standards that are intended to be implemented nationally through State and Territory legislation.

The Commonwealth government develops these initiatives by conducting various Reviews into animal-related issues, creating Reports that make certain recommendations intended to be implemented through Policy Proposals. One such Report and Proposal frames the theoretical and legal analysis in this thesis.

\textsuperscript{30} Alex Bruce, 'Do Sacred Cows Make the Best Hamburgers? The Legal Regulation of the Religious Slaughter of Animal's (2011) 34(1) University of New South Wales Law Journal 351.


Recently, the Commonwealth government concluded a comprehensive review into food product labelling in Australia. In January 2011, the gracelessly titled 'Legislative and Government Forum on Food Regulation (Convening as the Australia and New Zealand Food Regulation Ministerial Council)' released its Labelling Logic Report making certain recommendations about future regulatory initiatives concerning product labelling.33

Importantly for the analysis in this thesis, the Labelling Logic Report recommended what it called 'consumer values issues'; that is consumer concerns associated with food animal welfare and religious practices associated with food animal products, to be regulated through the mechanisms in the Competition and Consumer Act 2010 (Cth) but particularly the new ACL.34

In its December 2011 Response to the Labelling Logic Report, the Commonwealth government agreed.35

What this means is that Instead of simply legislating to prohibit certain animal farming practices, or to regulate the religious slaughter of animals, the Commonwealth government is intending market forces in the form of consumer demand exerting up-stream market pressure on primary industry producers to implement food animal welfare initiatives.

In an increasingly competitive market, it is anticipated that demand for ethically produced food animal products will signal producers of consumers' preferences for food animal welfare practices such as free-range farms.36

34 Ibid 47, [3.20].
36 Above n 34.
In safeguarding this consumer demand, the Commonwealth government intends the ACL will be enforced to prevent misleading or deceptive animal welfare claims made by suppliers underscoring the importance of accurately evaluating the potential for the ACL to fulfil these policy objectives and in so doing, advance food animal welfare initiatives.\textsuperscript{37}

But how realistic is this intention? This thesis explores the following five principal questions as it evaluates the potential use of the ACL for this purpose.

First; how has contemporary Western civilisation arrived at the doubly unfortunate characterisation of animals as mere property and as mere instruments to be exploited to satisfy the wants, needs and preferences of humans? What are the ancient and contemporary philosophical schools of thought that form the foundations of this characterisation? And as part of this question, how would a proposed ethic of bioinclusiveness address the perceived limitations associated with those ancient and contemporary philosophical schools of thought?

Second, how does this characterisation of animals as property manifest in an inherent conflict between government policies attempting to facilitate primary industry exploitation of food animals as an economic resource and to permit freedom of religious practice on the one hand, while simultaneously encouraging the protection of animals on the other?

Third, given the existence of this regulatory and policy conflict, what are its actual consequences for food animals? That is, what are the actual conditions experienced by food animals in Australia as they are processed into food products for consumption by people?

\textsuperscript{37} Above n 33, 97, [6.3].
Fourth, what are the economic assumptions behind the Commonwealth government’s intention to use the ACL to address ‘consumer values issues’ associated with food animal welfare? Do consumers possess this sort of economic power? And even if they do, would consumers be willing to pay a price-premium for welfare friendly food animal products? and

Fifth, does the case law actually permit an interpretation of the prohibition against misleading or deceptive conduct in ACL s. 18 in ways that will advance welfare initiatives by suppliers of food animal products? Does the case law permit the ACL to be enforced in ways that require food animal producers to substantiate claims such as ‘free range’, ‘organic meat’ or ‘barn raised’? Early indications from the Federal Court suggest that it can. As part of this question, will the case law characterise a supplier’s failure to advise consumers that the meat they have purchased is derived from animals that have been slaughtered according to religious ritual, to constitute misleading or deceptive conduct in breach of the ACL?

These five questions form the philosophical, regulatory and legal framework within which the Commonwealth government’s intended use of the ACL may be evaluated.

Methodology - The Four-Fold Path of this Thesis

Having explained the significance of the issues to be explored by this thesis and the five principal questions those issues provoke, this section explains the structure of the thesis and how its four parts analyses and answers them.

In exploring the potential for the ACL to fulfil the Commonwealth government's intention to regulate consumer values issues associated with food animal products, the discussion in this thesis proceeds in four parts in honour of my own spiritual tradition, reflecting the thematic cause and effect inherent in the Buddhist Four Noble Truths.

Let me explain.

Some weeks after he attained enlightenment in the fifth century BCE, Siddhartha Gautama, the Buddha, travelled to Deer Park in Sarnath where he gave his first teaching.39

Recorded in the *Samyutta-nikaya*, the Buddha taught the 'Four Noble Truths'; (i) the truth of suffering, (ii) the truth of the cause of suffering, (iii) the truth of the cessation of suffering and (iv) the truth of the path to the cessation of suffering. These truths were intended to 'put one in touch with the reality of the human condition and present one with a religious path that can transform one's life'.40

In the Tibetan Buddhist tradition, 'Four Noble Truths' is a translation of the Tibetan term: 'bden ba bzhi'.41 In fact (bden ba) is a term that means something like; 'the way things actually are' rather than 'truths that must be believed'. Buddhism is a non-proselytising religion / philosophy.

The basic Buddhist message can therefore be presented in simple terms of cause and effect. There are certain causes that give rise to the effects of suffering or dissatisfaction, but that by putting in place other causes, one can experience the effect of the cessation of suffering.

40 Ibid 47.
41 Tibetan language is derived from Sanskrit and Devanagri. In this paragraph I have translated Tibetan words following the ‘Wylie’ transliteration scheme.
Following this cause-and-effect structure the arguments advanced by this thesis are arranged in four parts with Parts 1, 2 and 3 containing two Chapters each while Part 4 concludes the thesis. The arguments in each Part of this thesis are structured as follows.


Part 1 answers the first question: 'how did contemporary Western civilisation arrive at the doubly unfortunate characterisation of animals as mere property and as mere instruments to be exploited to satisfy the wants, needs and interests of humans'?

Chapter 1 traces the answer to that question to the voices of the ancients, located in the dominance of Aristotle's seminal philosophical influence on Western civilisation. Consistent with Aristotle's 'Great Chain of Being', animals were relegated to a lowly status, creatures that could be used to satisfy human ends.42

Despite contrary views held by Pythagoras43 and Plato,44 it was Aristotle's characterisation of animals that was subsequently imported into the fabric of Western Christian society by Thomas Aquinas.

Aquinas adopted and then modified Aristotle's 'Great Chain of Being' giving theological authority to the lowly status of animals.45 Now it was not only reason that justified human dominion over animals, but reason having its divine origin in God's own plan for creation.

44 Stephen Newmeyer, Animals in Greek and Roman Thought: A Sourcebook, (Routledge, United Kingdom, 2011) 101.
Chapter 1 discusses how the Aristotelian / Thomistic characterisation of animals remained largely untroubled by post-Enlightenment philosophies and thus established the cultural foundations for the later industrial exploitation of animals by Western societies.

It explains how Rene Descartes’ mechanistic conception of animals reinforced an instrumentalist characterisation of animals\textsuperscript{46} while Immanuel Kant’s deontological philosophy, and variations proposed by animal friendly neo-Kantian philosophers, only imposed \textit{indirect duties} on humans toward animals.\textsuperscript{47}

Chapter 2 then explores three principal contemporary philosophical thought-systems advocating for animal welfare; Peter Singer’s ‘Preference Utilitarianism’, contemporary deontological theories of Tom Regan and Gary Francione, and Rawlsian Contractarianism, including Martha Nussbaum ‘capacities approach’ as an answer to the perceived shortcomings of Contractarian theories of animal welfare.

Chapter 2 explains that despite the apparent advantages for animals promised by these three contemporary philosophical schools of thought, they ultimately fail to provide a workable basis for food animal welfare reforms. This is because each school of thought has its own internal faults precluding the formation of a philosophical consensus about whether and to what extent animals are included in the social contract and possess rights or interests that can be asserted against human claims and interests.

However, Chapter 2 also acknowledges that it is not at all difficult to find fault with any scholarship, especially philosophical theories. It is much more difficult to offer alternative and new ways of thinking about old issues.

\textsuperscript{46} Peter Harrison, ‘Descartes on Animals’ (1992) 42(167) \textit{The Philosophical Quarterly} 219.

\textsuperscript{47} Heather Kendrick, ‘Animals in the Kingdom of Ends’ (2010) \textit{Between the Species} 25.
Accordingly, Chapter 2 offers a theoretical framework for a new animal welfare ethic that strives to incorporate animals within the social contract. Emphasising sentience and the interconnectedness of humans, animals and the environment, an *ethic of bioinclusiveness* is proposed as a reasoned basis for including both intellectually compromised human beings and animals within the larger social contract.

As useful as these philosophical schools may be, until an adequate characterisation of animals is created, food animals in most Western societies including Australia suffer as a result of an inherent regulatory conflict between government policies attempting to facilitate primary industry exploitation of food animals as an economic resource while simultaneously encouraging the protection of animal welfare.48

**Part 2: Regulatory Conflict & the Exploitation of Animals**

Part 2 commences with the acknowledgement that despite all of these criticisms and limitations, ‘one emerges blinking from the shadows of philosophy to discover that there is a moral consensus in the Western world that animals should be treated better than they are’.49

However, Part 2 demonstrates how an inability to translate this intuitive moral consensus into pragmatic legal and regulatory initiatives intended to ensure food animals are ‘treated better than they are’ manifests in the inherent conflict identified above. It answers the second question by developing these arguments in two Chapters exploring how this regulatory and policy conflict manifests in two distinct spheres of food animal exploitation.


Chapter 3 answers the third question by evaluating the regulatory regime establishing intensive or 'factory farming' practices in the chicken, beef and pork industries producing meat and eggs intended for general consumption.\textsuperscript{50} It explores how neo-classical economic principles of efficiency and profit maximisation have influenced production techniques in these industries.

In doing so, it explains the conditions in which these food animals are processed and how the inherent conflict identified above emerges from the actual legal and subordinate instruments that regulate the processing of those food animals.\textsuperscript{51}

While food animals intended for general consumption are required to be stunned before slaughter, religious requirements associated with kosher and some halal slaughter prohibit prior stunning of food animals. Specific exemptions for this purpose are embodied in all State and Territory Animal Welfare Acts and in Commonwealth Model Codes of Practice.\textsuperscript{52} Chapter 4 therefore explores the legal and regulatory difficulties and conflicts associated with the religious slaughter of animals for consumption by specific groups of consumers. This is a highly controversial regulatory issue.\textsuperscript{53} Chapter 4 explains how attempts in the United Kingdom, European Union and New Zealand to regulate the religious slaughter of animals to enable consumers to make a choice about whether to purchase kosher or halal food animal products, have generated a great deal of regulatory, social and legal conflict.\textsuperscript{54}


\textsuperscript{51} Alex Bruce, Animals as Food, Chapter 9 in Animal Law in Australia: An Integrated Approach, (LexisNexis Butterworths, Australia 2012).

\textsuperscript{52} Ibid 237.


\textsuperscript{54} Alex Bruce, 'Do Sacred Cows Make the Best Hamburgers? The Legal Regulation of Religious Slaughter of Animals' (2011) 34(1) University of New South Wales Law Journal 351.
Given these apparently intractable legal, regulatory, religious and ethical conflicts, exacerbated by the absence of a generally accepted philosophical framework of animal rights, it is therefore an open question as to whether competition and consumer law and policy will support the ACL in playing the role anticipated by the *Labelling Logic Report*.

**Part 3: Animals as Beneficiaries of Competition & Consumer Policy?**

Having established the philosophical foundations for the Western characterisation of animals-as-property in Part 1 and demonstrated in Part 2 how that characterisation manifests in a legal and regulatory framework permitting the commercial exploitation of food animals, Part 3 then analyses the potential for the prohibition against misleading or deceptive conduct in section 18 of the *Australian Consumer Law* to advance food animal welfare initiatives.

This task is important given the Commonwealth government's intention, expressed in its *Labelling Logic Report*, to regulate consumer values issues associated with food animal welfare and related religious practices through the ACL.

Part 3 therefore examines the potential for the ACL to navigate the legal and regulatory difficulties generated by the conflict between government attempts to facilitate primary industry exploitation of food animals as an economic resource and freedom of religious practice on the one hand, while simultaneously encouraging the protection of animal welfare on the other.
Chapter 5 answers the fourth question by exploring the theoretical basis of the Commonwealth government's intention to indirectly regulate consumer values issues associated with animal welfare through market forces; specifically consumer purchasing power. It therefore locates the ACL within consumer protection theory, grounded in the notion of consumer sovereignty. How might the ACL empower consumers in a way that not only compels accurate product labelling, but also advances food animal welfare reform? And even if it can, would consumers be willing to pay for 'ethically produced' food animal products?

Chapter 5 proposes affirmative answers to these questions indicating the theoretical potential for the ACL to bypass the seemingly intractable debates about human rights claims and religious rights claims versus animal rights or interests.

Chapter 6 then answers the fifth question by critically evaluating the application of the ACL as it translates consumer protection theory into legal reality. Even if it is theoretically possible for the ACL to empower consumers who are willing to pay for ethically produced food animal products, does the case law actually support the use of the ACL in this way? Can the prohibition against misleading and deceptive conduct in ACL s 18 be interpreted in a way that will compel ethical change by suppliers of food animal products? Drawing upon general principles and recent case law, the thesis proposes affirmative answers to these questions.


56 Above n 28.

However, Chapter 6 also examines the difficulties associated with the ACL compromising its ability to effectively address welfare concerns associated with the religious slaughter of animals. A failure by a supplier to inform consumers that the meat products they have or are about to purchase have originated from animals slaughtered according to religious ritual is unlikely to be considered misleading or deceptive conduct in breach of ACL s 18. This is because the law relating to ‘silence’ or failure to advise as misleading or deceptive conduct would not characterise a ‘mere’ failure to advise, without additional circumstantial conduct, as a breach ACL s 18.

Part 3 therefore concludes by evaluating the likely utility of the Commonwealth government’s intention, expressed in its Labelling Logic Report, to use the ACL as a means of addressing consumer values issues associated with food animal products. Without specific animal welfare initiatives, sole reliance on the ACL to overcome the inability to translate the intuitive moral consensus identified earlier, that food animals should be ‘treated better than they are’, and into pragmatic welfare initiatives will only partially succeed. Specific legislative initiatives will be required.

**Part 4: Imperative of Enlarging the Law's Heart to Include Animals.**

Part 4 concludes with a final Chapter 7 that reviews the research undertaken throughout the thesis as it explored answers to the five principal questions posed earlier in evaluating whether the prohibition against misleading or deceptive conduct in ACL s 18 could be interpreted in ways that achieve the policy goals anticipated by the Labelling Logic Report. It discusses the findings encountered through the philosophical, regulatory and legal dimensions of the analysis. It explains the wider significance of what has been shown, states the conclusions it has reached and offers recommendations for legislative reform initiatives.
Part 4 concludes that the strategic use of the ACL can support partial legislative, enforcement and consumer initiatives in advancing food animal welfare. While the ACL will be successful in ensuring suppliers of food animal products make accurate animal welfare representation on food labels, difficulties with the legal characterisation of silence as misleading conduct will compromise the ACL’s ability to compel disclosure of the religious slaughter of animals.

Although limited in this way, the Commonwealth government will nevertheless find it comparatively easier to support the ACL by introducing additional specific legislative ‘truth in labelling’ initiatives such as the Food Labelling (Halal and Kosher Meat) Bill 2012 recently attempted by the United Kingdom Parliament or Information Standards prescribed under the Competition and Consumer Act 2010 (Cth) than to initiate food animal welfare reform on the basis of one or other philosophies of ‘animal rights’.

For regulators like the Australian Competition and Consumer Commission, the ACL will provide a more coherent basis for strategic legal and enforcement initiatives than action based on alleged breaches of inchoate ‘animal rights’. And finally, accuracy in product labelling, supported by specific legislative initiatives will provide consumers with sufficient and accurate information about animal-derived food products enabling them to make purchasing choices that reflect their personal values.

While recourse to the ACL or other legislative initiatives does not absolve Western societies of the larger imperative to develop a coherent philosophy of animal welfare based in wisdom and compassion and that commands general acceptance, until such a time, the thesis concludes that consumer demand, protected by the ACL and underwritten by strategic enforcement through the ACCC, can provide a realistic basis for at least partial advances in food animal welfare initiatives.
A Note on Emotive Language in the Animal Rights Literature

Almost all literature arguing for or against the moral status of animals contains emotive language. This is especially so in literature discussing the suffering food animals experience as part of industrial factory farming operations.\(^{58}\)

Not all of this language is helpful. Highly emotive language can obscure the need for a rational evaluation of arguments for or against certain animal welfare issues. This is an expression of a maxim apparently implicit within Western thought that it is important to ‘avoid contamination of moral theory with compassion, sympathy or caring’.\(^{59}\)

Michael Stocker and Elizabeth Hegeman note that since the enlightenment and under the influence of Kant, reason is distinguished from emotion with the result that rationality is believed to be the best state for inquiry while emotions must be tightly controlled if not eliminated altogether.\(^{60}\)

Emotional language in rational debate is therefore frowned upon because it uses words ‘with additional affective force often in an attempt to influence the listener or reader irrationally’.\(^{61}\) The irrational aspect of emotive language manifests when a proponent attempts to persuade a listener to adopt a conclusion, not through the force of reason, but through rhetorical ploys; usually involving an appeal to compassion, pity or guilt.\(^{62}\)

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\(^{58}\) For example, in *Animal Law in Australia and New Zealand*, (Lawbook Company Ltd, Sydney, Australia, 2010) Deborah Cao, Steven White and Katrina Sharman describe food animal processing in Australia as ‘legalized cruelty’, 212.


Alternatively, the use of emotional language can actually represent a thinly disguised *ad hominen* attack on the arguer rather than the argument at issue. In the context of animal rights debates, Carl Cohen and Tom Regan frankly admit:

The continuing debate over the moral status of animals is often characterized by more heat than light. Those who use animals on farms and in laboratories, are thought callous and immoral by many who contend that animals have rights and that killing them in our own interests cruelly infringes upon those rights.

Those who defend the use of animals in science and agriculture often regard their critics as extremists who sometimes substitute terrorist acts for rational discourse. A great gulf separates the partisans of the two sides, and so deep has this gulf become that even the hope for genuine understanding of each side by the other is commonly lost.63

Geordie Duckler is even less restrained in his criticism of the language deployed in animal rights arguments,64

In its current guise, animal rights advocacy imposes few intellectual demands on its proponents, usually requiring little more than a colourful Web site and a college dictionary – the former to construct an audience and the latter to provide the emotion-laden phrases needed to inflame that audience...hard thought is not really essential for animal rights advocates to be able to proclaim an end to animal abuse.

Despite these criticisms, there is a place for emotive language in critical thinking, especially in an area of scholarship that of its nature provokes strong emotions.65 Why is this?


In her text on the elements of academic argument, Annette Rottenberg reminds writers that:

unless you are writing purely factual statements, such as scientists write, understanding and using it (emotive language) effectively is indispensable to the arguer who wants to move an audience to accept a point of view or undertake action. Emotive language reveals your approval or disapproval, assigns praise or blame - in other words, makes a judgement about the subject.66

Rottenberg's key advice is using emotive language *effectively* in making a judgement about the subject.

There is a high degree of responsibility on proponents in debate to ensure the use of emotive language does not deteriorate into rhetoric or insult. With that in mind, scholars have commonly employed emotional language in two circumstances.

First emotional language has been used in scholarship devoted to feminist critiques of economic and social systems involving power imbalances that facilitate the exploitation of other people and animals. These scholars have succeeded without diminishing the force of reason underpinning their arguments.67

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66 Annette Rottenberg; *Elements of Argument*, (2nd Ed), (Bedford / St Martin's Press, United States, 1988), Chapter 6 *Language and Thought*, 142 - 143.

Second, scholars have used emotional language to provoke and to challenge. In Nobel Laureate John Coetzee's text *The Lives of Animals*, the central character, Elizabeth Costello draws a comparison between the atrocities of the Holocaust and the horrors faced by animals in slaughterhouses.

Costello opens her address on animal cruelty to an audience stating: 'we are surrounded by an enterprise of degradation, cruelty and killing which rivals anything that the Third Reich was capable of'.

Coetzee's highly emotive language provoked an immediate reaction and stimulated a useful debate that is ongoing.

In this thesis, I will be employing terms such as 'slaughter', 'suffering', 'exploitation' and 'cruelty'. These are terms that pervade the literature on animals, animal rights and animal farming and are very clearly intended by their authors to express disapproval of the subject matter of the argument.

While I will be using some emotional language in this thesis, it will not be passed off as reasoned conclusion nor will it attempt to persuade the reader by appealing to pity or guilt. The arguments in this thesis stand *in spite of* the emotive language that pervades the literature rather than *because of* that emotive language.

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Part 1

The Philosophical Foundations of Animal Exploitation

Prologue: Marcus Cicero’s Astonishment

Marcus Tullius Cicero was astonished at the spectacle unfolding before him. This was itself a remarkable event. A hardened politician, Cicero was Rome’s greatest orator and along with his fellow Romans, had long since ceased to be surprised by the cruelty the imaginative human mind could devise.¹

Nevertheless, there he was on a warm afternoon in Rome in 55 BCE attending games to celebrate the dedication of Pompey’s theatre and he was astonished.² Pompey himself was in no doubt that animals should be used to display the might of Rome: ‘even the wild animals that live in Africa should be taught to respect the strength and courage of the Roman people.’³

Those lessons took the form of blood sports intended to teach as much as to entertain: ‘Animals were rarely kept in zoos. Only by displaying them in combat, the monstrous matched with the human, could Pompey instruct his fellow citizens in what it took to be the rulers of the world.’⁴

For many citizens, and at least for Cicero on that day, the lesson was too difficult to digest.

¹ Torill Christine Lindstrom; ‘The Animals of the Arena: How and Why Could their Destruction and Death be Endured and Enjoyed?’ (2010) 42(2) World Archaeology 310. Lindstrom suggests several reasons for the apparent ease with which ancient Romans tolerated blood sports including hunter insensitivity, diffusion of responsibility and neurological processes connected to the enjoyment of cruelty.
² Patricia Southern, Pompey the Great, (Stroud, Tempus Publishing Group, United Kingdom, 2002).
He later wrote about what had so affected him in a letter to his friend Marius, who had not been able to attend:

There remain the two wild-beast hunts, lasting five days, magnificent - nobody denies it - and yet, what pleasure can it be to a man of refinement, when either a weak man is torn by an extremely powerful animal, or a splendid animal is transfixed by a hunting spear. The last day was that of the elephants, on which there was a great deal of astonishment on the part of the vulgar crowd, but no pleasure whatever. Nay, there was even a certain feeling of compassion aroused by it, and a kind of belief created that that animal has something in common with mankind.5

In that instant, Cicero felt himself faced with an internal paradox; instead of being entertained, he was repulsed. Throughout his writings, Cicero had affirmed the accepted Aristotelian view that animals were commodities that could be exploited by humans for their own wants and needs.6

However, his letter to Marius suggests that Cicero attributed the crowd’s adverse reaction to the elephant slaughter as being grounded in the perception of some form of fellowship between humans and animals. An admirer of the stoics, Cicero had previously denied that this sort of fellowship between humans and animals was possible.7 And yet while he was governor of Cilicia, Cicero complained about constant requests to supply panthers for a *venatio* (wild beast hunt) organised by a certain Marcus Rufus.8

Whether and to what extent Cicero resolved this paradox is unknown.9

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7 Above n 5.
9 Although Cicero thought that philosophers die in their beds, his own death was violent and degrading. Having enraged Marc Antony in his *Philippics*, Cicero’s head and hands were cut off and publically displayed above the Rostra. See Plutarch, *Selected Lives*, (Wordworths Classics, United Kingdom, 1998) 611.
However, it is known that ancient Roman society was riddled with such paradoxes. One of the 20th Century’s leading Roman Art historians, Jocelyn Toynbee wrote:

one of the most outstanding paradoxes of the Roman mind - that a people that was so much alive to the interest and beauty of the animal kingdom, that admired the intelligence and skill to be found in so many of its representatives, that never seems to tire of the sight of rare and unfamiliar specimens, that displayed such devotion to pets, should yet have taken pleasure in often hideous suffering and agonizing deaths of quantities of magnificent and noble creatures.10

Truly vast quantities of magnificent and noble creatures were indeed slaughtered to entertain Romans. The Emperor Trajan (AD 56 - 117) celebrated his victories with 70 successive days of games during which some 11 000 animals of all species were slaughtered for public entertainment.11 When Titus Vespasian (AD 39 - 81) opened the Colosseum in AD 80, some 5000 animals, including lions, tigers, giraffes and hippos died in a single day.12

More than mere entertainment, it was a symbol of Rome’s global hegemony that exotic animals from the limits of the Empire were captured and shipped back to Rome. It was an age summed up by Petronius, Nero’s master of ceremonies; ‘the padding tiger, shipped in a golden cage, lapping at human blood, applauded by the crowds’.13 In the face of the vast Roman enterprise of animal capture and slaughter, Cicero’s objections appear to have been the exception rather than the rule.14

It is difficult to imagine the ethical concerns of ancient Romans; it was a society that was not informed by Christian principles. Built on equal parts of militaristic stoicism and polytheistic superstition, few Romans expressed real concern for the suffering of animals. What little concern for animals exists, is found in the poetry of Statius, Lucretius, Virgil and Ovid.\textsuperscript{15} However, these poets do not attempt to resolve the paradox Toynbee identifies nor do they offer an alternative philosophical framework that might attempt the task.

For most Romans, the plight of animals was not foremost on their minds amidst the daily struggle for survival in a city built on reclaimed malarial swamp land and reliant for their daily bread on regular grain shipments from vassal-state Egypt. What little concern is found in fact anticipates Immanuel Kant's notion of indirect duties. For those Romans who thought about it, the regular brutal animal slaughter at the arena was only of concern to the extent that people became desensitised by the violence and thus behaved brutally toward others.\textsuperscript{16}

Cicero's comments and the paradox pervading ancient Roman society they reveal, continue to resonate deeply in contemporary 21st Century Western Society. Like ancient Roman society, humans today continue to exploit animals for entertainment and to satisfy food preferences. Unlike ancient Roman society, most Western societies have enacted \textit{Animal Welfare Acts} intended to protect animals from cruelty.\textsuperscript{17}


\textsuperscript{16} Stephen T Newmeyer, \textit{Animals in Greek and Roman Thought: A Sourcebook}, (Routledge, United Kingdom, 2011) 93.

\textsuperscript{17} Animals in ancient societies were not protected by anti-cruelty legislation and were therefore dependent on the kindness of their human owners. There is evidence that companion animals were beloved by their owners who often composed funerary poems when their pets died; see Graham Shipley et all, \textit{The Cambridge Dictionary of Classical Civilisation}, (Cambridge University Press, United Kingdom, 2006) 50. In \textit{The Odyssey}, Homer records a very moving reunion between Odysseus and his dog 'Argus' who apparently had not been cared for in Odysseus's absence; Homer, \textit{The Odyssey}, E.V Rieu, D.C Reiu and Peter Jones (trans), (Penguin Classics, United Kingdom, 2003) 230 - 231.
However, despite widespread support for laws prohibiting acts of cruelty, animals intended to become food for humans are farmed and slaughtered in conditions of cruelty while other animals, our companions and pets, are lavished with love and care.

The paradox therefore remains; often manifesting in bizarre forms. For example, Grace Clement observes that in Michael Moore's movie Roger and Me, a resident of Flint, Michigan, who had fallen on hard economic times, offered rabbits for sale under the sign 'Rabbits or Bunnies, Pets or Meat for Sale'. The message inherent in the sign indicates that animals can be equally characterised as companions or food, not based on any inherent quality of the animal, but on the preferences of the humans who buy them.

Part 1 of this thesis identifies and interrogates the assumptions built into the fabric of Western civilization underlying this paradox and by which animals are considered of lesser legal and moral status, assigned instrumental value and systematically exploited to satisfy the wants, needs and preferences of humans.

The Technical Language of Animal Philosophy

Exploring the different schools of animal philosophies can at times feel like learning a different language. To make sense of the philosophy it is important to understand the basic 'vocabulary' used by philosophical schools in talking about animals. An explanation of the basic philosophical vocabulary associated with the animal rights debates is set out in Appendix B to this thesis.

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19 Ibid.
20 Deborah Cao, The Legal Status of Animals, Chapter 3 in Cao, Animal Law in Australia and New Zealand, (Thompson Reuters, Australia, 2010) 63.
It is particularly important to understand what philosophical schools mean when they use terms like ‘moral standing’, ‘moral agency’ and what making ‘morally relevant distinctions’ means.

In Western societies, ‘rights’ are accorded to sentient beings that are moral agents. If a sentient being is a moral agent, then that being is entitled to be treated with ‘minimum standards of acceptable behaviour’\(^{21}\) and that being’s rights must be taken into account in determining any course of action.

‘Rights’ are sometimes contrasted with ‘interests’ in the sense that ‘rights’ are considered ‘valid moral claims that must always be respected, in contrast to interests that need not always be respected’.\(^{22}\)

Accordingly, if it is thought that animals are ‘moral agents’ then it follows that animals possess ‘moral standing’ with certain ‘rights’ and unless there is some ‘morally relevant distinction’, it is not permissible to preserve the rights that accrue to humans while also alienating or violating those rights accruing to animals.

However, if it is thought that animals are not moral agents and do not possess rights, then a morally relevant distinction between humans and animals is said to exist thereby permitting the differential treatment of animals. Thus there is no need for the application of the ‘principle of equal consideration’.

How people treat different groups of entities therefore depends on the existence of ‘morally relevant distinctions’. If there are no morally relevant distinctions between members of a class of entities then all entities within that class ought to be treated consistently.

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However, if one class of entities is to be treated differently from another, that can only be permitted if there is a morally relevant distinction between the two classes of entities. Therefore, if there are no morally relevant distinctions between humans and animals, then advocates suggest that there can be no basis for the industrial exploitation of animals, because humans are not similarly exploited.

If there are no morally relevant distinctions, the principle of equal consideration applies. The ‘Principle of Equal Consideration’ might be expressed as follows: ‘we must treat like cases alike except when a morally relevant difference supports treating them differently.’ Is there a morally relevant distinction between animals and humans that supports treating animals differently?

Both animal ‘welfare’ advocates and animal ‘rights’ advocates admit that the principle of equal consideration requires that humans include the interests or preferences of animals when deciding whether to engage in certain practices involving animals such as factory farming. However, they differ in the application of that principle.

Because welfare advocates would sanction limited practices of, for example, animal experimentation where the interests of humans outweighs the interests of animals in the conduct of that experimentation, there is a morally relevant distinction that can be drawn between humans and animals. For welfare advocates therefore, that morally relevant distinction is sufficient to neutralize the principle of equal consideration.

Chapters 1 and 2 demonstrate how this vocabulary and the concepts they express have been employed since ancient times to justify the subordination and exploitation of animals by humans.
Chapter 1

Ancient Voices and Animal Exploitation

Introduction

Part 1 answers the question: 'how did contemporary Western civilisation arrive at the doubly unfortunate characterisation of animals as mere property and as mere instruments able to be exploited to satisfy the wants, needs and interests of humans'? It investigates the assumptions relied upon to support the morally relevant distinctions that for millennia have justified humans denying animals moral standing, characterising them as property and then exploiting them as such.

Ancient in origin and empowered by theological authority, these assumptions have influenced centuries of social, political, legal and economic policies inimical to slaves, women, indigenous peoples and animals. Most Western societies have moved beyond the state-sanctioned exploitation of slaves, women and indigenous peoples. Indeed, animal rights scholars investigate historical processes empowering formerly disenfranchised entities for what they might teach in supporting animal welfare initiatives.

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However, despite the fact that animals are sentient beings capable of feeling pain and happiness and express behavioural preferences, they remain the most vulnerable and exploited category of sentient beings within contemporary society.

Animals continue to be characterised as mere property and exploited by humans for their flesh, skin, fur and other components.\(^{27}\)

What is it about the philosophical foundations of contemporary Western societies that deprive animals of rights and absolves humans from extending duties toward them? What is it about these same foundations that make it so difficult for contemporary thinkers to advocate for the welfare of animals in our society?\(^{28}\) How do contemporary philosophers approach the issue of animal welfare and interests?

Part 1 is divided into two Chapters exploring prominent pre and post-enlightenment philosophers and the implications of their philosophies for the human - animal relationship.\(^{29}\)

Chapter 1, Section I demonstrates how the cultural foundations for characterising animals as inferior creatures available for economic exploitation by humans derives from the writings of Aristotle.

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\(^{28}\) Martha Nussbaum has remarked on this difficulty, locating it in the self-serving inconsistencies associated with attempts to overcome the anthropocentric bias inherent in contemporary animal philosophies; Martha Nussbaum, 'Animal Rights: The Need for a Theoretical Basis' (2001) 114(5) *Harvard Law Review* 1506, 1548.

\(^{29}\) I acknowledge that characterising philosophers in this way is rather fluid. Some philosophers prefer not to refer to periods of time, but the philosophers themselves. Hence Bryan Magee refers to ‘the Great Empiricists’ and ‘French Revolutionary Thinkers'; *The Story of Philosophy*, (Dorling Kindersley, United Kingdom, 2001) 4 - 5. Bertrand Russell does not refer to the enlightenment, but to the 'Renaissance'; *History of Western Philosophy*, (Routledge, United Kingdom, 1961) 479.
It explores Aristotle’s belief that animals lacked the capacity for rational thought; a morally relevant distinction justifying relegating animals to a lowly status on the *scala naturae* (Great Chain of Being) and available to satisfy human wants, needs and preferences. While Section I also notes the views of several contemporary scholars who refute this belief, it acknowledges the dominance of Aristotle’s seminal philosophical influence on Western civilisation.

Despite contrary views held by Pythagoras and Plato, it was Aristotle’s conception of animals that was subsequently imported into the fabric of Western Christian society by Thomas Aquinas.

Chapter 1, Section II explains how Thomas Aquinas adopted and then modified Aristotle’s ‘Great Chain of Being’ thereby giving theological authority to the lowly status of animals. Now, it was not only reason that justified human dominion over animals, but reason having its divine origin in God’s own plan for creation. It demonstrates how contemporary anthropocentric approaches to animal rights rests upon a denial of moral agency to animals. It explains how Aristotle, Aquinas, and Kant considered that a lack of rational capacity in animals constituted a sufficient morally relevant distinction justifying the characterisation of animals as inferior and mere property.
Chapter 1, Section III demonstrates how the Aristotelian / Thomistic characterisation of animals as lacking the capacity for rational thought has remained largely untroubled by Enlightenment and post-Enlightenment philosophies.

In fact, Immanuel Kant's deontological philosophy, and variations proposed by animal friendly neo-Kantian philosophers discussed in Chapter 1, Section III only imposed indirect duties on humans toward animals while Descartes' mechanistic conception of animals, discussed in Chapter 1, Section IV proposed a mechanistic understanding of animals that reinforced their characterisation as lacking in rational capacity.

Chapter 1 concludes with a Pythagorean 'through experiment' in Section V by speculating about an alternative future in which the thinking of Pythagoras informs debate about animal ethics. Resonating with Eastern Buddhist philosophy, the thought experiment locates discussion of animal ethics within the wider philosophical concepts of rebirth / reincarnation and karma that pervade Pythagorean and Buddhist thought. It anticipates an ethic of bioinclusiveness proposed in Chapter 2.

Chapter 2 explores the three dominant contemporary philosophical thought-systems advocating for animal welfare; Peter Singer's Preference Utilitarianism, in Chapter 2, Section I; contemporary deontologists Tom Regan and Gary Francione in Chapter 2, Section II who argue for animal rights and finally Rawlsian Contractarianism, including Martha Nussbaum's 'capacities approach' as an answer to the perceived shortcomings of Contractarian theories of animal welfare, in Chapter 2, Section III.

Chapter 2 demonstrates that despite the challenges to the morally relevant distinction identified by pre-Enlightenment philosophers and the apparent advantages for animals promised by these three contemporary philosophical schools of thought, they ultimately fail to provide a workable basis for advancing food animal welfare initiatives.

This is because each school of thought has its own internal faults that preclude the formation of a philosophical consensus about whether and to what extent animals have rights or interests that can be asserted against human rights claims and interests.

So pervasive are these difficulties, that Nussbaum concludes ‘our current theories in this area (especially regarding matters of political obligation) are so deficient as to be almost non-existent.’

However Chapter 2, Section IV braves these difficulties by proposing the framework for a new animal welfare system based upon an ethic of bioinclusiveness. Emphasising sentience and the interconnectedness of humans, animals and the environment, an ethic of bioinclusiveness provides a reasoned basis for including animals within the larger social contract.

Part 1 of the thesis therefore establishes the philosophical foundations for the legal and regulatory regimes by which food animals characterised as exploitable property are processed for their meat. These regimes are explored in Part 2.

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In its discussion, Part 1 works within the generally accepted understanding that contemporary philosophical approaches to animal interests are characterised by the idea that human beings and only human beings deserve moral consideration. As a result, ‘human interests are located at the centre of the moral universe to the exclusion of other beings’. These approaches have been variously termed ‘anthropocentrism’, ‘moral anthropocentrism’, ‘ethical humanism’ or even ‘speciesism’. Roger Fjellstrom argues that the proliferation of terms used to describe a relatively simple concept (the privileging of human interests over animal interests) creates conceptual confusion. He advocates the use of a single term: ‘speciesist’.

Whatever term is used, prominent Australian animal law scholar Professor Deborah Cao observes that these approaches have ‘made up mainstream thought and orthodoxy over thousands of years’ and have not been challenged in any meaningful way until well into the 20th century.

In this thesis, I will be using the terms ‘anthropocentrism’ and ‘speciesism’ simply because these are the most common terms appearing in the literature and are often used interchangeably. For example, James Rachels identifies that the principal philosophical strategy deployed in defence of anthropocentrism is ‘qualified speciesism’.

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40 Gary Steiner, Anthropocentrism and its Discontents: The Moral Status of Animals in the History of Western Philosophy, (The University of Pittsburgh Press, United States, 2005), 58.
41 Above n 39, 17.
43 Deborah Cao, Animal Law in Australia and New Zealand, (Lawbook Co, Australia, 2009) 4.
44 I am aware that some scholars have questioned the ‘characterisation of the conceptual framework’ of the issue of speciesism - Oscar Horta, ‘What is Speciesism?’ (2010) 23 Journal of Agricultural Environmental Ethics 243. However, I do not intend to engage with this conceptual debate in this thesis.
Qualified speciesism states that if animals are to be treated differently from humans, then there must be some qualifying characteristic (described earlier as a ‘morally relevant distinction’) that is possessed by humans and lacking in animals that justifies the differential treatment of animals.\footnote{Above n 41, 15.}

However, all of these debates start with the seminal influence of Aristotle’s writings about animals and their relationship with humans.

**A Philosophical Ressourcement?**

In fact, the writings of both Aristotle and Pythagoras continue to influence 21st Century thinking about animals. Although Pythagoras’ approach is closer to the Indian understanding of animals,\footnote{Thomas McEvilley, *The Shape of Ancient Thought: Comparative Studies in Greek and Indian Philosophies*, (Allworth Press, New York, United States, 2002) 102; noting the similarities.} it is the writings of Aristotle that have been and continue to exert the major influence on the way Western culture understand the nature and place of animals within human society.

It was to Aristotle’s works that Thomas Aquinas turned in forming Western society’s approach to animals and animal welfare.\footnote{Jacques Maritain, *St. Thomas Aquinas*, (Sheed & Ward, London, United Kingdom, 1948) 10; Aidan Nichols, *Discovering Aquinas: An Introduction to His Life, Work and Influence*, (Darton, Longman and Todd Ltd, United Kingdom, 2002) 3 ff.} And so it was Aristotle’s writings that directly influenced Western Judeo-Christian understanding of the world and the place of humans and animals in the world.\footnote{Richard E. Rubenstein, *Aristotle’s Children: How Christians, Muslims, and Jews Rediscovered Ancient Wisdom and Illuminated the Dark Ages*, (HarCourt inc, United States, 2003); Maria Rosa Menocal, *The Ornament of the World*, (Black Bay Books, United States, 2002) 215.}
However, given the amount of contemporary philosophical scholarship associated with animals, animal rights and interests, is it really necessary to return to ancient times to investigate whether the Australian Consumer Law can underwrite the regulatory regime proposed by the Labelling Logic Report and in so doing advance food animal welfare initiatives? I believe it is.

Food animals are characterised as property, legally able to be exploited for the economic profit of their owners.

In the wake of the economic recovery following the Second World War, rural agriculture transformed from family owned farms to the dominance of corporate-owned highly vertically integrated concentrated animal feeding operations ('CAFOs').

Post-war prosperity, generated by massive employment for returning service men and the growth of the consumer economy needed to be fuelled. In this era, the triumph of neo-classical economics transformed the way in which the success or failure of agricultural enterprises was measured.

Now, success was measured in terms of efficiency and profits per unit as corporations embraced techniques of mass-production of food animal products. Wealth-maximisation, that holy grail of neo-classical economics, was the key to successful animal farming practices.

Pursuing economically efficient farming practices necessitated characterising animals as units of production; capital to be exploited as efficiently as possible. The cultural foundations for the development of these CAFOs were laid down centuries ago in the writings of Aristotle, Aquinas and others who characterised animals as lesser beings, lacking in rational capacity and therefore available to be exploited to satisfy the needs and wants of humans.

Therefore to understand why Western society characterises animals in this way, it is necessary to return to interrogate and then challenge the philosophical foundations upon which this characterisation rests. Unless the substantial causes for food animal suffering are addressed, attempts to challenge this issue are likely to be superficial rather than rehabilitative.

For example, Dinesh Wadiwel notes that the instrumentalist characterisation of animals 'very clearly underpin animal welfare approaches which seek to minimise animals suffering without necessarily changing the frameworks of violence and power that perpetuate this suffering. For example, the notion that slaughter houses are tolerable once perceived pain is eliminated'.

Wadiwel's observation accurately characterises the recent decision by the Commonwealth government to mandate structural changes to the use of the 'Mark 1' restraint box used in slaughtering cattle in the belief that it provides less opportunity for cattle to move about and thus suffer. However, in terms of food animal welfare, these changes are superficial.

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Changes to the ‘Mark 1’ restraint box do nothing to challenge the underlying characterisation of animals as property, a resource able to be sold and slaughtered to satisfy human preferences for the taste of animal flesh. While this underlying characterisation remains unchallenged, ‘improvements’ in food animal welfare, while welcome, remain largely superficial.

Even so, is there anything useful in what the ancient philosophers have to say?

Most contemporary discussions concerning animals, ethics and philosophy tend to move quickly from Aristotle to Descartes, with a passing nod to Thomas Aquinas, and then on to Kantian deontology before concluding with two or three prominent 20th century philosophical schools of thought.58

In fact there are two patterns emerging from contemporary scholarship into animal rights debates. First, there is a tendency for contemporary animal welfare advocates to think of their insights as being novel or fresh when this is not the case. Second, there appears to be a tendency for advocates to either dismiss or ignore the views of the ancients.59

However, concerns for the welfare of animals is not a new phenomenon, nor are many of the arguments in favour of animal welfare. In dedicating the revised edition of his text Animal Liberation to members of the animal liberation movement, Peter Singer notes that without them:

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(t)he first edition would have suffered the fate of Henry Salt's book *Animal's Rights*, published in 1892 and left to gather dust on the shelves of the British Museum library until, eighty years later, a new generation formulated the arguments afresh, stumbled across a few obscure references, and discovered that it had all been said before, but to no avail.60

Singer’s insight reveals the tendency for philosophical arguments about animal rights, animal welfare and the relationship between animals and humans to briefly flare into consciousness for a while, only to fade into obscurity until the next generation of scholars re-discovers them.

Recently however, several scholars, principally Stephen Newmeyer from Duquesne University, have instigated a form of *ressourcement*,61 drawing attention to the thought of ancient writers whose own arguments advocating for the welfare of animals reveal ‘striking foreshadowings of those developed in contemporary philosophical inquiries into the moral status of animals’.62

**Three Reasons why the Ancients have something to say.**

Accordingly there are at least three reasons why a recovery of ancient philosophical sources is important for contemporary thinking concerning our relationship with animals. First, as Singer noted, those who advocate for animal rights or animal welfare have tended to forget the lessons of the past.

60 Ibid.

61 There is no definitive English translation of the French term ‘Ressourcement’. It is a term that is associated with some Catholic Theologians interpreting the significance of the Second Vatican Council (1963 - 1965) as a means of bringing pre-scholastic and ancient theological insights back into the present in a process of re-appropriation and renewal: see Ormond Rush, *Still Interpreting Vatican II*, (Paulist Press, New York, United States, 2004) 7.

In fact, when the writings of ancient philosophers, but particularly the Greek pre-Socratic thinkers are examined, the reader discovers that they anticipated much of contemporary appeals to justice for animals. 63

Therefore in evaluating existing contemporary theories of animal rights or interests and in attempting to formulate alternative theories, it will be useful to investigate the contribution of the ancients. For example, Stephen Newmeyer has investigated the extent to which Plutarch’s *De Sollertia Animalium* (On the Cleverness of Animals) might be employed to evaluate the ‘argument from marginal cases’. 64

Second, ancient Greek philosophy does not form a cohesive body of writing. The attention paid to Aristotle is as much a result of the recovery of his writings in the Middle Ages and their adoption by Thomas Aquinas, as it is about the intellectual force of his arguments. 65 Aristotle was not the only ancient Greek writing about animals.

There were other Greek thinkers whose views on animals do not accord with Western, Christian thinking. Pythagoras and Plato developed views about animals that resonate with Eastern, Buddhist philosophical views.

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64 Stephen Newmeyer, ‘Plutarch on the Treatment of Animals: The Argument from Marginal Cases’ (1996) *Between the Species* 40. The argument from marginal cases is employed by animal rights / interests philosophers to demonstrate that we do not assign rights to sentient beings solely on the basis of higher rational abilities. Just because babies, intellectually handicapped or comatose humans do not express higher rational abilities, we do not deny them rights. From these ‘marginal cases’ it is argued that the lack of higher rational abilities in animals should not be an *a priori* reason for denying rights to those animals. See Elizabeth Anderson, *Animal Rights and the Values of Non Human Life*, in Cass Sunstein and Martha Nussbaum, *Animal Rights: Current Debates and New Directions*, (Oxford University Press, New York, United States, 2004) 279 - 280.
If the consequence of Aristotle and Aquinas' views is a sharp difference in substance between rational human beings and irrational brutish animals, then Pythagoras and Plato's views suggest a difference not of substance but of degree.66

Third, if Steiner is correct in asserting that ancient Greek thinkers did anticipate much of present day argument about the human - animal relationship, then contemporary arguments may have a firmer philosophical pedigree than first thought and may even benefit from those ancient insights.

For example, Catherine Osbourne has demonstrated that the philosophy of Hermachus of Mytilene anticipates much of Rawls' contractualism67 while Jo-Ann Shelton demonstrates how contractarian thinking generally was anticipated by Lucretius.68

However, the starting point for any analysis of animal rights or interests and the characterisation of animals in contemporary Western society must be with the influence of Aristotle.

Nobel Laureate philosopher Bertrand Russell acknowledges that 'throughout modern times, practically every advance in science, in logic or in philosophy has had to be made in the teeth of opposition from Aristotle' 69

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67 Catherine Osbourne, Dumb Beasts & Dead Philosophers (Oxford University Press, United Kingdom, 2007) 203.
Chapter 1, Section I: Aristotle Denies Reason to Animals

Aristotle was a student of Plato and went on to become tutor to Alexander the Great. ‘Aristotelianism’ is the term given to the school of philosophical thought associated with Aristotle and ‘amounts to the largest surviving philosophical oeuvre from classical antiquity and the most important and influential.’

It is difficult to overestimate the extent to which Aristotle’s works have shaped contemporary Western civilisation and it is generally accepted that it is Aristotelianism that has ‘exercised the deeper and more lasting historical influence on Western thought’.

Aristotle’s writings about animals are puzzling and have generated a divergence of views about what he really thought about them. Aristotle wrote several books devoted to the study of animals in which his admiration and affection for all forms of animals is obvious. His texts on animals can be divided into two groups; (a) zoological / biological texts explicitly devoted to the study of animals and (b) political / ethical texts in which animals are mentioned but are not the explicit subject of the texts.

Aristotle was born in Macedonia in 384 BCE. He studied with Plato for 20 years before becoming tutor to Alexander the Great. Aristotle established ‘the Lyceum’, his own enormously popular school of philosophy in Athens. After Alexander died in 323 BCE, Aristotle fled Athens ahead of rising anti-Macedonian hostility. Aristotle fled to the Chalcis, the principal city on the Greek island of Euboea. Aristotle remained there until his death a year later in 322 BCE. Various causes are attributed to Aristotle’s death including self-administered poison and a stomach disease that may have been some form of cancer.


Aristotle’s zoological / biological texts include the *Historia Animalium* (Inquiry into Animals), *De Partibus Animalium* (On the Parts of Animals), *De Generatione Animalium* (On the Generation of Animals) and *De Motu Animalium* (On the Motion of Animals) - see Martha Nussbaum, *Aristotle in Oxford Classical Dictionary*, 3rd Ed, (Simon Hornblower and Anthony Spawforth 1996) 165 - 166.

Aristotle’s political / ethical texts mentioning animals most famously include *The Politics*, *Nicomachean Ethics* and *De Anima* (The Soul) - see Margaret Howatson (ed) *The*
Based on a reading of these texts, the standard Aristotelian view of animals that remains to this day is constructed. An example of that standard view is presented by Steven Wise in his text *Rattling the Cage: Toward Legal Rights for Animals* as follows: ‘ancient philosophers claimed that all nonhuman animals had been designed and placed on this earth just for human beings’.\(^7\)

This view is reinforced when selectively reading parts of Aristotle's works, particularly Sections of *The Politics*, where Aristotle writes:

Plants exist for the sake of animals and brute beasts for the sake of humans -tame ones for the use he can make of them as well as for the food they provide; and as for wild animals, most though not all can be used for food or are useful in other ways: clothing and instruments can be made out of them. If nature makes nothing without some end in view, nothing to no purpose, it must be that nature has made all of them for the sake of man.\(^7\)

In an earlier passage in *The Politics*, Aristotle claims that human slaves are living property; that slavery is a natural phenomenon because one group must rule over another.\(^7\)

Stephen Newmeyer explains that when this earlier passage concerning slavery is then read with the one immediately above, it reveals the basics of Aristotle's *teleology* where all natural things are located in a graduated scale and designed toward some end (*telos*).\(^7\)

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\(^7\) Stephen T Newmeyer, *Animals in Greek and Roman Thought: A Sourcebook* (Routledge, United Kingdom, 2011) 27.
The inevitable conclusion from Aristotle's teleology is that:

Just as it is natural for one man to rule over another, so it is natural for humans to rule over animals, for they are intended for man's use in the same way that some humans are intended for the use of other humans.\(^80\)

According to Gary Steiner the 'bald assertion that animals exist entirely for the sake of human beings.....has done much to cement Aristotle's reputation as a hard-line speciesist.'\(^81\) Aristotle's reputation as a 'hard line speciesist' continues over 2000 years after his death.

Aristotle's writings concerning animals raise three important questions; first, how does Aristotle reach his conclusions about animals? Second, given the variety of Aristotle's writings about animals, is it accurate to reduce his belief about animals to the standard view expressed above? (Has Aristotle been framed?) And third, whatever the answer to these questions, what do Aristotle's views have to do with the earlier discussion about the creation of morally relevant distinctions justifying the differential, and exploitative treatment of animals?

**Aristotle Causes a Crisis**

Earlier, it was noted that in recent years scholars have initiated a *ressourcement* in recovering and evaluating the texts of ancient philosophers concerning animals. One of those scholars, Richard Sorabji commences his text by stating his intention to show that 'a crisis was provoked when Aristotle denied reason (*logos*) to animals'.\(^82\)

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\(^{80}\) Ibid.


Entire treatises have been devoted to exhaustively exploring the crisis referred to by Sorbaji and it is well beyond the scope of this thesis to offer an evaluation of that scholarship. However, it is appropriate to set out Aristotle's basic philosophical framework in relation to animals in order to answer the questions posed above.

Before Aristotle, philosophers such as Hippocrates, Pythagoras and Plato, collectively referred to as 'pre-Socratic' thinkers, did not draw the hard-line distinction between humans and animals that contemporary Western society draws. For these pre-Socratic philosophers, the awareness with which humans and animals go about their actions is the result of certain faculties of the soul but they 'do not see human reason as the sign of an essential distinction, between animals and humans'.

Aristotle overturned this view by arguing that awareness must be a function of reason and while admitting that animals have sensation (feelings) he denied them the capacity for reasoning that enables humans to search for and participate in the good life and in community or politics.

For Aristotle, therefore the physical movement of humans and the activities they engage in are the result of reason directing the will. However, while animals do possess some awareness in the form of sense perception, Aristotle explains their movement and reaction to the environment without the need to impute reason.

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84 Above n 81, 53.
85 Ibid.
87 Above n 81, 63.
There are two important consequences that follow from these views. First Aristotle appears to be creating a natural hierarchy in which plants differ from animals and animal differ from humans in substance. For Aristotle, the substantial difference between animals and humans is the lack of reasoning ability in the former. Second, Aristotle seems to be saying that animals may thus be exploited by humans since the lower may be exploited by the higher; ‘what is by nature superior should govern what is inferior. Non-human creatures are entirely without reason and it is only proper that they should be used for human purposes’.  

These conclusions; the hierarchical ordering of plants, animals and humans found in Aristotle’s work has led some scholars to suggest that Aristotle created what is sometimes called a scala naturae or ‘Great Chain of Being’. The scala naturae suggests there is a linear progression of organisms from the simple to the more complex. According to some scholars, while there is some form of continuity between species, animals are essentially at a lower ‘level’ than humans and thus are available for use by humans. The consequence of this scala naturae for the status of animals is captured by Ryder:

Aristotle did not deny that men and women were animals, but placed them (as the most rational of animals) at the head of a natural hierarchy and proposed that the less rational exist to serve the purposes of the more rational. Even slaves, although human and capable of feeling please and pain were considered to be less rational and, therefore, open to justifiable exploitation by the more rational. 

It is this second conclusion, that animals are available for exploitation by humans that is controversial.

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89 Charles Singer, A Short History of Biology, (Oxford University Press, United Kingdom, 1931).
I do not believe that Aristotle’s writings about animals are so unequivocal that this conclusion of permissible exploitation follows. In fact, there is a body of contemporary scholarship that questions this apparently inevitable conclusion.

Rehabilitating Aristotle?

Other scholars agree that although Aristotle did create this hierarchical taxonomy (classification) of organisms, he did not create a *scala naturae* intended to support the *exploitation* of animals by humans. Scholars such as Martha Nussbaum suggest:

Aristotle does rank lives but he does not hold in general that one species exists for the sake of another. Each species nature (or characteristic form of life) is its end.\(^{92}\)

This last sentence contains an important observation. In his writings on animals, Aristotle regarded all life as being ends in themselves because he believed that all living creatures were organised to both maintain themselves and flourish in ways that are appropriate to each creature.\(^{93}\)

For this reason, each animal is an end in itself and not merely a means to someone else’s end, a line of thinking that anticipates the writing of German philosopher Immanuel Kant.

However, other scholars argue that Aristotle did intend to create a hierarchy of creation, but that the *reasoning* used by Aristotle to create it and hence the *implications* drawn from that reasoning have been misrepresented.\(^{94}\)

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\(^{93}\) Ibid 1519.

If Aristotle did suggest a form of hierarchy, or ‘Great Chain’ of living creatures, but did not then go on to suggest that creatures lower on that chain could be exploited by humans who were higher on the chain, what did he mean?

Perhaps influenced by notions of class structure and the Theory of Evolution, scholars have tended to impute value judgements to Aristotle’s works concerning animals in ways that privilege humans as ‘superior’ while relegating animals to an ‘inferior’ status. Gary Steiner notes the natural conclusion drawn from Aristotle:

> If Aristotle denies reason and belief to animals, then this statement about a natural hierarchy in which animals stand below human beings might appear to follow quite directly: in virtue of our rational capacity, we humans stand above all non-rational beings in the hierarchy of nature, and these non-rational beings exists simply to satisfy our needs and desires.\(^95\)

In fact, a closer reading of Aristotle’s works concerning nature generally and animals particularly, suggests that he thought of nature in terms of units of increasing complexity rather than in terms of ‘better’ or ‘worse’.\(^96\)

Imputing value judgements to Aristotle’s natural taxonomy opens the way for the exploitation of those entities lower down on the scale of being. However, I believe further scholarship into an overlooked issue will expose the weakness of this reasoning.

What is this overlooked issue?

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\(^{95}\) Ibid 58.

An Overlooked Issue?

Orthodox scholarship concerning Aristotle's writings on animals discussed above, quickly moves from statements in *The Politics* about the subordinate status of animals, to the right possessed by humans to use and exploit those animals.

The movement from the premise of animal inferiority to the conclusion of permissible exploitation generally rests on an interpretation of Chapter l.v of *The Politics* in which Aristotle seeks to demonstrate that slavery is part of a universal pattern. That conclusion is summarised by Ernest Barker in his translation of *The Politics*:

> There is a principle of rule and subordination in nature at large: it appears in the realm of animate creation. By virtue of that principle, the soul rules the body; and by virtue of it the master, who possess the rational faculty of the soul, rules the slave, who possesses only bodily powers and the faculty of understanding the directions given by another's reason.

Because animals lack rational capacity, a relationship of justice between animals and humans is impossible, a view Aristotle later affirms in the *Nicomachean Ethics* in discussing affections in various degrees of friendships. Absent however, are reasons given for the conclusion that because slaves, women and animals exist in these inferior relationships (to white Greek men) they may therefore be *exploited*.

Likewise, there is an absence in the wider literature investigating this apparently assumed conclusion.

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It is not within the scope of this thesis to deconstruct Aristotle's reasoning on this point and to offer a normative alternative. However textual support is hinted at in a passage in *The Politics* where Aristotle suggests that it is better for both slaves and animals to be benevolently ruled over by their masters than suffer in the wild world beyond the master's household.\(^ {100} \)

If Aristotle's views about animals are to be rehabilitated for the 21st century, then it would be useful for scholarship to explore this little developed notion of benevolence and care. Future scholarship might then build upon Martha Nussbaum's observation that a frequently overlooked aspect of Aristotle's work on animals is his teleological vision for animals.\(^ {101} \) Nussbaum argues that far from advocating the exploitation of animals, Aristotle actually 'articulates a notion of flourishing for animals (and) regards each animal as an end in itself, each as the measure of its own type of flourishing'.\(^ {102} \) In fact, the qualities of benevolence and care, ordered to the flourishing of sentient beings, are part of the proposed ethic of bioinclusiveness.

**Aristotle's Morally Relevant Distinction?**

Earlier this Chapter outlined the contemporary philosophical framework concerning animals and animal interests. That framework denies moral agency to animals because of the presence of a morally relevant distinction that justifies the differential treatment of humans as sentient beings as opposed to animals as sentient beings.\(^ {103} \)

\(^ {100} \) Above n 97, 68 - 69.


Aristotle's denial of the capacity for reason in animals resulted in them being located toward the lower end of the *scala naturae* and available to satisfy the needs and wants of humans. For Aristotle (or at least attributed to Aristotle) the lack of rational capacity is the morally relevant distinction that justifies the view that animals can be exploited for human ends.\(^{104}\)

The absence of rational capacity as a sufficient morally relevant distinction justifying the exploitation of animals was then adopted and adapted by Thomas Aquinas and subsequently influenced Emmanuel Kant's deontological theories.

Despite challenges from utilitarian, contractarian and neo-Kantian rights theories, Aristotle's characterisation of animals as exploitable property has continued into the 21st century and is reflected in legal and regulatory regimes in most Western countries.

For example, in Australia, Commonwealth *Model Codes of Practice* for the welfare of animals in certain industries and associated *Animal Welfare Standards* are issued under the auspices of the former Primary Industries Ministerial Council, now the *Standing Council on Primary Industries* composed of the primary industries ministers from each State and Territory. The objective of the PIMC is ‘to develop and promote sustainable, innovative and profitable agriculture, fisheries/aquaculture, and food and forestry industries’.\(^{105}\)

In other words, SCoPI / PIMC’s statutory objective of developing profitable primary industries appears to take priority over the welfare of animals exploited to achieve that objective.

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And, where there is a conflict of these interests, the welfare of animals is subordinated to efficient industry practices and market forces. This conflict and its implications for the welfare of food animals will be explored in Part 2 of this thesis.

Chapter 1, Section II: Thomas Aquinas: The ‘Dumb Ox’ on Dumber Animals

One important scholar to benefit from the effort in the Middle Ages to recover Aristotle's philosophy was Catholic theologian and Dominican Priest, Thomas Aquinas. Generally regarded as one of Europe's most important philosophers, Aquinas synthesised re-discovered Aristotelian philosophy with Christian theology.

Aquinas' appearance belied his intellectual genius. Morbidly obese and retiring to the point of reclusiveness, he was known as the 'dumb ox'. In this respect the taunts directed toward Aquinas' contemplative and slow nature are similar to those directed toward the great 9th Century Buddhist philosopher Shantideva; of whom it was said all he did was 'eat, sleep and defecate'.

107 Christianity is not based on any single philosophical system but on a saving encounter with Christ. Throughout history, the Church has drawn upon existing philosophical systems to explain and proclaim the significance of that encounter. St Augustine drew upon Neo-Platonic concepts while St Thomas Aquinas drew upon Aristotelian concepts. In the late 20th and early 21st Century, John Paul II drew upon the phenomenology and personalism of Max Scheler and others; John Paul II, Fides et Ratio (1993) 7.
Despite his appearance Aquinas created a hugely influential school of philosophy known as ‘Thomism’, involving ‘an elaborate cosmic teleology that draws on Aristotle...in placing animals in the service of human interests’. The influence of Aquinas on Western philosophy is enormous.

No less an authority than Nobel Laureate Bertrand Russell suggests;

St Thomas is not only of historical interest, but is a living influence, like Plato, Aristotle, Kant and Hegel - more in fact than the latter two.

Throughout his most important philosophical work, the *Summa Theologica*, Aquinas adopted two very important principles of Aristotelian philosophy; first, that humans can employ reason through observation of the world and second, that there is a hierarchical order to nature, but with the Christian God at its apex, animals at its base, and humans above the animals.

Aquinas thought that Aristotle has seriously erred in the formulation of his hierarchy of created things:

Thomas insisted (that)...where the Philosopher (Aristotle) fell short - seriously short-was in failing to recognize that all created things, with their built in tendencies to behave or develop according to their natures, owe their entire being to God.

Aquinas therefore transposed Aristotle's hierarchical taxonomy into the Christian theological tradition, with the consequence that animals were again subordinated to the desires and needs of humans.

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110 Aquinas died from a blood-clot caused after hitting his head on a low branch while riding a donkey.
112 Bertrand Russell, *History of Western Philosophy*, (2nd Ed) (George Allen & Unwin Ltd, United Kingdom, 1961) 444.
113 Thomas Aquinas, *Summa Theologica*; Second Part of the Second Part, Qs.64; Vols. I - V; (Benziger Bros, New York, United States, 1948).
Earlier, it was noted that although scholars are divided about the meaning of Aristotle's taxonomy or hierarchical classification of organisms, his statement in *The Politics* seems very clearly to say that animals are available to satisfy the needs and wants of humans.\(^{116}\)

Whatever the resolution of this dispute as to Aristotle's intent, it seems clear that Aquinas took the passage from *The Politics* at face value in formulating his approach to animals and the uses of them. This is why scholars such as Ryder suggests:

> Aquinas was very much influenced by Aristotle, many of whose works had only recently become available to European scholars, and it seems he absorbed from Aristotle the idea that less rational beings, such as slaves and animals, exist to serve the interests of the more rational.\(^{117}\)

Aquinas' conclusions about animals sat easily with a pre-scientific culture that read the Bible as historical fact. And in the Book of Genesis, God himself had commanded humans to exercise 'dominion' over all of nature.

**Why it is not unjust to kill animals**

What is important here is Aquinas' acceptance of rational capacity as a morally relevant distinction; humans possess it while animals do not. This conclusion enables Aquinas to simultaneously uphold the Christian Commandment not to kill while maintaining that because animals do not possess rational capacity, it is not unjust to kill them.

Aquinas develops these conclusions in the 'Second Part of the Second Part' of his *Summa Theologica*.\(^{118}\)
In that Part, Aquinas comments on the Theological and Cardinal Virtues.\textsuperscript{119} In discussing the Cardinal Virtue of ‘Justice’, Aquinas considers whether it is lawful to kill any living thing through a response to a syllogism constructed as follows; murder is a sin because it deprives humans of life. But life is common to both plants and animals. Therefore, it is a sin to kill animals and plants.\textsuperscript{120}

Aquinas refutes this conclusion by firstly quoting from a work by St. Augustine who lived centuries before. In Book 1 of his important work \textit{City of God}, Augustine discusses suicide and states:

> When we say, Thou shalt not kill, we do not understand this of the plants, since they have no sensation, nor of the irrational animals that fly, swim, walk or creep, since they are disassociated from us by their want of reason, and are therefore by the just appointment of the Creator subjected to us to kill or keep alive for our own uses.\textsuperscript{121}

From this ‘authority’, Aquinas then argues that since ‘dumb’ (irrational) animals lack the reason that directs their movements, they must be moved (animated) by ‘impulse’. For Aquinas, this impulse is a sign by which animals are ‘naturally enslaved and accommodated to the uses of others’.\textsuperscript{122}

Therefore to kill an animal belonging to another person is not to commit the sin of murder. Rather, because the animal is ‘accommodated to the use’ of that person, the sin committed is one of theft of property.

\textsuperscript{119} The ‘Theological Virtues’ are Faith, Hope and Charity (Love) and the ‘Cardinal Virtues’ are Prudence (Discernment), Justice, Fortitude and Temperance (Self Mastery). See \textit{Catechism of the Catholic Church} (2nd Ed), 1997, St Pauls Publications, Australia, Article 7, 443 - 450.

\textsuperscript{120} A syllogism is a form of logical argument in which the conclusion is established through inference from two or more premises.

\textsuperscript{121} Michael Dods, \textit{The City of God by St Augustine}, (The Modern Library, New York, United States, 1950) Book 1, 26, [20].

\textsuperscript{122} Above n 114.
An instrumentalist view of animals

What is emerging from Aquinas' thought is an instrumentalist view of animals. In his work *Summa Contra Gentiles* ('Against the Gentiles') Aquinas concluded:

If in Holy Scripture there are found some injunctions forbidding the infliction of some cruelty toward brute animals....this is either for removing a man's mind from exercising cruelty toward other men or because the injury inflicted on animals turns to a temporal loss for some person.\(^{123}\)

In other words, kindness toward animals is not grounded in any intrinsic value of the animal, but because being kind to animals encourages people to be kind toward other people. In this way, Aquinas pre-figures the indirect duties approach of Immanuel Kant. Nevertheless, Aquinas' approach is instrumentalist in its orientation and is described by Wade as follows:

Aquinas argued that cruelty to animals was wrong because it encouraged people to behave in a similarly cruel fashion toward other. In addition, if people practiced pity or compassion toward animals, they would be disposed to do the same toward humans.\(^{124}\)

Thoroughly basing himself in Aristotle's works, the attitude of Aquinas toward animals has been summarised as follows:\(^ {125}\)

- Unlike human beings, animals lack rationality;
- Animals are intended for human use;
- Animals are made for humans by divine providence; and
- Because animals do not have reason, they lack immortal souls.

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Aquinas' Morally Relevant Distinction?

Because he relies upon and develops Aristotle's works, for Aquinas, the lack of rationality and reason is the morally relevant distinction that justifies the subordination of animals to human needs and wants. So powerful an influence has Aristotelianism and Thomism exerted over the philosophical foundations of Western civilisation, their fundamental tenets were not challenged for centuries.\textsuperscript{126}

The remainder of Chapter 1 explores challenges to the prevailing Aristotelian / Thomist characterisation of animals before returning to consider the neglected works of Pythagoras as an alternative to Aristotle.

Chapter 1, Section III: Immanuel Kant's Indirect Concern for Animals

Immanuel Kant thought that animals did not enjoy direct moral status and therefore neither the law nor people owed \textit{direct} duties toward them. Kant's moral philosophy is introduced in his very important, if awkwardly titled \textit{Groundwork for the Metaphysics of Morals}.\textsuperscript{127}

One of the central propositions in Kant's ethical system is that people and people alone are proper objects of respect and to whom moral duties are owed. Kant believed that respect for others demands that we avoid all use of force, coercion and deception intended to override the autonomous choices of others.

\textsuperscript{126} Although I note that Judith Barad believes that scholarship about Aquinas and animals has neglected what Barad calls a distinction between Aquinas' \textit{ontological views} in contrast with his \textit{ethical views}; Judith Barad, 'Aquinas' Inconsistency on the Nature and the Treatment of Animals' (1988) \textit{Between the Species} 102.

This belief has its basis in Kant's statement that humans are ends in themselves and should never be treated merely as a means to someone else's ends. Kant formulated what he called the 'Categorical Imperative'. It has several formulations but the best known is its first:

I ought never to act in any way other than according to a maxim which I can at the same time will should become a universal law. (that is, which I regard as applicable universally to everyone and not just me).\textsuperscript{128}

The Categorical Imperative Does Not Embrace Animals

However, Kant's categorical imperative did not apply to animals. Since animals were not moral agents, they were not owed direct duties but only \textit{indirect duties}. In his \textit{Lectures on Ethics}, Kant explains:

But so far as animals are concerned, we have no direct duties. Animals are not self-conscious and are there merely as a means to an end. That end is man....Our duties towards animals are merely indirect duties towards humanity. Animal nature has analogies to human nature, and by doing our duties to animals in respect of manifestations of human nature, we indirectly do our duty towards humanity....If he is not to stifle his human feelings, he must practice kindness towards animals, for he who is cruel to animals becomes hard also in his dealings with men.\textsuperscript{129}

For Kant, indirect duties are duties directed toward an entity that is not a moral agent but who nevertheless benefits from direct duties owed to some third party who is a moral agent. In terms of animals, Kant thought that we only owed indirect duties to the extent that those indirect duties facilitated direct duties. Therefore, we should not be cruel to animals because it would harm the development of good moral character (indirect).

\textsuperscript{128} Anthony Grayling, \textit{What is Good? The Search for the Best Way to Live}, (Weidenfeld & Nicolson, United Kingdom, 2003) 135.

And the failure to develop good moral character would increase the likelihood of us treating other moral agents (to whom we owe direct duties) with cruelty.

For example, I have a direct duty to my next door neighbour Sally because she is a moral agent. But I do not have direct duties to Sally's cat because the cat is not a moral agent. Therefore I owe only indirect duties toward Sally's cat. If I were to act cruelly toward Sally's cat, it would incline me to act cruelly toward other people.

Kant's views are persuasive because at their heart are powerful notions of respect and dignity toward humans. Humans are ends in themselves and not to be treated as mere objects or as means to someone else's ends. Animals 'free ride' within this conceptual framework because they benefit from reflected kindness.

This position is similar to contemporary animal 'welfarist' views which acknowledge that although animals do not possess legal rights and are not owed direct duties, they are not to be treated cruelly and their suffering must be minimised.

Earlier it was noted that some scholars considered Aristotle's approach to animals, included a 'scale' or ranking of living creatures and because animals were very much lower on that scale, they were therefore able to be used by humans. However it was also noted that other scholars disagreed arguing instead that although:

Aristotle does rank lives (he) does not hold in general that one species exists for the sake of another. Each species nature (or characteristic form of life) is its end.

Aristotle's view that all living creatures were organised to both maintain themselves and flourish in ways that are appropriate to each creature sounds similar to Kant's idea that people are ends in themselves and are not to be used as means to someone else's ends.

Rehabilitating Kant?

Does this apparent similarity mean that it would be possible to reappropriate Aristotle's philosophy and use it to modify Kant's notion of direct duties thus extending those duties to animals? Or is it possible to find in Kant's ethical system some other ground for extending direct duties toward animals?

Some scholars believe that there is an internal contradiction in Kant's views in relation to animals. If animals are merely 'things' able to be used as means to human ends, then won't such an attitude mean that humans will also tend to see other people as means to their ends? This is the argument put by Broadie and Pybus:

[Kant's] argument, put briefly, is to the effect that if human beings maltreat animals they will acquire a tendency to use rationality (in themselves or in other people) as a means. But, according to Kant, animals are, in a technical sense, things, and consequently are precisely what we should use as means. His argument therefore is that if we use certain things, viz. animals, as means, we will be led to use human beings as means.132

Other scholars disagree, maintaining that Kant never suggested that it is wrong to use animals as means to certain ends such as sheep dogs or donkeys carrying loads. Rather, they argue that Kant said the maltreatment of animals is wrong because it would lead us to maltreat other people to whom we owe direct duties.133

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133 Tom Regan, 'Broadie & Pybus on Kant (1976) 51 Philosophy 471.
There have been attempts by contemporary scholars to demonstrate how Kant's ethical system can accommodate some sort of animal welfare stance. For example, Christine Korsgaard believes that when Kant speaks of an 'end in itself', it is wide enough to embrace animals as beings who welcome, enjoy and pursue their own goods.

However while Kant's views represent a significant step forward in considering the interests of animals, they do not provide an adequate foundation for a more comprehensive animal welfare ethic.

This is because in order to provide direct duties for animals, Kant's views about the source of moral agency would have to be enlarged to elevate animals to the status of beings who are owed direct duties, that is, to the status of moral agents.

The principal difficulty with attempts such as Korsgaard's to enlarge Kant's ethical system to accommodate more direct duties toward animals is that they result in either attenuating Kant's views to the breaking point, or placing so many qualifications on his reasoning that his original thought is emptied of its content.

So for example, one scholar has suggested such attempts amount to distinguishing 'Kant the man from Kantianism the theory' and then manipulating the theory into a form that 'Kant the man' would no longer recognise.

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135 Christine Korsgaard, Fellow Creatures: Kantian Ethics and Our Duties to Animals, 2005, Tanner Lectures on Human Values 77, 103.
At the very least, Kant did not deny that animals suffer. This conclusion was however the logical result of Descartes' characterisation of animals as mere machines. And the consequence for animals was devastating, motivating even Descartes' friends to complain of his 'internecine and cutthroat idea...which snatches life and sensibility away from all the animals.' \(^\text{139}\)

**Chapter 1, Section IV: Rene Descartes and the Clockwork Menagerie**

Although Descartes lived and wrote before Kant, he did not stand with Aristotle, Aquinas or Kant in maintaining the absence of reason as a sufficient morally relevant distinction justifying the subordination of animals to human needs and wants.

Nevertheless, 'Descartes' conviction that we have no duties toward animals is wholly in accord with a tradition of thinking about animals that extends back to antiquity.' \(^\text{140}\) In fact, Andrew Linzey argues that 'Descartes carried the line of indifference to cruelty to animals already indicated by St Thomas (Aquinas) to its logical conclusion.' \(^\text{141}\)

French philosopher Rene Descartes was a lawyer, soldier and inventor of analytical geometry where he is remembered for the 'Cartesian Graph'. Descartes concluded that humans were subjects that experienced the world through their minds.


\(^{140}\) Ibid 135.

He thus divided the world into mind and matter in a process known as ‘Cartesian Dualism’. It is from this division that Descartes derived his famous maxim *cognito ergo sum* (I think therefore I am).

**Animals as Machines**

Descartes' work *Principles of Philosophy* (1644) split the world into observer and subject; subject and object and intellect and mechanics. Descartes viewed the world and its processes in mechanical, geometric and mathematical concepts and frames of reference. He therefore attempted to account for all natural phenomena in one system of mechanical principles; 'Descartes held that everything that consisted of matter was governed by mechanistic principles, like those that governed a clock'.

Descartes develops his views about animals most fully in Part 5 of his *Discourse on Method* and in correspondence between himself and Henry More in which Descartes defends himself against 'the internecine and cutthroat idea that you advance in *Method* which snatches life and sensibility away from all the animals'.

For Descartes, it is the capacity for self-consciousness, as opposed to higher reasoning abilities, and expressed through language that distinguishes humans from animals. Since animals were, in Descartes' view, non-reflective creatures lacking the capacity for self-consciousness, he thought that animals were little more than inanimate objects without the capacity to think or to feel pain.

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143 Above n 139, 132.
Descartes therefore believed that the behaviour of animals did not need to be explained by theories of sentience, reason or consciousness, but could be explained by the simple mechanical functioning of their constituent parts:

that animals do better than humans do, does not prove that they are endowed with mind, for in this case, they would have more reason that any of us, and would surpass us in all other things. It rather shows that they have no reason at all and that it is nature which acts in them according to the disposition of their organs...  

The result is that, as Cottingham observes; 'to be able to believe that a dog with a broken paw is not really in pain when it whimpers is quite an extraordinary achievement, even for a philosopher.'

And it appears that in the late seventeenth century, scientists experimenting with dogs managed exactly that achievement:

They administered beating to dogs with perfect indifference, and made fun of those who pitied the creatures as if they felt pain. They said the animals were clocks; that the cries they emitted when struck were only the noise of a little spring that had been touched, but that the whole body was without feeling.

In his research on vivisection, James Rachels noted that annoyed by the screams and yelps of pain, scientists would often sever the dog’s vocal chords in order to complete the vivisection in relative silence.

Two centuries later and although anaesthetic was available, leading scientists in animal physiology influenced by Descartes’ thinking, refused to use it during vivisection procedures.

146 Rene Descartes, Discourse on Method and Meditations on First Philosophy, (Wisemam ed) Yale University Press, United States, 1996.
149 James Rachels, Created from Animals, (Oxford University Press, United Kingdom, 1990) 129.
For example Claude Bernard, a pioneer in animal physiology did not think to use anaesthetic on dogs, any more than he would have used it on clocks.\textsuperscript{150} And after being caught out vivisecting the family dog, Bernard's wife and daughters created the first anti-vivisection society in Europe.\textsuperscript{151}

Not surprisingly, Descartes' views have exposed him to accusations that his philosophy involves a 'monstrous thesis' that 'brutally violates the old kindly fellowship of living things'.\textsuperscript{152} However, we know that Descartes himself loved animals; including his dog 'Monsieur Grat' (Mr Scratch) who would follow Descartes on long walks.\textsuperscript{153}

It appears that Descartes never resolved the internal paradox suffered by Cicero either.\textsuperscript{154}

For Descartes, the morally relevant distinction justifying the denial of moral agency to animals is the lack of consciousness evidenced by animals' inability to deploy language to express that consciousness.\textsuperscript{155}

\textsuperscript{150} Evelyn Pluhar, 'Arguing Away Suffering: The Neo-Cartesian Revival' (1993) \textit{Between the Species} 27, 28.
\textsuperscript{151} Mary Midgely, \textit{Animals and Why they Matter}, (University of Georgia Press, United States, 1983) 28.
\textsuperscript{152} Peter Harrison, 'Descartes on Animals' (1992) 167 (42) \textit{The Philosophical Quarterly} 219.
\textsuperscript{154} Curiously, Nathaniel Wolloch suggests that the emergence of paintings of dead animals in the Netherlands at the time of Descartes represented an expression of the philosophical paradox inherent in the appreciation of the suffering of animals on the one hand and the Cartesian view of animals as machines on the other: Nathaniel Wolloch, 'Dead Animals and the Beast Machine: Seventeenth-Century Netherlands Paintings of dead Animals, as Anti-Cartesian Statements' (1999) 22(5) \textit{Art History} 705.
\textsuperscript{155} Peter Harrison, 'Descartes on Animals' (1992) 42(167) \textit{The Philosophical Quarterly} 219, 221.
Descartes is Challenged

Happily, the Cartesian view of animals as simple mechanical automata with little or no capacity for reason or feeling has been challenged by contemporary philosophers.¹⁵⁶ For example, Justin Leiber asserts that there are at least four ways in which Descartes' thoughts have been misconstrued; including the apparently contradictory argument that while animals can experience sensation, they do not have minds.¹⁵⁷

And in his study on animals, Gary Steiner identifies a further three scholars who 'take the position, either implicitly or explicitly, that Descartes had a much more enlightened view of animals than is generally recognised'.¹⁵⁸

Nevertheless, it is not too difficult to see the growth of agribusiness in Western societies involving commercial animal farming practices as a reflection of the Cartesian approach to animals and animal welfare.¹⁵⁹ Certainly in Australia, Descartes' conception of animals has led to a commodification of animals and animal products. When animals are conceptualised as goods to be 'efficiently marketed', their interests and welfare are subordinated to the economic pressures of the market.¹⁶⁰

Essence of the Ancients

Aristotle, Aquinas and Kant regarded the difference between humans and animals as one of substance rather than one of degree.

The absence of reason and the ability to use that reason to pursue community, the good life and to distinguish between right and wrong meant that animals were not moral agents toward whom duties were owed. As Gary Steiner has noted:

For both Kant and Aquinas, what differentiates humans from animals is the ability to rise above the sensate tendencies and to take a reasoned standpoint on what is right or wrong....only rational beings are capable of doing this and because animals are determined by their sensory inclination, they are fundamentally non-rational beings.\(^{161}\)

Descartes similarly dismissed the notion that humans owe animals duties. However, for Descartes, the morally relevant distinction that permitted this conclusion was not the absence of rational capacity but that ‘animals are devoid of the capacity to speak, to form sentences or signs expressing thought....but more than that it displays that animals are natural automata, machines without thought and soul. As such, humans are justified in using animals for their own purposes.’\(^{162}\)

Aquinas and then Kant developed their views within a philosophical world-system that had been established by Aristotle and despite the existence of other Greek philosophers whose views were more favourable to animals in their implications.

The foremost of these was Pythagoras and his views are remarkable.

\(^{161}\) Above n 158, 154.

Chapter 1, Section V: Reconceptualising Animal Welfare;
A Pythagorean Thought Experiment

Earlier this Chapter noted that ancient Greek philosophy does not form a cohesive body of writing. The attention paid to Aristotle was as much a result of the recovery of his writings in the Middle Ages and their adoption by Thomas Aquinas, as it was about the intellectual force of his arguments. Aristotle was not the only ancient Greek writing about animals.

There were other Greek thinkers whose views about animals do not accord with traditional views held by Western, Christian societies. Pythagoras and Plato developed views about animals that resonate with Eastern, Buddhist philosophical views.

This is significant because if the consequence of Aristotle and Aquinas' views is a sharp difference in substance between rational human beings and irrational brutish animals, then Pythagoras' and Plato's views that do not privilege reason, suggest a difference not of substance but only of degree.

What does Pythagoras have to say about animals? Pythagoras' reputation was that of a man whose genius was as much religious as it was scientific. For Pythagoras, the mysteries of the universe required spiritual illumination. Mathematics and the harmonies of music were religious as well as scientific subjects of inquiry.

While we remember Pythagoras for his mathematical genius and in particular his theories concerning triangles and geometry, he was also an animal lover, a vegetarian and probably one of the world's first 'animal liberationist' from his habit of buying animals from the market and setting them free.

**Pythagoras and the Rebirth of the Soul**

What was the basis of Pythagoras' concern for animal welfare? Pythagoras founded a philosophical thought-system with the doctrine of transmigration of souls at its base; a concept often referred to as *metempsychosis*.\(^{165}\) Pythagoras taught that the soul was an immortal thing born again and again in the revolutions of a cycle. According to Dikairchos of Messene (a pupil of Aristotle), Pythagoras taught:

> First that the soul is an immortal thing and that it is transformed into other kinds of living things; further that whatever comes into existence is born again in the revolutions of a certain cycle, nothing being absolutely new; and that all things that are born with life in them ought to be treated as kindred.\(^{166}\)

Pythagoras developed his views independently of established religious traditions because he was teaching 500 years before Christianity had been established and although he was roughly a contemporary of the Buddha, there is no explicit evidence that Pythagoras adopted Buddhist principles.

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Nevertheless, contemporary religious scholars are beginning to uncover the 'mutually formative contacts between the Greek and Indian philosophical traditions'.\textsuperscript{167} Theodor Gomez for example argues for an explicit connection between Pythagoras' thinking and Indian philosophy:

> From what people or creed did the sage who was famous above all for this far-reaching 'inquiry' borrow the doctrines of *metempsychosis*?....There is a far closer agreement between Pythagorism and the Indian doctrine; not merely in their general features, but even in certain details, such as vegetarianism.\textsuperscript{168}

Like St Francis of Assisi, Pythagoras was said to have preached to animals.\textsuperscript{169} Unlike St Francis, Pythagoras considered beans to be taboo and prohibited his followers from eating them.\textsuperscript{170}

Pythagoras himself insisted that he could remember having lived a past life as a Trojan warrior named Euphorbus who had been killed in a siege and it was said by his followers that Pythagoras was the only human to be able to remember all his past lives and experiences.\textsuperscript{171}

Accordingly, Pythagoras counselled against killing and eating animals because those animals could well be friends or relatives reborn.


\textsuperscript{169} Above n 166, 52.


\textsuperscript{171} Margaret Shipley et al, *The Cambridge Dictionary of Classical Civilization*, (Cambridge University Press, United Kingdom, 2008) 737. It should also be noted that Siddhartha Gautama, the historical Buddha was said to have remembered all his past lives while attaining enlightenment and in the 20th Century, the American Edgar Cayce was alleged to possess similar abilities. Likewise practitioners and patients of hypnotic regression therapy invariably report having experienced past lives.
There is an anecdote told by the sixth-century BCE poet Xenophanes that when Pythagoras saw a person cruelly whipping a little puppy, he intervened:

Once he was present when a puppy was being beaten, they say, and he took pity and spoke this word: 'Stop! Do not strike it, for it is the soul of a man who is dear. I recognized it when I heard it screaming.\(^{172}\)

Pythagoras believed that because both humans and animals possessed souls that transmigrated through successive incarnations, it was simply unthinkable to abuse an animal or to eat its flesh.

In her review of contemporary philosophical work concerning animal rights, Harvard philosopher Martha Nussbaum notes that ‘ethical views about animals based on ideas of transmigration and the kinship of all life are still alive in popular culture, but have had little impact on the thinking of philosophers’.\(^{173}\)

This is because the orientation of Western Christian philosophy was largely determined by its Aristotelian / Thomistic foundations. Concepts such as ‘transmigration’, ‘reincarnation’ and ‘rebirth’ did not form part of those foundations as they did in the philosophies of Pythagoras and the Buddha.

Three Interesting Reasons to Explore Pythagoras

However, in my view, there are three interesting reasons to investigate Pythagoras. I acknowledge that these reasons are personal and would not be accepted by the majority of citizens or scholars in contemporary Western, Christian societies.


First, as Nussbaum observed, Pythagorean (and Buddhist) concepts of transmigration pervade popular culture even if they have not yet been explored by serious philosophers.\(^{174}\) Second, beginning in the mid-20th century, advances in medical resuscitation techniques meant that people who might have been considered clinically dead in earlier times were now being revived.

Upon resuscitation, many of these people tell remarkable stories about the continuation of their consciousness beyond death. This has led to the commencement of serious studies into the ‘Near Death Experience’ (‘NDEs’).\(^{175}\) People who have experienced NDEs often undergo profound behavioural changes, adopting a personal ethical framework that resonates with Pythagorean and Buddhist philosophy.

Simultaneously, Professor Ian Stevenson at the University of Virginia was painstakingly collecting and researching accounts from around the world of children who, to the consternation of their parents, spontaneously recalled experiences of past lives. Professor Stevenson’s most famous text *Twenty Cases Suggestive of Reincarnation*,\(^{176}\) sparked world-wide interest in the phenomenon and led to many more texts exploring its implications.\(^{177}\)

What made Professor Stevenson’s work truly interesting was the rigorous research methodology he imposed upon his work. For this reason, Stevenson was able to publish his research in peer-reviewed scientific journals.\(^{178}\) Stevenson himself continually stated that his intention was not to offer *proof* of reincarnation, but to offer carefully researched cases *suggestive* of reincarnation.

\(^{174}\) Ibid 1527.


\(^{176}\) Ian Stevenson, *Twenty Cases Suggestive of Reincarnation*, 2nd Ed, (University of Virginia Press, United States, 1974).


\(^{178}\) For example, in 1977 the Journal of Nervous and Mental Diseases, devoted an entire edition to Stevenson’s research.
Finally, since the mid-1970s, advances in psychology and hypnotherapy have given therapists access to very deep levels of the subconscious mind. Many hypnotherapists found that while under trance, patients spontaneously recounted living in past times; usually lives of grinding poverty, hardship and early violent death. Therapists sometimes found that the origin of a patients present psychosomatic problem actually lay in a heightened emotional incident in the past; usually death.\textsuperscript{179}

Australian psychologist Peter Ramster encountered this phenomenon in his own practice so often that he decided to test the supposed past-life memories of several patients. Ramster took several patients who had never travelled beyond Australia, to different parts of the world in search of actual evidence of these memories.

Although initially sceptical, Ramster was mystified when these patients were able to unerringly locate buried objects, navigate villages and find local landmarks that corresponded with their past-life memories. Shaken by what he found, Ramster subsequently published the results of his investigation.\textsuperscript{180}

Presently, Western science and philosophy does not accept the possibility of transmigration of souls or reincarnation. This does not mean that these concepts will never be accepted.

Toward the end of his life, the English philosopher and mystic, Paul Brunton (1898 - 1981) wrote about the connection between ethics and metaphysics in Western civilization. Brunton distinguished three stages that characterise this connection.\textsuperscript{181}

\textsuperscript{179} Roger Woolger, \textit{Other Lives, Other Selves}, (Bantam Books, United States, 1988).
\textsuperscript{180} Peter Ramster, \textit{The Search for Past Lives}, (Somerset Film and Publishing Pty Ltd, Sydney, Australia, 1992).
In the first stage, ethical conduct is encouraged and unethical behaviour discouraged by uncertain fears of a God that probably exists. In the Christian West, the general acceptance of the existence of God as creator, redeemer, natural law-giver and judge motivates adherence to some form of ethical behaviour. Ethical conduct is rewarded while unethical conduct is punished.

In the second stage, the ‘humanist stage’, the almost exclusive focus on the human capacity for rational thinking results in a complete indifference to a non-existent God. The result is an exaltation of human will and desire involving little or no restraint on conduct. If there is no God and no natural law then ethical standards are simply established by human actors or the State. In the 19th and early 20th centuries, influential Christian philosophers referred to this stage as a sort of ‘atheistic humanism’ and argued that it would ultimately result in societies destructively turning upon themselves as the powerful imposed their will upon the weak.182

However, Brunton believed that there will be a third and future stage:

The ethics of the future, he surmises, will be based on a 'rational understanding of the power of karma, the law of personal responsibility' within a larger theory of karma and reincarnation (or transmigration).183

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182 The influential French Jesuit Henri de Lubac wrote extensively on this concern - The Drama of Atheist Humanism (Ignatius Press, United States, 1983). It was also a concern of Pope John Paul II (1920 - 2005), one of the most influential Popes in history devoting an entire Encyclical in 1993 (Veritatis Splendor) to reconnecting ethical conduct leading to genuine human freedom and metaphysical truths - Veritatis Splendor and the Renewal of Moral Theology, DiNoia and Cessario (eds), 1999, Midwest Theological Forum, United States at 129.

Establishing the Foundations for an Ethic of Bioinclusiveness

The law of karma functions as a sort of universal conservation law of ethical energy. Intention motivates action, an energetic potential or seed is placed upon the mind-stream that later ripens into an experience of happiness or suffering. One is therefore responsible for one’s experiences. If Brunton’s third stage does eventuate, both Pythagorean and Buddhist philosophy will be well placed to provide a coherent ethic for the kindly treatment of animals.\textsuperscript{184} And at least one scholar has begun the exploration of the consequences of reincarnation for animal welfare.\textsuperscript{185}

Although this is a legal and not a philosophical thesis, I nevertheless draw upon these principles of sentience and interconnectedness at the heart of Buddhist / Pythagorean philosophy in formulating a proposed ethic of bioinclusiveness, presented in Chapter 2, Section IV.

Conclusion

For thousands of years, humans have been thinking about animals and their place within society. That place, according to the accepted philosophical view, is one of service to humans. After all, God had issued a divine warrant permitting humanity to exercise dominion over all the creatures of the Earth.


\textsuperscript{185} Michael Fox, 'Reincarnation, Self-realization and Animal Protection' (1993) Between the Species 214.
More than just food, animals serviced a crucial role in mediating the relationship between humans and their gods. In pre-scientific societies, disasters, disease, famine and death appeared to strike with a vicious randomness. Innocently ignorant of germ theory, meteorological science, genetics and basic medical bio-chemistry, the ancients looked to their gods for the causes of the personal and environmental tragedies that befell them. Animal sacrifice played a key role in the daily cosmic dramas of propitiating the gods. Elaborate religious rituals were intended to stave off disease, famine and death and the streets frequently ran red with the blood of bulls, sheep, goats and even turtledoves sacrificed to the gods.186

In this context, Aristotle's *scala naturae*, facilitated the easy use of animals for both religious and other needs. In an ancient world where the *polis* system was disintegrating, and the old order was threatened by multi-ethnicity and the blurring of the distinction between Greek and barbarian, it was Aristotle who 'rationally synthesised and sanctioned the old order'.187

In doing so, Aristotle established a framework for the continuation of slavery and animal sacrifice that was believed to be crucial for the continuing prosperity of the *polis*.188 That framework denied rational capacity to slaves and animals; an absence affirmed by Aquinas who saw God's hand in the natural ordering of animals to human ends.

> The last end of all generation is the human soul, and to this does matter tend as its ultimate form. Consequently.....plants are for the sake of animals and animals for the sake of man...The end of the movement of the heavens is directed to man as its last end in the genus of things subject to generation and movement.189

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188 Thomas Martin; *Ancient Greece: From Prehistoric to Hellenistic Times*, (Yale University Press, United States, 1996) 127 - 128.
And although slavery is no longer practiced to the same extent as in ancient times, the philosophical framework constructed by Aristotle and Aquinas came to resemble an iron cage for animals; providing a 'lasting justificatory framework for their complete subjugation'.

Not even the genius of Kant could penetrate this cage.

The Search for New Ways of Thinking

Faced with the apparent horror of Descartes' characterisation of animals as machines, Kant preferred to explain animal behaviour using Thomistic principles of impulse and instinct. But in doing so, he strictly separated humans from animals on the basis of rational capacity.

Because humans possess rational capacity, they are ends in themselves. But animals lack this capacity and if they are not mere machines, then they are 'things' to be used for human ends;

man has, in his own person, an inviolability; it is something holy, that has been entrusted to us. All else is subject to man....that which a man can dispose over, must be a thing. Animals are here regarded as things; but man is nothing.

At best, Kant’s categorical imperative enables animals to bask in the reflected benevolence of humans caring for each other; ‘it is wrong to be cruel to animals, not because we transgress against a moral bond with animals, but because we violate a principle of respect for humanity’.

At worst, the very ‘thing-ness’ of animals justifies cruelty if it produced benefits for humans.

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Kant therefore did not think it wrong for anatomists to experiment on living animals if it produced benefits for humans. Following the Industrial Revolution and with the rise of corporate dominated agribusiness in the 20th century, the full implications of these views became apparent. And with these agribusiness practices have come other philosophical schools of thought challenging the impersonal, industrialised cruelty toward animals.

Ironically, and if they had the capacity to reflect on it, animals need not have worried about being singled out for brutal treatment. The same principles of industrialisation and mechanisation enslaving millions of animals were also brought to bear on the bloody trenches of the First World War decimating entire populations of European countries. It was only exceeded in its savagery by a Second World War when technology enabled the development of nuclear weaponry. So terrible was this industrial / technical achievement that the forever haunted Professor Robert Oppenheimer reached back to the ancient Hindu Bhagavad Gita to find appropriate words in describing his creation; ‘now I am become death, the destroyer of worlds.’

When technology simultaneously alienates and desensitises humans to animal suffering, some have attempted to navigate a way through competing human - animal interests by employing a utilitarian calculus of pain versus pleasure. Others, horrified by the suffering experienced by animals have attempted to resurrect new forms of right-based approaches. Still others, acutely aware of how closely their daily lives include animals have sought to address the issue of industrial alienation through a modified form of social contractarianism. The nature and success, or otherwise, of these newer schools of thought are explored in Chapter 2.

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Chapter 2

Contemporary Voices and Animal Exploitation

Introduction

In 1780, while Kant was giving his lectures on ethics explaining why humans do not owe direct duties to animals, Jeremy Bentham completed his *Introduction to the Principles of Morals and Legislation*\(^1\). In doing so, Bentham inaugurated the most promising philosophical foundation for animal welfare to date; utilitarian philosophy:

In the modern West, the first sustained philosophical efforts to rethink the traditional status of animals are discernible within the work of the English utilitarians of the eighteenth and nineteenth centuries.\(^2\)

To be sure, other European philosophers had criticised the apparently counter-intuitive implications of Descartes' thought; Voltaire for example launched a stinging attack:

Barbarians seize this dog, which in friendship surpasses man so prodigiously, they nail it on a table and dissect it alive in order to show the mesenteric veins. You discover in it all the same organs of feeling that are in yourself. Answer me machinist, has nature arranged all the means of feeling in this animal so that it may not feel?\(^3\)

Thomas Hobbes, a contemporary of Descartes also attacked the mechanistic characterisation of animals.


\(^3\) Voltaire's *Philosophical Dictionary*, (The Echo Library, United Kingdom, 2012) 14.
In his *Third Set of Objections*, Hobbes directly challenged Descartes' conclusions about animals set out in the *Meditations* by noting that both humans and animals are corporeal and therefore capable of thought and, more importantly, feeling.\(^4\)

However it was Jeremy Bentham who developed the most systematic reply to the views of Aristotle, Aquinas and Kant. He did this by re-framing the question of animal welfare so that the issue was not whether animals possessed rational or communicative capacity, but whether they could suffer. In this respect, Bentham directly challenged Descartes' purely mechanistic characterisation of animals as being incapable of feeling.

Bentham's utilitarian philosophy was largely influenced by the empiricism of Thomas Hobbes and David Hume.\(^5\) With its emphasis on sensation and experience as the determining factor, empiricism provided philosophers like Bentham with an effective critique of the rationalists.

For Bentham, humans and animals do not differ in substance because of a lack of rational capacity, but differ only in degree because of a shared capacity for the experience of pleasure and pain.\(^6\)

It was a form of Bentham's utilitarianism that was championed to the benefit of animals in the 20th century by Peter Singer whose seminal text *Animal Liberation*\(^7\) re-ignited the issue of animal welfare for a new generation; particularly drawing attention to the suffering experienced by food animals.

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\(^6\) Ibid Steiner.

Singer was joined in this task by philosophers from other schools of thought including prominent neo-Kantian rights theorists in the form of Tom Regan\(^8\) and Gary Francione.\(^9\)

Attempts were also made by contractarian theorists to deploy the insights of John Rawls' *Theory of Justice*\(^10\) to embrace animal welfare by including them within the social contract.

These contemporary philosophers have adopted Bentham's views in arguing that a lack of rational capacity is not a sufficient morally relevant distinction justifying the exploitation of animals solely for human ends. In doing so, they have attempted to circumvent the shortcomings of the earlier philosophical schools of thought discussed in Chapter 1.

None of them have been successful in commanding general acceptance.

This Chapter 2, explores three dominant contemporary philosophical thought-systems advocating for animal welfare; utilitarianism generally and Peter Singer's preference utilitarianism specifically is discussed in Section I; contemporary deontologists Tom Regan and Gary Francione and their animal rights approach is discussed in Section II; and Rawlsian contractualism, including Martha Nussbaum 'capacities approach' as an answer to the perceived shortcomings of Contractarian theories of animal welfare is explored in Section III. It demonstrates how each of these contemporary schools of thought attempts to overcome the limitations of Aristotelian, Thomistic, Cartesian and Kantian approaches to animals discussed in Chapter 1.

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Despite the apparent advantages for animals promised by these three contemporary philosophical schools of thought, Chapter 2 suggests that they ultimately fail to provide a workable basis for food animal welfare reforms. This is because each school of thought has its own internal faults that has precluded the formation of a philosophical consensus about whether and to what extent animals have rights or interests that can be asserted against human claims and interests.

In fact, the effect of the comparatively wider dissemination and analysis of these contemporary schools of thought has not been to unite Western society in common concern for animals. Nor have these schools of thought generated sufficient momentum within wider Western society to drive legal and regulatory initiatives in favour of food animal welfare.

By emphasising the possession of rational ability, the capacity for higher cognitive functions or dogged by allegations of inconsistent application, most Western schools of animal philosophy run into immense difficulties in explaining why marginal humans (such as the profoundly intellectually disabled) are nevertheless included within the social contract while animals remain systematically excluded.

Although this is a legal thesis, it nevertheless offers an alternative ‘ethic of bioinclusiveness’ that attempts to overcome difficulties inherent in Western animal philosophies. With its emphasis on *sentience* and *interconnectedness*, (as opposed to the possession of rational capacity and Cartesian autonomous separateness), an ethic of bioinclusiveness can function as a potentially useful calibration device against which legal and policy initiatives involving animals might be evaluated.

Despite existing and proposed animal philosophies, and although more people than at any other time within Western society are aware of the fact of animal suffering, they nevertheless live in the midst of a form of cultural contradiction.
This cultural contradiction exists because while ‘there is a moral consensus in the Western world that animals should be treated better than they are’ most people accept the legal characterisation of animals as economically exploitable property.

In most Western countries, but particularly in Australia, this cultural contradiction manifests in a legal and regulatory framework that attempts to achieve inconsistent aims. On the one hand, Commonwealth, State and Territory governments attempt to protect some classes of animals from cruelty while simultaneously encouraging primary industries to profit from the economic exploitation of animals to satisfy the food preferences of humans.

And so it is with the intuition that animals should be treated better than they are because, like humans, they also suffer that Chapter 2 commences.

Chapter 2, Section I: Jeremy Bentham's Empathy for Animals

Born in 1748 in England, Jeremy Bentham was a philosopher, jurist and social reformer advocating the abolition of slavery, equal rights for women and the abolition of corporal punishment. He was an animal lover from an early age. John Bowring was a childhood friend of Bentham and, later in life wrote a text about Bentham's works containing anecdotes from Bentham's life. Bowring records that:

The mice were encouraged by Bentham to play about in his workshop. I remember when one got among his papers, that he exclaimed: 'Ho! Ho! Here's a mouse at work; why won't he come into my lap? - but then I should be stroking him when I ought to be writing legislation, and that would not do.'

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13 Ibid 81.
It has been suggested that Bentham was ‘perhaps the modern Western tradition’s first major philosophical theorist of animal entitlements.’\textsuperscript{14}

\textbf{A Common Capacity for Suffering}

Bentham argued that because animals were capable of experiencing pleasure and pain it was therefore senseless to exclude them from ethical consideration simply because they did not have the capacity for rational thought.

In his famous work, \textit{Introduction to the Principles of Morals and Legislation},\textsuperscript{15} Bentham suggested that for ethical purposes, the species to which a creature belongs was as irrelevant as race and that neither species nor race provided a valid reason to deprive a sentient being of life.

In contemporary philosophical language, and for Bentham, the idea that animals lack the capacity for rational thought or higher cognitive abilities does not constitute a sufficient morally relevant distinction justifying their harsh treatment. Bentham wrote:

\begin{quote}
  The day \textit{may} come when the rest of the animal creation may acquire those rights which never could have been withheld from them but by the hand of tyranny...It may one day come to be recognized that the number of the legs, the villosity of the skin, or the termination of the \textit{os sacrum} are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? .The question is not, Can they \textit{reason}? Nor, Can they \textit{talk}? but, Can they \textit{suffer}?\textsuperscript{16}
\end{quote}

The last sentence is important.


\textsuperscript{15} Jeremy Bentham, \textit{Introduction to the Principles of Morals and Legislation}, (Burns J.H & Hart H.L.A (eds) Methuen, United Kingdom, 1982).

\textsuperscript{16} Ibid chapter 17.
By relying on the capacity to feel pain as the determinative principle of ethical action, Bentham extended the class of subjects of ethical action beyond humans. For Bentham, human commonality with animals in experiencing suffering was the crucial issue.

This was a major advance on the philosophies of Aristotle, Descartes and Kant because it extended ethical concern to moral subjects beyond those with the capacity for reason and self-reflection. By focussing on the capacity for suffering, Bentham established a commonality with humans that simply did not exist for Aristotle, Descartes or Kant.

The Utilitarian Ethic

Bentham's guiding principle was one of utilitarianism; where;

the rightness or wrongness of an action was to be judged entirely in terms of its consequences (so that motives, for instance, were irrelevant); that good consequences were those that gave pleasure to someone while bad consequences were those that gave pain to someone; and therefore that in any situation, the right course of action to pursue was the one that would maximise the excess of pleasure over pain or else minimise the excess of pain over pleasure.\(^\text{17}\)

Utilitarianism involves evaluating each action by its utility; that is, in the sense of the capacity for that action to generate the consequences of either an increase in happiness or a decrease in suffering. The classical formulation of utilitarian ethical theory is expressed as follows: 'the moral worth of our actions is a function of the net pleasure or happiness they produce when taking into account all parties that are affected'.\(^\text{18}\) It can be summarised as the greatest good for the greatest number.

\(^{17}\) Bryan Magee, The Utilitarians, in The Story of Philosophy (Doring Kindersley Limited, United Kingdom, 2001) 183.

Two of the constituent foundations of utilitarian philosophy are 'consequentialism' and 'sum ranking'. Consequentialism is described above, that is; the right course of conduct is the one that maximises the excess of happiness or pleasure.

'Sum-ranking' involves aggregation and concludes that the right course of conduct is the one that brings the total amount of desired result to the maximum number of people.\(^{19}\)

However, Bentham's famous inquiry about whether animals can suffer needs to be placed into the larger context of his *Introduction to the Principles of Morals and Legislation*. As Marc Fellenz reminds us, that inquiry is 'buried in a footnote of the final Chapter of the work - its content barely broached in the body of the text'.\(^{20}\) In fact, Bentham was not opposed to the use of animals to provide food for humans or in vivisection practices.\(^{21}\)

It was Peter Singer, building upon and extending Bentham's utilitarian framework in developing his own form of 'preference utilitarianism' that initiated the contemporary debate about animal welfare.

**Peter Singer, Contemporary Prophet of Animal Welfare**

Peter Singer is a philosopher in the utilitarian tradition of Jeremy Bentham and therefore 'regards an action as right if it produces as much or more of an increase in the happiness of all affected by it than any alternative action, and wrong if it does not.'\(^{22}\)

\(^{21}\) Ibid 59.
\(^{22}\) Peter Singer, *Practical Ethics*, (2nd Ed), (Cambridge University Press, United States, 1996) 3.
Utilitarian philosophy has a number of forms; classical, rule and preference utilitarianism.

Peter Singer is a ‘preference utilitarian’, a version that 'judges actions, not by their tendency to maximise pleasure or minimise pain, but by the extent to which they accord with the preferences of any being affected by the action or its consequences'. 23

What is the difference? Singer himself suggests that preference utilitarianism permits ‘finer distinctions’ to be made between competing courses of conduct than does classical utilitarianism. 24 What does it mean to think as a preference utilitarian? Singer states that:

My own interests cannot count for more, simply because they are my own, than the interests of others. In place of my own interests, I now have to take into account the interests of all those affected by my decision. This requires me to weigh up all these interests and adopt the course of action most likely to maximise the interests of those affected. Thus, at least at some level in my moral reasoning, I must choose the course of action that has the best consequences, on balance for all affected....

This is a form of utilitarianism. It differs from classical utilitarianism in that 'best consequences' is understood as meaning what, on balance, furthers the interests of those affected, rather than merely what increases pleasure and reduces pain. 25

The Capacity to Experience Pain and Happiness

In his text Practical Ethics, Singer argues that humans should include the interests of animals when evaluating a particular course of action that might affect those animals. 26 But what interests does he mean?

23 Peter Singer, Writings on an Ethical Life, (Fourth Estate Publishers (Harper Collins) United Kingdom, 2002) 133.
24 Ibid.
25 Above n 22, 13-14.
26 Ibid 57-58.
Singer departs from the Aristotelian and Thomistic conclusion that only those beings with higher cognitive functions are moral agents toward whom duties are owed. While Aristotle and Aquinas would suggest that the capacity for rational thought and self-awareness is the basis on which morally relevant distinctions can be drawn between humans and animals, Singer would strongly disagree.

If possessing a higher degree of intelligence does not entitle one human to use another for his own ends, how can it entitle humans to exploit nonhumans for the same purpose? 27

Instead, following Bentham, Singer holds that animals have an interest in avoiding pain and suffering and in experiencing happiness.

The capacity for suffering and enjoying things is a prerequisite for having interests at all....It would be nonsense to say that it was not in the interests of a stone to be kicked along the road by a schoolboy. A stone does not have interests because it cannot suffer....A mouse, on the other hand, does have an interest in not being tormented, because mice will suffer if that are treated in this way. If a being suffers, there can be no moral justification for refusing to take that suffering into consideration....If a being is not capable of suffering, or of experiencing enjoyment or happiness, there is nothing to be taken into account.

This is why the limit of sentience (using the term as a convenient, if not strictly accurate, shorthand for the capacity to suffer or experience enjoyment or happiness) is the only defensible boundary of concern for the interests of others. 28

Therefore, Singer holds that if a being is sentient; that is, it is capable of experiencing pain and suffering as well as happiness, then there is no morally relevant distinction justifying the exclusion of its interests in evaluating conduct that affects that being's interests. It doesn't matter whether the sentient being is a cow or a human. This is Singer's 'principle of equal consideration'.

28 Ibid.
Principle of Equal Consideration of Interests

For Singer, all sentient beings have the capacity to experience pain and suffering and to experience happiness and all sentient beings have an interest in avoiding pain and suffering. Therefore, why are the preferences of human sentient beings to be preferred over nonhuman sentient beings with the same interests?

For Singer, excluding a nonhuman animal's interest and preference not to experience pain simply because it is an animal is as nonsensical as excluding the preference of a white or black-coloured person not to experience pain.

From this point of view race is irrelevant to the consideration of interests; for all that counts are the interests themselves. To give less consideration to a specified amount of pain because that pain was experienced by a back would be to make an arbitrary distinction. Why pick on race? Why not on whether a person was born in a leap year? Or whether there is more than one vowel in her surname? All these characteristics are equally irrelevant to the undesirability of pain from the universal point of view.29

Because sentient beings are equal in their capacity to experience pain and suffering as well as happiness, there is no morally relevant distinction based on the mere possession of higher cognitive abilities or functions.

Singer therefore concludes;

We have seen that this principle (of equal consideration) implies that our concern for others ought not to depend on what they are like, or what abilities they possess. It is on this basis that we are able to say that the fact that some people are not members of our race does not entitle us to exploit them, and similarly the fact that some people are less intelligent than others does not mean that their interests may be disregarded.

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29 Peter Singer Practical Ethics, 2nd Ed), (Cambridge University Press, United States, 1996) 22.
But the principle also implies that the fact that beings are not members of our species does not entitle us to exploit them, and similarly the fact that other animals are less intelligent than we are does not mean that their interests may be disregarded.  

Despite the apparent soundness of this conclusion, humans have little hesitation in exploiting animals because those animals satisfy human taste, aesthetic and other preferences.

And if it is true that humans really do make morally relevant distinctions on the basis of intellect, then why, asks Singer, aren't intellectually disabled or seriously brain-damaged humans exploited in ways similar to animals?  

The Spectre of 'Speciesism'

Singer's response to that question is to assert that humans exhibit a form of 'speciesism', taking the aspect of a bias or prejudice in favour of the interests of one's own species and against the interests of another species. Singer argues that membership of a particular species is not a morally relevant distinction in evaluating whether to exploit animals. This is because, like any sentient being, animals have the capacity to experience pain and happiness.

However, while people may intellectually agree with this proposition and with its resulting requirement of equal consideration of interests, they nevertheless instinctively recoil at the suggestion that humans with equivalent cognitive abilities as animals (such as infants and the severely intellectually disabled) should also be exploited.

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30 Ibid 56.
For Singer, this bias or prejudice manifests in the way humans 'take an active part in, acquiescence in, and allow their taxes to pay for practices that require the sacrifice of the most important interests of members of other species in order to promote the most trivial interests of our own species'.

Consequently, even though humans may theoretically support the idea that animals should not be made to suffer, in practice, humans acquiesce in permitting wide-scale animal suffering to satisfy their own interests, no matter how insignificant.

Application of Singer's Philosophy to Food Animal Exploitation

How does Singer's preference utilitarianism evaluate the food animal industry? At the outset, Singer advocates a vegetarian diet for humans, asserting that carnivorous diets are not mandatory. Singer's approach may be illustrated as follows:

1. The appropriate standard to be applied in choosing to participate in the industrial exploitation of animals is what will result in the greatest fulfilment of interests for the greatest number of beings;

2. Animals have an interest in avoiding being harmed and killed to satisfy the preferences of humans for the taste of animal flesh and other products;

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33 Ibid 35.
34 Ibid 66ff.
3. Because the suffering that is experienced by animals is equal to that of humans, the principle of equal consideration requires the preference on the part of animals to avoid that suffering to be taken into account;

4. The application of the principle of equal consideration therefore requires the elimination of most forms of institutional exploitation of animals in satisfying the food and clothing preferences of humans; and

5. Because there is no morally relevant distinction between humans and animals when such preferences are taken into account, to continue to maintain and participate in ‘animal farming’ practices is a form of discrimination; a form of speciesism.

For Singer, the preference for pleasure expressed by humans in the form of eating animals flesh and in the form of wearing clothing derived from animals is outweighed by the preference for continued life and sentience on the part of those animals that would otherwise be slaughtered to satisfy those human preferences.

However, while this preference calculus might seem theoretically straightforward, critics maintain that utilitarian ethics generally and Singer’s utilitarianism specifically, is unworkable in actual practice.

**Criticisms of the Utilitarian Ethic Generally**

Despite the advantages utilitarian philosophy promises for animal welfare, there are very significant problems in its practical application. In deciding whether particular conduct is ‘good’ or ‘bad’, the choice maker aggregates all of the pleasure or pains that will flow from the conduct.
The choice maker then chooses the course of conduct productive of the largest or total average pleasure.

But just what factors go into the calculation of pleasure and pain? Assume the issue under consideration is whether the practice of scientific experiments on animals is appropriate. In making this determination it is necessary to aggregate the pleasure and pain that would be experienced by both humans and animals involved in the industry.

If the practice were to be abandoned, then scientists might be out of work, medical cures may be lost and people may die or at least continue to suffer as a result of the absence of research and development. There may be vast economic consequences to pharmaceutical companies passed onto consumers as increased cost of medicines. Some people may not be able to afford the medicine and suffer or even die as a result.

The problem is clear, utilitarian philosophy would permit practices such as animal farming, scientific experimentation and medical research in which the suffering of the animals (that have no moral rights) is outweighed by the benefits that accrue to a greater number of humans.

Under the aggregation principle, the suffering experienced by the animals would be outweighed by the aggregated pleasure experienced by humans whether in the form of pleasurable diet or availability of medicines and cures for diseases. As Fieldhouse concludes:

Utilitarianism, after all, affords no rights or fundamental protections to anyone, except the right to have one's interests given equal consideration in the grand calculation.36

But there are other, more subtle difficulties in using utilitarian principles as a basis for animal welfare.

For example, what is meant by ‘pleasure’ and ‘pain’? Is it possible for a battery hen to even comprehend that a better way of life might exist? Utilitarian philosophy does not adequately address other dimensions of what it means to live a meaningful life, such as dignity, movement, affection and community. Turning from the general to the specific, critics also attack Singer’s own views.

**Criticism of Singer's Philosophy Specifically**

There are three common criticisms of Singer’s views;

1. Critics allege that it is difficult to draw boundaries between beings that are sentient and beings that are not. Where does ‘sentience’ begin? Where is the boundary?

2. Critics allege that it is difficult, if not impossible to quantify the interests involved in the utilitarian equation. How is it possible to definitively measure the pleasures and pains associated with certain conduct? and

3. Critics allege that even if it is possible to quantify competing interests, Singer’s views are still ‘anthropocentric’ and tend to favour humans.

That is, it is argued that Singer’s views do not guarantee the protection of any preferences that animals might have, just that such preferences will be taken into account in determining a course of action. And in most cases, the preferences of humans will be determinative.

Rights theorists therefore criticise utilitarian approaches to animal welfare because of the balancing of interests involved.

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Rights theorists assert that animals possess rights that cannot be dismissed in the utilitarian equation and that to do so is to diminish those animals' practical autonomy.

Where Does Sentience Begin & End?

Jeremy Bentham's utilitarian philosophy represented a major advance over Aristotelian and Thomistic views of animals. This is because utilitarian philosophers place their emphasis on the ability of an animal to suffer and experience pain rather than whether an animal can think.

Like Bentham, Singer makes animal sentience the centrepiece of his moral theory: Any being that feels pain would be entitled to equal consideration as to the infliction of pain....Singer argues that killing for sport and food consumption, where unnecessary for survival, is inconsistent with an ethic of care for animals that takes their interests seriously.38

However, what does 'sentience' mean? Is sentience the subjective mental quality of being 'self-aware'? If so, how is it possible to identify which beings are self-aware or not? Singer himself:

.....does not answer these questions. Instead, he notes that we are keeping brain-dead humans alive on expensive hospital machines while denying freedom of movement, adequate nutrition, mother's care and life itself to otherwise healthy sentient animals. He concludes that the pressing question is not where to draw a new line, but how to begin the process of uprooting extant speciesist attitudes and actions.39

For Singer, it is enough that animals currently being processed and slaughtered to satisfy lifestyle preferences of humans are most certainly self-aware, sentient and therefore capable of feeling pain. It is also sufficient that these animals exhibit a preference for avoiding pain and suffering while preferring physical comfort, freedom of movement and the comfort of their mothers.

The Problem of Quantification

Utilitarianism generally, and preference utilitarianism specifically, requires the aggregation of the interests and preferences of each sentient being affected by the proposed course of conduct. The difficulty lies in quantifying the pleasure, pain and preferences of each sentient being. By way of example, consider Singer's suggestion that a vegetarian diet is morally preferable to a meat-based diet. Assume that consideration is being given to a global shift to a vegetarian diet. How might this proposal be evaluated?

To begin with, there would be substantial loss of income from many sectors of the economy. This includes not just the animal farmers themselves, but the farm factory employees, export workers and the employees of associated industries such as metal workers providing knives and other cutting / processing equipment and transport workers. Further 'down the line' butchers and supermarket deli operators would be affected. What about the loss to the families of those workers? What about the increased strain on the market for alternative employment?

Where to draw the line when aggregating losses?

Singer's response to this problem is to separate out the issues. He firstly addresses the issue of whether a meat-based diet is preferable to a vegetarian-based diet.

In doing so, 'Singer weighs the pleasures and pains of eating flesh versus eating vegetables and concludes that there is no utilitarian gain for eating flesh.'

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In terms of economic losses flowing from the abolition of meat industries, Singer invites us to:

Compare the indefinite prolongation of animal suffering with the once-only cost of a transition and I think that as long as we give the interests of animals equal consideration with similar human interests, the answer is clear.\(^{41}\)

Despite Singer’s certainty however, the comparison is not at all clear. Critics point out that the animal agri-business is already in existence and that to abolish it would be to cause massive harm to humans:

These harms cannot fairly be removed from Singer’s utilitarian equation. If the equation has been worked out \textit{before} the advent of agri-business, Singer could reasonably focus only on dietary matters, or world hunger, or on the conditions and deaths of animals, and it would have been clear that the animal-killing industries ought never to begin. However, in the early twenty-first century, this mammoth business cannot be eliminated without creating hardship for millions.\(^{42}\)

Another difficulty lies in measuring the respective pleasures of meat-eaters and vegetarians. It may be that a vegetarian-based diet is healthier for people and this may translate into society advocating for a vegetarian diet. But, 'how might Singer measure Suzie’s preference for flesh eating against the society’s health interests in having citizens partake of a non-flesh diet'?\(^{43}\) Neither utilitarianism generally nor Singer specifically has attempted the task.

\textbf{The Allegation of Anthropocentrism}

Anthropocentrism is at the heart of all utilitarian considerations because it places the feelings of humans at the centre of the calculus of competing considerations of interests or preferences.

\(^{41}\) Ibid 334.


\(^{43}\) Ibid 117.
While the interests or preferences of animals are included in the utilitarian calculus, the interests and preferences of humans are often considered superior to those of animals and thus prioritised in the calculation.

Singer's approach is therefore said to de-value the interests of animals compared with the interests of humans.

(Singer) has stated that he does not believe that animals have desires for their own futures or a 'continuous mental existence'. In one such writing, Singer introduces the idea that the loss of an animal life is not as significant as the loss of a human life because there is more to human existence than there is to bat existence. Writing such as these reveal that Singer believes that human life is more valuable than animal life (although not necessarily that human interests are more important than animal interests) and that, if forced to choose between the two, he would always save the human life.\(^{44}\)

If this conclusion is correct then in the life-boat scenario, Singer would clearly throw an animal (that apparently does not have a subjective desire for future existence) overboard in order to preserve the space for a human who does. However, for animal 'rights theorists', this is a conclusion that would not automatically follow.

**Chapter 2, Section II: Kant Redux: Animal Rights Theorists**

Although there are different sub-schools of thought within the ranks of animal rights theorists, in essence, all assert that animals are autonomous sentient beings that can be considered moral agents for the purposes of assigning and enforcing rights. However, rights theorists differ in identifying what actually constitutes an animal as a moral agent.

Where is the line drawn?

The basic tenet of animal rights is that animals who can be considered autonomous subjects have rights, and humans have associated duties. Rights theorists differ on what makes an animal a morally significant subject and what specific entitlements these subject have; indeed, line-drawing between apes and rabbits, whales and sharks, based on their cognitive abilities is the hallmark of rights-based reasoning. As James Rachels observes in his essay, there are two distinct questions: '(1) where do we draw the line with respect to the kinds of animals to whom we have duties and (2) where do we draw the line with respect to the kinds of duties we should acknowledge.'

The intellectual pioneer of animal rights theorists is the American philosopher Tom Regan. In his influential 1988 text *The Case for Animal Rights* Regan critiques Peter Singer's utilitarian philosophy as inadequate to the task of protecting animals and their interests.

**Tom Regan & Animal Rights**

Regan creates a philosophical framework supporting his belief that rights theory supplies the most solid moral basis for our duties to animals since animals are moral 'patients' to whom rights and duties are owed.

First, Regan says that animals are 'subjects-of-a-life' in the sense that animals are:

- conscious, psychologically unified, and have an experiential welfare that can go better or worse for them. They have value beyond their usefulness to others and so deserve respectful treatment. Since marginal human beings have the right not to be eaten, worn, or experimented on for the benefit of other human beings, so do animals of comparable or more advanced physiological capacities.

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Regan’s use of the expression; ‘they have value beyond their usefulness to others’ is a reference to Kant’s *Categorical Imperative* discussed in Chapter 1.

The difficulty for Regan is that Kant confined the application of the categorical imperative to moral agents that is, to sentient beings with higher cognitive abilities. Regan therefore extends the principle to animals without assigning them the status of moral agents. How does he do this?

Regan goes on to suggest: (a) animals, like humans share ‘preference-interests’; that is animals exercise a form of consciousness that expresses itself in behaviour intended to fulfil their preferences for happiness and to avoid suffering; and (b) animals, like humans, share ‘welfare-interests’; that is ways of behaving that benefit them independently of their preferences for or against such behaviour.

Regan therefore distinguishes between ‘moral agents’, who fit the Kantian notion of a moral agent possessed of cognitive ability and ‘moral patients’ who do not possess cognitive abilities and are unable to assert their rights. These moral patients can be either disabled humans or animals, but who nevertheless share preference and welfare interests with moral agents. It’s still wrong to torture an intellectually disabled child, even though the child would not be considered a moral agent by most Western philosophical schools of thought.

Therefore, according to Regan, we owe to all sentient beings possessing preference and welfare interests (whether that individual is characterised as a moral patient or moral agent) a prima-facie duty not to harm them, because they possess the capacity to suffer harm and to exercise preference interests.
Regan calls this 'the harm principle'. And since animals are like humans in being moral patients, Regan articulates what he calls a ‘formal principle of justice’ in the following terms: ‘we must treat like cases alike except when a morally relevant difference supports treating them differently’. This is Regan’s version of the ‘principle of equal consideration’.

Regan suggests (a) moral agents and moral patients possess equal inherent value unrelated to the intrinsic value of their pleasures or preference satisfactions. This is called the ‘Inherent Value Postulate’; and (b) the attempt to deny or attribute less inherent value to moral patients is arbitrary given that both moral agents and patients are beings with both welfare and preference interests. Given that these characteristics are shared by animals, Regan concludes;

These shared morally relevant characteristics, together with the formal justice principle, underlie a direct duty we owe to all individuals with inherent value to treat them in ways respectful of their value (‘the Respect Principle’). Therefore we have a prima-facie duty not to harm such individuals - because we ‘fail to treat (individuals with inherent value) in ways that respect their value if we treat them in ways that detract from their welfare.

Regan therefore maintains that animals are ‘subjects-of-a-life’ with interests of their own that matter as much to them as similar interests matter to humans even though these animals might not be considered moral agents.

Differences in Approach?

Although both welfare and rights theorists advocate for the improvement of animal’s interests, there are significant differences in their respective approaches:

49 Ibid 839.
50 Ibid.
The rights view differs from utilitarianism in cases where there is a conflict of interest. According to utilitarianism such conflicts should be decided by giving most weight to the strongest interests. The rights view on the other hand claims that it is never justified to sacrifice the interests of one individual to benefit another. 51

Both Singer and Regan would like to see both justice and standards of moral behaviour apply to non-human animals:

Like Singer, Tom Regan seeks to extend our notions of justice and morality to animals. Unlike Singer, Regan does not see the need to raise the issue of rights. According to Regan, it is rights that must be extended to animals. He thus rejects Singer's utilitarianism. 52

Employing preference utilitarianism, Peter Singer sees nothing wrong with treating animals as means to human ends provided that the preferences of those animals are included in determining whether a certain course of action should be undertaken. Therefore Singer's approach:

...does not preclude the morality of a decision to exploit a human or non-human so long as animal interests are weighed fully before the decision is made. If the balance of interests weighs in favour of painful or intrusive experiments on animals, Singer would not object to such use; his objections would come if animals were made to suffer needlessly. Singer's biggest concern is that this weighing of interests is done without any notion that animal interests are necessarily inferior to those of humans. 53

Based on Singer's approach, it is permissible to experiment on animals if the aggregated benefits to humans outweighs the detriment constituted by animal suffering and discomfort.

However, according to Regan's Rights Approach, animal experimentation should be abandoned altogether. Because animals are 'moral patients' humans have a duty to protect animals against commercial and scientific exploitation. Regan develops his views from Kant:

To harm......individuals *merely* in order to produce the best consequences for all involved is to do what is wrong - is to treat them unjustly - because it fails to respect their inherent value. To borrow part of a phrase from Kant, individuals who have inherent value must never be treated *merely as a means to securing the best aggregate consequences.*

The trouble with Regan's approach is that it fails to provide a mechanism for resolving conflicts *between species.* What if the interests of two sentient beings come into conflict? How is it possible to simultaneously incorporate respect for the value of the lives of rats on the one hand, with respect for the value of the interests of humans who may be exposed to diseases spread by the fleas that live on the rats?

**Theoretical Differences Mean Practical Differences**

These *theoretical* differences between welfarist and rights schools translate directly into *practical* differences when it comes to industry, legal and regulatory initiatives intended to improve the conditions of animals:

Those who are committed to animal rights, for example, are more likely to object to the status of animals as property, demanding that legislatures and Courts rework the fundamentals of the human-animal relationship. Those with a utilitarian bent are more willing to work within existing hierarchies between animals and humans but insist on new protections against unjustified animal suffering.

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Essentially, utilitarian-influenced welfare theorists would support campaigns directed toward legislative reform of (for example) battery hens by advocating for larger cages or more room to move about. However, rights theorists would support campaigns to abolish industrial exploitation of animals altogether.

Both Welfarist and Rights Theorists Remain Anthropocentric

However, both Singer and Regan’s theories have been criticised for being anthropocentric. For example, Hall maintains that:

..because normal humans have cognitive capacities that presumably outshine those of other animals, in a true emergency situation, we are compelled to sacrifice non-human beings if it is necessary to save human beings. (He) has considered the example of a lifeboat with a limited capacity and decided that it is our moral obligation to throw the dog overboard to save a human being.\(^{56}\)

In both cases, it is the animal that is sacrificed. This is an unacceptable conclusion according to stricter rights theorists who would seek to substantially widen the attribution of rights. But on what basis are these rights widened?

Widening the Circle of Rights - Sentience As Key

American Professor of Law, Gary Francione goes further than Regan, advocating for a complete abolition of the property-ownership paradigm of animals. Francione argues that cognition and higher cognitive ability are not necessary pre-requisites for assigning rights to animals.

For Francione:

Animals qualify for basic liberty rights merely because they feel. The principle of equal consideration, he argues, requires that animals who can suffer be grouped with humans and differentiated from everything else...the circle he draws is wider than Regan's. Any animal that has a sense of self, he says, has an interest in continued existence in addition to an interest in happiness.  

Francione's position is thus immune to the anthropocentric criticisms directed toward Singer and Regan.

Francione's position constitutes a major advance of all other liberal approaches to the moral status of animals, in that it is invulnerable to the criticism that it privileges human beings over other sentient beings in the legal and moral order of things in matters.

Entrenching Animals-as-Property Paradigm

In a series of publications, Francione criticises the capacity of both Singer and Regan's philosophies to adequately protect the interests of animals. Francione believes that both welfarist and rights theorists entrench the animals-as-property paradigm and therefore encourage the continued exploitation of animals for human ends. According to Francione, the consequence of this entrenched position is that:

The property status of animals renders completely meaningless any balancing that is supposedly required under the humane treatment principle or animal welfare laws, because what we really balance are the interests of property owners against the interests of their animal property...Such a balance will rarely, if ever, tip in the animal's favour...(at bottom) it is always necessary to decide against animals in order to protect human property rights in animals.

To illustrate his point, Francione distinguishes the ‘lifeboat’ scenario discussed earlier, maintaining that it is an artificial construct and therefore not a reliable guide as to how humans treat animals on a day-to-day basis. Francione explains:

We place non-humans into daily conflicts with us, and then proceed to choose our interests over theirs. For example, each year we raise billions of animals only to slaughter them; not because of necessity or emergency, but to satisfy our desire for the taste of their flesh or the look of their fur or skins. We perform experiments on animals simply to produce yet another brand of furniture polish. Millions of animals are forced to live solely for the purpose of entertaining us. We justify exploitation of all other animals by saying that nonhumans can be sacrificed when the human need arises, yet we ourselves design and market most of these purported needs.61

The Distinctiveness of Francione's Approach

Francione's approach to animal 'rights' differs from welfarist and other rights-oriented approaches in several important respects and in doing so, is said to move beyond the implications of Aristotelian, Thomistic, Cartesian, Kantian and Utilitarian theories and the limitations they contain.

First, there are no species hierarchies that might serve to alienate animals from rights. Francione therefore rejects the Aristotelian and Thomistic scala naturae which served to subordinate the place of animals to the place of humans.

Second, there is no requirement for higher cognitive capacities as a prerequisite for the possession of rights. Francione therefore rejects the Cartesian and Kantian notions that animals are subordinated to human ends because only humans possess higher cognitive capacities.

61 Above n 57, 87.
Third, there is no requirement for the capacity to experience suffering as a pre-requisite for the possession of rights. Francione therefore goes further than the utilitarian philosophies of both Bentham and Singer in aggregating suffering and preferences in determining the rightness or wrongness of a course of action.

Finally, the cornerstone of Francione's approach is the existence of sentience in any animal: 'if a being is sentient, then that being has an interest in not suffering and a fortiori an unqualified right not to be property'.62

The Consequences of Francione's Approach

Many critics of rights theorists question the number and nature of the rights that animals might possess. For example, would the possession of rights enable animals to sue their owners for a breach of those rights?

Francione's approach, which advocates the abolition of animals-as-property, avoids these criticisms:

Asking whether the cow would be able to sue the farmer misses Francione's point. When the cows come home to our sphere of moral concern, they will not be forced to bear calves into an utterly dependent, controlled and wholly instrumental existence in the first place. Likewise when elephants are understood as persons, the question of whether they will be defendants in tort suits is nonsensical. They would not be caught and shipped to North American owners in the first place.63

62 Above n 58, 6 - 7.
63 Above n 57, 90 - 91.
According to Francione however, the present reality is vastly different. Despite claims by welfarist advocates that conserving animal interests is consistent with the property paradigm, Francione argues that:

There have been no significant improvements in animal welfare or animal welfare laws in the United States and almost all changes have been linked explicitly to making animal use more efficient. That is, welfare changes are based on such considerations as increasing productivity or reducing labour costs and to not recognize that animals have inherent value requiring that we respect their interests even when there is no benefit to us.64

Francione's Critics

Like all welfarist and rights theorists, Francione's views have attracted significant criticism. In his review of Francione's text Introduction to Animal Rights: Your Child or the Dog?, Professor Cass Sunstein raises three concerns with Francione's arguments.65

First, Sunstein argues that Francione has not demonstrated that the status of animals as property is inconsistent with recognising the value of animals, or that the use of animals as opposed to the ill-treatment of animals is morally objectionable.

Second, Sunstein argues that constructing a theory of rights based on sentience alone is ambiguous; and third, even if animals were to have rights, those rights could be abrogated when there would be considerable benefits to humans in doing so. Francione has responded and rebutted Sunstein's criticisms and the debate continues without apparent resolution.66

These apparently intractable conflicts have therefore led other philosophers to search for answers outside the frameworks of utilitarian and deontological ethical theories.

The most promising of these involves social contract theory, also referred to as 'contractarian' theories or 'contractualism'. However, while contractualism does overcome several of the difficulties associated with utilitarian and deontological theories, it suffers from profound internal disagreement amongst scholars about whether and to what extent the normative foundations of social contract theory are expansive enough to include animals.

Chapter 2, Section III: Are Animals Included in the Social Contract?

While the limitations attributed to utilitarian and deontological theories discussed above make it difficult to establish a generally accepted theory of animal rights, an unlikely alternative has presented itself in recent years.

It has been suggested that social contract theory may provide at least as coherent a basis for animal welfare as utilitarian philosophy if not being 'capable of affording animals direct moral status'. This is an extraordinary statement given the traditional exclusion of animals from most contractarian theories. Clare Palmer notes that 'hardly any of the great social contract theorists of the past 350 years even thought of the possibility of a human/animal contract of any kind, and those who did were immediately dismissive of it'.

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While there are many different forms of social contract theory, Palmer has identified four characteristics common to all. First, the social contract signifies a transition from a state of nature to a state of culture or society. Second, the social contract carries with it the loss or limitation of certain freedoms. Third, all parties to the social contract are rational, free and equal. And finally, all parties to the contract receive gains.

What makes it so difficult for social contract theorists to include animals within their framework is the inability to fit animals within these accepted parameters. Within contractarian theory, principles of justice and moral standing are grounded 'in an agreement among rational agents bargaining from a position of rough equality....and (because) non-human animals exhibit little of any of the traits that are necessary for being a party to such agreement some critics charge that contractarianism must then either deny that animals have any claims to justice or confer on them a second-class moral status.'

Unable to transition from a state of nature to one of culture, lacking rational capacity to insist upon and value rights and unable to demand benefits or gains, animals remain trapped in their original nature, famously described by Hobbes as 'solitary, poor, nasty, brutish and short'.

Is it any wonder therefore that zoos, circuses and other captive programs often present themselves in neo-colonial terms, as havens of 'civilized' refuges for animals otherwise destined for a short, diseased and violent life in the wild?

Rawls, Contractualism and Animal Welfare

In recent times however, the four basic elements descriptive of contractarian philosophy and their implications for the inclusion of animals within the social contract, have been re-evaluated within the context of John Rawls' social contract theory set out in his seminal text *A Theory of Justice*.²³

While acknowledging the existence of other social contract theorists, this Chapter will limit its discussion to Rawlsian contractualism because it is the most prominently debated contractualist school in the context of animal welfare.²⁴

In creating the framework of his social contract, Rawls invites people (citizens) to think of themselves as rational actors who will choose the principles of justice that will govern their society. In order to do this, the rational actors are placed behind a hypothetical 'veil of ignorance' so that, in choosing desirable principles of justice, they will be blind to race, class, gender and other morally arbitrary factors. From this 'original position' the rational actors then choose the principles of justice that are in their own interests.²⁵

Rawls' contractualism therefore starts with an *a priori* assumption that the citizens choosing principles of justice are rational creatures who are capable of demonstrating reciprocity in considering each other's interests under the social contract.


²⁴ Two alternative social contract theorists who have considered the place of animals within the social contract include Jan Narveson (animals do not count) *The Libertarian Idea*, (Temple University Press, United States, 1988); and Peter Curruthers (withholding rights from animals), *The Animals Issue: Moral Theory in Practice*, (Cambridge University Press, United Kingdom, 1992).

²⁵ A good description of Rawls' assumptions is discussed by Julia Tanner, 'Rowlands, Rawlsian Justice and Animal Experimentation' (2011) *14 Ethical Theory and Moral Practice* 569, 570.
On this understanding, animals cannot become members of the social contract because they are not rational creatures capable of understanding or accepting moral obligations against other members of society. Indeed Peter Carruthers argues that Rawls’ theory of justice cannot extend to animals because any attempt do so would ‘destroy the theoretical coherence of Rawlsian contractualism’.77

Rawls himself appears to have equivocated on the issue. On the one hand, he states that 'equal justice is owed to those who have the capacity to take part in and act in accordance with the public understanding of the initial situation'.78

On the other hand, Rawls writes that 'it is wrong to be cruel to animals....the capacity for feelings of pleasure and pain and for the forms of life of which animals are capable clearly impose duties of compassion and humanity in their care'.79 Rawls does not provide any guidance or explanation about the nature and extent of those duties of compassion and humanity. Nor does he explain how those duties might be incorporated into the social contract.

Profound Disagreements Amongst Scholars

It is this apparent equivocation on the part of Rawls that has generated significant debate about the place of animals within his contractualist system. Scholars of Rawls’ work on social contract theory disagree profoundly about whether his theories can be enlarged to accommodate duties protective of animal interests.

79 Ibid 448.
Prominent contractualist scholars Peter Carruthers\(^{80}\) and Thomas Scanlon\(^ {81}\) conclude that general principles of contractualism *necessarily* preclude animals from the social contract because animals lack the rational capacity necessary to give effect to the constitutive elements of a social contract.

Other scholars such as Clare Palmer\(^ {82}\) and Ruth Abbey\(^ {83}\) agree, arguing that it is simply not possible to tailor Rawls' views to support any theories of animal rights.

In fact, Abbey goes further, suggesting that in tracing the evolution of Rawls' thinking from *A Theory of Justice* to *Political Liberalism*, one can identify 'a depletion of normative resources in Rawlsian thought for addressing animal ethics'.\(^ {84}\) In other words, there is just not enough content in the intellectual architecture of Rawls' work to create an ethic of animal welfare.

Robert Garner's analysis, considered the 'most robust and thoroughgoing critique of Rawlsian thought from the perspective of animal ethics'\(^ {85}\) therefore describes attempts to enlarge Rawls' contractualist framework to include animal welfare as fatally flawed. He therefore concludes that 'we should look elsewhere in a search for the most appropriate ideological location for animal protection'.\(^ {86}\)

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80 Above n 77.
84 Ibid 2.
85 Ibid.
And in a conclusion reminiscent of some views of Aristotle's taxonomy of creatures, several critics of Rawls' theory go further, asserting that because animals are outside the social contract, it is permissible to exploit them like other non-sentient natural resources.\textsuperscript{87}

However, other scholars claim that Rawls' writings do support a version of welfare for animals but outside of 'rights talk.'

Jennifer Swanson\textsuperscript{88} asserts that the arguments made by Peter Carruthers and Thomas Scanlan for necessarily excluding animals from the social contract based on general principles are themselves flawed.

Other scholars such as Andrew Cohen\textsuperscript{89}, and C. Tucker and C. MacDonald\textsuperscript{90} do not go so far as Swanson, but instead argue that Rawls' theories can form a coherent basis for the argument that animals are moral agents toward whom direct duties are owed. These scholars point out that although Rawls did exclude animals from his understanding of the social contract, it does not follow that animals are able to be exploited by humans in whatever manner they choose.\textsuperscript{91}

In this context, Abbey has argued that when Rawls states that animals are owed duties of compassion and humanity he should be taken at face value.\textsuperscript{92} After all, Rawls himself argues that the treatment of animals is more appropriately examined from the perspective of morality rather than the perspective of the much narrower issue of justice.\textsuperscript{93}


\textsuperscript{88} Jennifer Swanson, 'Contractualism and the Moral Status of Animals' (2011) 14(1) Between the Species 1.

\textsuperscript{89} Andrew Cohen, 'Contractarianism, Other-regarding Attitudes, and the Moral Standing of Nonhuman Animals' (2007) 24(2) Journal of Applied Philosophy 188.


\textsuperscript{92} Ibid 7.

An Underdeveloped Issue?

This *equivocation* in Rawls’ thinking about the place of animals in society that is evident in moving from *A Theory of Justice* to *Political Liberalism* is a potentially fruitful area for further study. In his text *Political Liberalism*, Rawls acknowledges that the concept of justice is quite narrow, dealing only with the political structure of society and not other subjects such as ‘the status of the natural world and our proper relation to it’. 94 Because of this, Rawls concludes that ‘our conduct towards animals is not regulated by the principles of justice’. 95

If Rawls does not believe that human conduct toward animals is regulated by principles of justice, what does he suggest should regulate that conduct? Future scholarship might start from Abbey’s observation above that there is a realm of moral consideration independent of the realm of justice. The issue then becomes to what extent this moral realm might accommodate Rawls’ belief that animals are owed duties of compassion and humanity and therefore act as sufficient grounds to include them within some form of social contract. Because this thesis is investigating a legal as opposed to a philosophical approach to advancing food animal welfare, I do not intend to develop this area of potential Rawlsian scholarship further at this time.

The Inherent Conflict and the Search for an Alternative Framework

Returning to the generally accepted understanding of Rawls’ work, there is no agreement amongst contractualist scholars generally and Rawlsian scholars specifically about the place of animals within the social contract and whether and to what extent some form of duties may be owed to those animals.

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95 Ibid 246.
In fact, debate about this issue appears to have stalled somewhat, prompting titles in the recent literature such as Rawls, Animals and Justice: New Literature, Same Response.96

What makes it so difficult for contractualists generally and Rawlsian philosophers specifically, to sensibly advocate for the inclusion of animals in the social contract is a form of philosophical bind inherent in the very parameters of contractualist theory.

In the context of Rawls’ theory of justice, members of society are owed justice because they are presumed to be rational agents. As rational agents they are members of the social contract.

However, as Cynthia Stark points out, members of Western societies who do not possess rational agency are also owed justice and included within the social contract.97 If principles of justice are solely mediated through contractualism, then why are infant humans and intellectually impaired humans considered to be moral agents?

And perhaps more uncomfortably, if some humans would not be considered rational agents, and presumably outside the social contract, but are nevertheless considered to be moral agents, then why aren’t animals similarly lacking in rational capacity also considered to be moral agents and also included within the social contract?

Martha Nussbaum & the Capabilities Approach

The search for an answer to this conundrum has led prominent Harvard philosopher Martha Nussbaum, herself a contractualist scholar and former pupil of John Rawls, to search outside the contractualist framework for a resolution.

Simon Hailwood describes Nussbaum as 'the most influential contemporary political philosopher to depart from the widespread agreement with Rawls' view that we owe animals 'compassion' and 'humanity' but not justice.98

Nussbaum's point of departure from orthodox contractualist scholars is her formulation of what she calls the 'capabilities approach' to animal welfare based on the work of Nobel Laureate Amartya Sen in evaluating quality of life based on personal capacity.99 Nussbaum developed her capabilities approach in several stages; in her 2000 text *Women and Human Development: The Capabilities Approach*,100 a 2001 Harvard Law Review article reviewing Steven Wise's text *Rattling the Cage*,101 in a chapter in her 2004 edited text *Animal Rights*102 and in her 2006 text *Frontiers of Justice*.103

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Although *Women and Human Development* was intended to challenge
gender inequality for women, it established the basic conceptual
framework for a capabilities approach Nussbaum then enlarged through
later scholarship to include other disadvantaged humans and finally
animals, particularly in Chapter 6 of *Frontiers of Justice*.

Nussbaum's starting point is a fundamental critique of the undesirable
consequences of utilitarianism generally and Rawlsian contractualism
specifically.

These undesirable consequences include the exclusion of animals as well as
intellectually disabled humans from the social contract and hence as moral
agents owed political rights. In such a world, the persons to whom
duties of justice are owed are limited to the rational actors who *framed*
those principles of justice.

According to Nussbaum, what is missing are the 'richer ties of sympathy,
benevolence, care, dependence and love of justice that binds society'.
These qualities do not *necessarily* relate to principles of justice, but to the
notion of what it means to *flourish* as a sentient being. In this sense,
Nussbaum frames her capabilities approach in light of the Aristotelian
notion of what it means to live the good life within one's own limitations
and capabilities.

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104 Ibid 64 - 65.
105 Ibid at 21 - 22.
As it applies to animals, Nussbaum's capabilities approach argues that 'the desired outcome for non-human species is that their dignity is respected and that they are given the opportunity to flourish within the limitations of their innate capabilities.'\textsuperscript{108}

Nussbaum enumerates 10 principles that form the basis of her capabilities approach:\textsuperscript{109} (i) life, (ii) bodily health, (iii) bodily integrity, (iv) senses, imagination and thought, (v) emotions, (vi) practical reason, (vii) affiliation, (viii) other species, (ix) play and (x) control over one's environment.

In this way, Nussbaum's focus is on 'respecting the dignity of individuals by securing minimal requirements for flourishing unpacked in terms of capabilities'.\textsuperscript{110}

What is said to make the capabilities approach superior to traditional utilitarianism is its ability focus on outcomes (expressed in terms of flourishing) \textit{without} the requirement to aggregate what is 'the good outcome' across many individuals.\textsuperscript{111}

The result is explained by Simon Hailwood; 'we have direct duties of justice (not mere compassion) to shape human institutions so as to progressively ensure all sentient animals receive their entitlements to threshold levels of the capabilities required for them to flourish with dignity'.\textsuperscript{112}


\textsuperscript{110} Above n 106, 4.

\textsuperscript{111} Above n 109, 82.

Some scholars argue that Nussbaum's capabilities approach therefore overcomes the weaknesses in Rawlsian contractualism and provides a coherent platform for including animals within the social contract outside of the framework for justice.113

Other scholars disagree, arguing that Nussbaum's approach is idealistic but 'implausible and unappealing'114 at best and completely incoherent at worst.115 The principal difficulty with Nussbaum's approach lies in the societal framework needed to support the capabilities necessary for flourishing.

Nussbaum's ten capabilities precede the flourishing of protected political rights in the sense that if those capabilities are compromised or missing, then political or legal rights supporting flourishing are insecure at best, non-existent at worst. As James Boettcher explains, in a society in which women are repressed through violence, the ability to control their environment is lacking. In those circumstances and in that environment, women cannot be said to flourish.116

This is particularly problematic for animals that are farmed and then slaughtered to satisfy the diet and taste preferences of humans. For these animals, what is lacking is the entitlement to 'continue their lives, whether or not they have such a conscious intent'.117 And this is only the very first of Nussbaum's ten principles found to be compromised.

Nussbaum herself appears to have difficulty in resolving the issue. In her 2001 review of Wise's text, Nussbaum states; 'I think we need to take a firm stand against the meat industry and its cruel practices. There is no doubt that creatures subject to factory farming lead hideous lives.'

In her 2004 Chapter in *Animal Ethics*, Nussbaum describes the issue as a very difficult case, stating; 'the capabilities approach agrees with utilitarianism in being most troubled by the torture of living animals. If animals were killed in a painless fashion after a healthy and free-ranging life, what then?...It seems unclear that the balance of considerations supports a complete ban on killings for food'.

The use of terms such as 'unclear', 'balance of considerations' and 'complete ban' suggests that Nussbaum would be prepared to tolerate some form of painless slaughter of animals to satisfy the food preferences for humans. Nussbaum has stated; 'I share Singer's doubts about whether a painless death is really a deprivation'.

However, later in her 2006 text *Frontiers of Justice*, and in relation to painless slaughter, Nussbaum states that this does not mean that 'no harm is done by painlessly killing a creature in its prime.... animals who are killed for food are typically killed in the prime or even their youth'.

Anders Schinkel has written about the difficulties that Nussbaum experiences in extending her capabilities approach to food animals slaughtered to satisfy the diet and taste preferences of humans.

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119 Above n 117, 315.
120 Ibid.
Schinkel concludes that however attractive for animals the capabilities approach might be, it does not resolve the conundrum of killing animals for food. He concludes that Nussbaum is unable to resolve the difficulty; ‘Nussbaum repeatedly speaks of 'killing for food' as a difficult case, in all three texts, but does not really address the issue, simply because she does not have a clear answer’.123

And acknowledging that these ‘inconsistencies...undermines the model's coherence and Nussbaum's claim that her approach goes beyond the rights versus utilitarian divide’124 appears to be as far as scholars have taken the application of Nussbaum's capabilities approach to animals slaughtered to provide food for humans!

Indeed, Marcel Wissenburg suggests that ‘one may deem Nussbaum's project, both the explicit and the implicit part, hopelessly utopian or even absurd - a judgement that may simply reflect present prejudice’.125

That Nussbaum's creative use of the Aristotelian notion of flourishing as an alternative to the exclusionary nature of contractualism is simultaneously praised and excoriated reveals the deeper problem with all philosophical schools of thought discussed in Part 1 of this thesis. Philosophers and academics can and have found fault with almost every aspect of this or that ethical theory of animal rights.

The creation and continual criticism of new and emerging systems of animal ethics has prevented the formation of a philosophical consensus about the place of animals within Western societies generally and how Western societies should resolve the particular issues associated with the slaughter of animals for food.

123 Ibid 51.
This does not mean that neo-Kantians, Rawlsian scholars and Martha Nussbaum should never have attempted this task. It is vastly easier to critique and find fault with any argument than it is to demonstrate the intellectual creativity and courage to propose new ways of thinking about ages-old problems. This is especially so if those new ways of thinking attempt to challenge the more unredeemed but vastly profitable aspects of Western culture.

Although this is a legal and not a philosophy thesis and in the spirit of not simply criticizing, it proposes a working framework for an alternative animal law ethic that attempts to overcome limitations associated with most of the Western schools of philosophy explored in Chapters 1 and 2 of this thesis. This new ethical framework is termed: 'bioinclusiveness'.

Chapter 2, Section IV – An Ethic of Bioinclusiveness is Proposed

A significant limitation associated with most Western schools of philosophy is the privileging of human reason over all other qualities possessed by sentient beings. Reason and the possession of higher cognitive abilities becomes the morally relevant distinction that justifies subordinating the welfare of animals to the wants, needs and interests of humans. It has been used to justify the exclusion of animals from the social contract.

With its emphasis on human rationality, Western philosophical systems easily accommodate the inherent perception that humans matter more than animals. For example, Posner argues that 'the superior claim of the human infant than of the dog on our consideration is a moral intuition deeper than any reason that could be given for it and impervious to any reason that anyone could give against it'.

The trouble with justifying this intuition solely on the basis of reason and rational capacity is that it doesn't satisfactorily address the status of people with marginal intellectual or reasoning capacity. While all Western philosophies include intellectually compromised people within the social contract, they do not then satisfactorily explain why animals continue to be excluded.¹²⁷

Western philosophy has experienced great difficulty resolving the case of the intellectually disabled child. There appears to be no satisfactory explanation as to why such a child is included within the social contract but animals are not, except to fall back on the inherent moral intuition identified by Posner that people simply matter more than animals.

Is there some system of thought that might resolve this inconsistency without discounting the interests of people or animals? Is it possible to develop a set of coherent philosophical principles that overcomes the perceived limitations of ancient and contemporary animal philosophies while also supporting long-term legal and regulatory initiatives benefiting people and animals?

Set out below are the constituent elements of an alternative framework of animal philosophy through what this thesis calls an 'ethic of bioinclusiveness'. The ethic of bioinclusiveness is intended to function as a calibration device against which proposed legal and regulatory initiatives involving animals and their welfare might be evaluated.

Because an ethic of bioinclusiveness incorporates human and environmental concerns, it is wider in its scope than an ethic solely focused on animal welfare or the possession of rational capacity. In this way, it can more readily address allegations of anthropocentrism.

The Eight-Fold Structure of an Ethic of Bioinclusiveness

To be coherent and workable, any potential ethical system must contain certain thematic features. This thesis proposes eight such features in explaining the fundamental tenets of an ethic of bioinclusiveness:

(i) It's guiding principles must be capable of coherent expression;

(ii) It must overcome the limitations inherent in the ancient and contemporary schools of animal philosophy discussed in Chapters 1 and 2 of this thesis; and demonstrate how it advances the vision of those schools;

(iii) It's principles must be consistent with current scientific understanding of animals and the environment;

(iv) It must account for the very real fact that humans are different from animals; a difference that is deeply felt by people while not excluding animals from the social contract;

(v) It must be capable of incorporating the best elements of the ancient and contemporary schools of animal rights philosophy discussed in Chapters 1 and 2 of this thesis;

(vi) The ethical and legal duties it imposes must be clear;

(vii) It must be capable of constructively informing policy, regulatory and legal initiatives in ways that are consistent with the long-term sustainability of humans, animals in the closed ecosystem that is the Earth; and

(viii) Its principles must be consistent with the qualities of wisdom and compassion in the world’s religious traditions.
Explanation of this Eight-Fold Structure

Set out below is a brief explanation of these eight characteristics that taken together, form the fabric of an ethic of bioinclusiveness.

Guiding Principles

Two guiding principles define the ethic of bioinclusiveness. First, it emphasizes the importance of sentience; a quality that animals share with humans. Sentience is an emergent property of mind, consciousness that is common to humans and animals. Plants are not sentient because they do not have mind or consciousness. Second, it attaches significance to the interdependent nature of all sentient beings and the environment.

This first defining principle of an ethic of bioinclusiveness is similar to Gary Francione’s emphasis on sentience; ‘if a being is sentient, then that being has an interest in not suffering and *a fortiori* an unqualified right not to be property.’\(^{128}\) Cass Sunstein has attacked Francione’s reliance on sentience as the sole basis for animal ethics because ‘sentience’ is an impossibly vague concept that is easily ignored when human interests are in conflict with animal interests.\(^{129}\)

However I believe that Sunstein’s criticisms can be addressed through application of the second defining principle, interconnectedness. The principle of interconnectedness is a relational value that permits a more nuanced approach to animal welfare. The evaluation of proposed conduct or enterprise involving animals includes the potential influence of that conduct or enterprise not just the animals themselves, but also on people, and the wider environment.


Used this way, the principle of interconnectedness anticipates and potentially contributes to the work of Cormac Cullinan in the emerging area of ‘Wild Law’.  

Overcomes Limitations & Proposes Advances Over Existing Philosophies

It is suggested that an ethic of bioinclusiveness overcomes some of the limitations inherent in most of the ancient and contemporary schools of thought discussed in Chapters 1 and 2 of this thesis.

With its emphasis on sentience and the interconnectivity between animals, humans and the environment, an ethic of bioinclusiveness does not privilege the possession of reason and higher cognitive abilities. Whereas Aristotle, Aquinas and Kant would exclude animals from the social contract because of an absence these capacities, an ethic of bioinclusiveness would include both people and animals lacking in them.

Consistent with accepted biological theories of evolution, an ethic of bioinclusiveness refutes the Thomistic notion of a natural hierarchy in which there are held to be differences in kind between humans and animals. An ethic of bioinclusiveness accounts for the graduation in the species; humans are simply different animals in the scheme of nature.

Because an ethic of bioinclusiveness focuses on the possession of sentience, on consciousness, there is no scope for the Cartesian explanation of animal movement and function based in impersonal mechanical principles. Animals are warm, feeling, sentient beings.

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While Kant would deny direct duties toward animals based on an alleged lack of higher cognitive ability, an ethic of bioinclusiveness would impose direct duties on humans for the stewardship of animals. The nature of this duty is discussed below.

An ethic of bioinclusiveness would therefore expand the social contract to include animals and in so doing, encompasses the disquiet expressed by John Rawls and Martha Nussbaum in attempting to account for the feeling that humans owe duties of compassion and kindness to animals.

The Principles of Bioinclusiveness must be consistent with current scientific understanding of animals and the environment

The philosophies of Aristotle, Aquinas and Kant largely pre-dated the modern scientific era. Aristotle’s morally relevant distinction between humans and animals was based on a pre-scientific understanding of the sentience of those animals. And the theistic hierarchy of Aquinas, involving permissible exploitation is steadily being eroded by both science and theologians.  

Charles Darwin’s seminal text On the Origin of Species demonstrated that the previously accepted hard-barrier between species was unsupportable in light of the Theory of Evolution. So persuasive and important is Darwin’s work that in a 1992 address to the Pontifical Academy of Sciences, the late Pope John Paul II declared that the theory of evolution was ‘more than a hypothesis’.

The principle of interconnectedness fits easily within current scientific understandings of humans and animals as creatures evolving through time, influenced by each other, the environment and genetic diversity.

However, an ethic of bioinclusiveness requires that humans adopt a certain posture of humility. History clearly warns against the tendency for each generation to assume that it is in possession of the final answer to life, the universe and everything. History demonstrates that with increases in human understanding of animals, increasing sensitivity of medical equipment, the finality of our assumptions about animals is suddenly questionable.

**Bioinclusiveness must account for the very real fact that humans are different from animals; a difference that is deeply felt by people.**

The radical differences between humans and animals proposed by earlier philosophies made it easier to exploit animals because they were either machines (Descartes), mere brutes divinely ordered for the use of humans (Aquinas) or so lacking in rationality that humans owed no duties toward them (Kant).

However, while an ethic of bioinclusiveness does not seek to eradicate the very real differences between humans and animals, it overcomes the perception that it is permissible for humans to exploit animals *because* of those differences. As sentient beings, animals are subjects of their own life and flourish in ways consistent with their nature. And it is here that the next characteristic of an ethic of bioinclusiveness functions.
Bioinclusiveness must be capable of incorporating the best elements of other systems of thought

Bioinclusiveness undermines the assumption that because animals are not humans, it is therefore permissible to exploit those animals. Earlier in Chapter 2, the thesis noted that this apparently settled conclusion rests on uncertain foundations.

It is here that the potential gaps in both Aristotelian and later philosophies referred to earlier, might be deployed in deconstructing the assumed conclusion of permissible animal exploitation. In doing so, future scholarship might build upon Martha Nussbaum’s observation that a frequently overlooked aspect of Aristotle’s work on animals is his teleological vision for animals.133

Nussbaum argues that far from advocating the exploitation of animals, Aristotle actually ‘articulates a notion of flourishing for animals (and) regards each animals as an end in itself, each as the measure of its own type of flourishing’.134 Future scholarship might then incorporate Rawls’ cryptic observation that ‘it is wrong to be cruel to animals....the capacity for feelings of pleasure and pain and for the forms of life of which animals are capable clearly impose duties of compassion and humanity in their care’.135

It is also here that Rawls’ equivocation concerning the basis for human interaction with animals based on duties of compassion rather than justice might contribute to an ethic of bioinclusiveness.

135 Ibid 448.
An ethic of bioinclusiveness must clearly state the responsibilities it imposes upon people.

What does an ethic of bioinclusiveness require humans to do, or to stop doing? Initially, it would require humans to accept that there is no *a priori* relationship between the possession of rational capacity on the one hand, and an assumed right to appropriate and exploit animals, indigenous peoples, children and the environment on the other.

Instead, an ethic of bioinclusiveness would attach a higher level of responsibility to the possession of rational capacity and intelligence. ‘With great power comes great responsibility’ goes the saying allegedly attributed to Voltaire.

That responsibility requires people to observe their own impulses, preferences, drives and wants from a larger vantage point. Instead of seeing themselves in Cartesian terms as atomized individuals somehow separate from the other people, other sentient beings and the environment, an ethic of bioinclusiveness requires people to think about the impact of their desires and preferences on a wider scale.136

An ethic of bioinclusiveness imposes direct duties of stewardship on those with higher rational capacities to care for those lacking in those capacities, including the environment.

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It must be capable of constructively informing policy, regulatory and legal initiatives in ways that are consistent with the long-term sustainability of humans, animals in the closed ecosystem that is the Earth.

An ethic of bioinclusiveness acknowledges the interconnectedness of people, animals and the environment. It would impress the consequences of this interconnectedness on policy, legal and regulatory initiatives.

For example, health care providers recognize the fundamental relationship between animals and the physical and mental health of people. Assistance animals, therapy animals and companion animals play crucial roles in rehabilitating physical and emotional injury.  

There is also an abundance of literature exploring the negative externalities associated with factory farming impacts on the environment and population health.

Its principles must be consistent with the best of the world’s religious traditions.

Although initially though inimical to animals, Christian theologians are recovering a form of animal ethic based on the notion of ‘stewardship’ rather than dominion.

An ethic of bioinclusiveness would impose duties of stewardship on those people with higher sentient abilities to care for those lacking in capacity. In this sense, it is consistent with Buddhist notions of care and compassion.

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137 Alex Bruce, Animals as Assistants, Chapter 4 in Animal Law in Australia: An Integrated Approach, (LexisNexis Butterworths, Australia, 2012) 89, 93.
139 Andrew Linzey, Creatures of the Same God: Explorations in Animal Theology, (Lantern Books, New York, United States, 2009).
There is much more that can and indeed needs to be explored if a proposed ethic of bioinclusiveness based on Pythagorean and Buddhist principles is to make a serious contribution to the ongoing dilemmas associated with animal rights, animal welfare and human exploitation of animals. However, as this is principally a legal thesis, that is a task for another time and forum.

Conclusion: The Defeat of the Rational by the Emotionally Autistic

One feature of the analysis of ancient and contemporary philosophical thinking exploring the place of animals within society discussed in Chapters 1 and 2 is very dear. Almost every element of the philosophy that underpins each school of thought discussed in Chapters 1 and 2 can and has been criticised; 'it takes little effort to turn up serious limitations in each of the ethical theories'.

A very significant reason is the intuitive sense that humans matter more than animals, an intuition reflected in Posner’s observation that humans possess a ‘moral intuition’ that membership of a particular species matters.

Posner demonstrates his assertion by suggesting that if a dog were about to bite a child and the only way to stop the bite was to impose more pain on the dog than the bite would cause the child, most people would say the dog should be stopped.

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142 Ibid 1302.
Posner therefore argues that:

The superior claim of the human infant than of the dog on our consideration is a moral intuition deeper than any reason that could be given for it and impervious to any reason that anyone could give against it.\textsuperscript{143}

The limitations of both utilitarian and rights based theorists are exposed because neither can explain nor deal with this intuition that membership of the human species is a morally relevant distinction. In essence, both remain vulnerable to criticisms of anthropocentrism.

Utilitarian philosophy does not provide rights for animals, nor does it impose duties on humans to care for animals. Although Utilitarian theories do account for the interests of animals in weighing up the implications of a course of conduct, they do not guarantee protective rights to animals. There is also no system of justice underpinning utilitarian approaches to animal welfare and: 'without a system of justice, there is no reason for humans to incur costs and benefit animals if humans can systematically look away'.\textsuperscript{144}

However, rights theories lack an agreed understanding of the content of those rights. Exactly what rights would be conferred on animals? Within rights theories, there is disagreement in terms of 'boundary drawing'. And whatever suite of rights might be agreed upon, do they devolve onto only those animals with cognitive abilities, on all animals with sentience or on all animals that can suffer? And how are these differences to be measured? Should there be a 'sliding scale' of rights depending on the measure of cognition or sentience employed?

\textsuperscript{143} Ibid.
\textsuperscript{144} Ibid 1304.
Attempts to look outside deontological or social contract theories have also met with criticism and defeat. The initial promise of Martha Nussbaum's capabilities approach appears to founder on her own inability to resolve the issue of killing animals for food; a fact that critics have been quick to exploit.

The best that can be said is that while contemporary ethical theories do represent advances over the traditional Aristotelian, Thomistic, Cartesian and Kantian theories, there is profound disagreement about whether and to what extent contemporary theories are able to be enforced in favour of animals and over and above the needs, wants and preferences of humans.145

At worst, Steven Bartlett suggests; ‘the self-interest of human groups which kill animals for food, sport, fashion, science or religion is emotionally autistic. Attempts to change the attitudes and behaviours of such groups will predictably be met with an equivalent form of the infantile annoyance, impatience and rage typical of the autistic child’.146

Is the task therefore impossible? It is not impossible because there is an unarticulated and felt consensus that animals should be treated with compassion and dignity. It is true that despite all of the criticisms and limitations discussed, 'one emerges blinking from the shadows of philosophy to discover that there is a moral consensus in the Western world that animals should be treated better than they are.'147

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The singular difficulty lies in reaching a consensus about how to translate that moral and emotional consensus into practical regulatory regimes protective of animals. Our present Western society cannot reach this consensus. Indeed one commentator has observed:

Our society is in the midst of a major debate over animal rights, our duties and the legal status of animals. As a whole, our movement is not able to agree on an end goal; we are not able to articulate what we are struggling to obtain or want others to recognize, and subsequently, we cannot agree upon which steps to take and struggle to gain widespread support.148

While these comments may appear depressing, it must be remembered that human societies faced similar philosophical, political and legal difficulties in all social justice movements throughout history.149 At one time, the United States Supreme Court in Scott v Ford150 endorsed the view that black slaves could be 'bought and sold and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it'.151

At least in terms of the legal regulation of animals, this task is relatively new; former Australian Law Reform President Professor David Weisbrot described the emerging field of animals and the law as 'the next great social justice movement in Australia'.152 Contemporary society is thus struggling and groaning its way to an acceptable philosophy of animal welfare, and future generations may well look back to the 21st century as the difficult apprenticeship of humanity's ethical maturity.

150 Scott v Ford 60, U.S. 393 (1846).
Until that day and in the absence of a universally accepted philosophy of animal ethics, Western societies continue to display profoundly contradictory or even emotionally autistic attitudes toward animals.

All animals remain legally characterised as property and as Wendy Adams has noted, 'classifying animals as property relegates them to the status of an instrumentality'.

According to this instrumentalist perspective, those animals useful to humans as companions are offered some measure of protection against ‘unnecessary’ suffering while the majority of animals in Western society generally and Australia particularly are offered little or no protection against cruelty.

In Australia, this dissonant attitude has resulted in a legal and regulatory framework that attempts to achieve contradictory aims. On the one hand, Commonwealth, State and Territory governments attempt to protect some classes of animals from cruelty while simultaneously encouraging primary industries to profit from the economic exploitation of animals to satisfy the food preferences of humans.

And in this process, the limitations placed upon the use of animals to satisfy human needs, wants and preferences mandated by State and Territory Animal Welfare Acts do not extend to food animals.

154 Alex Bruce, Animals and Cruelty, Chapter 8 in Animal Law in Australia: An Integrated Approach (LexisNexis Butterworths, Australia, 2012) 197.
155 The Primary Industries Ministerial Council (‘PIMC’), now Standing Council on Primary Industries, is responsible for approving the various Codes of Practice and Animal Welfare Standards that are intended to ensure a consistent regulatory approach to animal welfare. However, the stated objective of the PIMC is to ‘develop and promote sustainable, innovative and profitable agriculture, fisheries/aquaculture, and food and forestry industries’. <http://www.mincos.gov.au/about_pimc> (Accessed 26 March, 2012).
The consequence is that subject to limited exceptions, animals remain available for exploitation, particularly to provide food for humans in concentrated animal feedlot operations where:

Hidden from the view of modern consumers by a thin veil of civility - from the tidy cellophane and Styrofoam packages in the supermarket's meat Section to the elegant table setting at the restaurant - is the reality of sentient creatures whose every biological function is monitored and controlled with a view to hastening the day when they can be killed and consumed.  

The exploitation of animals as property in this way is simply a reflection of the Western legal framework; 'human beings do not treat animals harshly because they are classified as property; animals are classified as property so that human beings can legally treat them harshly'.  

Those legal and regulatory frameworks facilitating the efficient but cruel treatment of food animals in Australia are explored in Part 2 of this thesis.

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Part 2
Regulatory Inconsistency & Food Animal Exploitation

Introduction

Over two Chapters, Part 2 of this thesis demonstrates how corporations have exploited animals as property to satisfy the present and future needs, wants and preferences of humans. Human preferences for meat products have grown dramatically since the Second World War and will continue to grow at a dramatic rate throughout the 21st century as the world’s population soars.

In satisfying these growing preferences for meat products, animal farming enterprises have transitioned from small family owed operations to large-scale concentrated animal farming operations (‘CAFOs’). Large scale CFAOs, managed by vertically integrated corporations seek to maximise the efficient production of animal products to satisfy both domestic and foreign demand for food animal products.¹

The cultural foundations for CAFOs were established centuries ago consistent with Aristotelian, Thomistic and Cartesian philosophies discussed in Part 1 of this thesis, where animals were characterised as lesser beings, lacking in rational capacity and therefore property to be exploited in satisfying the needs and wants of humans.²

The step from characterising animals as property to the efficient exploitation of animals as property is effortlessly facilitated through contemporary market dynamics.

¹ This is particularly so with the Australian chicken meat industry where two vertically integrated companies supply approximately 80% of the Australian market. Australian Chicken Meat Federation Inc, The Australian Chicken Meat Industry: An Industry in Profile, 2012 at 13. <http://www.chicken.org.au/industryprofile/>
The idea of evaluating the effectiveness of CAFOs through the lens of efficiency is very much a product of the neo-classical school of economic theory; the prevailing hermeneutical lens through which contemporary markets and the legal regulation of those markets are understood.³

Neo-classical economic principles define corporate success in terms of profit and return on investments where wealth is maximised through productive, allocative and technical efficiencies accomplished through techniques of mass-production of food animal products.⁴

Therefore in the 21st century, successful CAFOs are those managed by corporations able to maximise their profits through the efficient management of feed / weight ratios. Success is measured in terms of profits per unit as corporations pursue efficiency as a means to wealth-maximisation, the key feature of neo-classical economics.⁵

Chapter 3 demonstrates how the Australian legal and regulatory framework facilitates the efficient exploitation of animals in the chicken, pork and beef industries to satisfy human needs, wants and preferences for meat, echoing Wendy Adams's observation that 'human beings do not treat animals harshly because they are classified as property; animals are classified as property so that human beings can legally treat them harshly'.⁶

Section I introduces the scale of food animal suffering by identifying the quantities of food animals processed by corporations at CAFOs for domestic consumption and export.

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It particularly notes the significant future demand for animal products as the world's population is expected to reach between 8 - 11 billion people by 2050.

In meeting present and future demand for animal products, animal husbandry techniques have intensified in order to become more efficient. Section II explains the role of corporations in managing CAFOs in order to meet this demand.

CAFOs are therefore managed in ways that enable the most efficient production of poultry, eggs, pork and beef. Section III explores the Australian legal and regulatory framework in which corporations manage CAFOs. It explores how the lack of express Constitutional power to regulate animals has led to a complex legal and regulatory framework in which responsibility for the welfare of food animals is shared between Commonwealth, State and Territory governments.

It demonstrates how, despite this perceived lack of Constitutional power, the Commonwealth has nevertheless attempted to provide national policy leadership in the management of animals through the Australian Animal Welfare Strategy and National Implementation Plan 2010 – 2014, (‘the AAWS’) issued in August 2011.  

Consistent with the AAWS (that has no legal status), the Commonwealth, States and Territories have created a complicated and uncertain environment in which food animals are notionally regulated by Commonwealth Model Codes of Practice (‘MCOPs’) (that also have no legal status) and that are given varying degrees of legal effect through State and Territory Animal Welfare Acts.

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It demonstrates how this framework subordinates the protection given to animals under State and Territory Animal Welfare Acts to the efficient and profitable production of animal products at CAFOs.

The actual animal husbandry practices employed by CAFOs to efficiently produce food animal products and permitted by MCOPs are explained in Section IV, discussing the physical suffering caused to broiler and egg laying hens in the poultry industry.

In fact, the principal focus of Chapter 3 is the poultry industry simply because of the sheer quantity of animals involved relative to those in the pork and beef industries and the extent of literature associated with the poultry industry.

It demonstrates how the relationship between the Commonwealth Model Code of Practice for the Welfare of Animals – Domestic Poultry (4th Ed) ('MCOP - Poultry') issued by the PIMC, now the Standing Council on Primary Industries, in 2002 and State Animal Welfare Acts permit corporations to strategically manipulate living space, feed, lighting and medical care to ensure animals reach physical maturity and optimal weight before being slaughtered.

Sections V and VI explores similar intensive animal husbandry practices associated with the pork and beef industries respectively.

Chapter 3 concludes by demonstrating how the complexities and inconsistencies embedded in the current regulatory regime are a manifestation of the inherent conflict of interest in the Commonwealth government attempting to regulate against the cruel treatment of animals while simultaneously permitting animal husbandry practices facilitating the efficient exploitation of animals by corporations in maintaining profitable primary industries.
Chapter 4 will then explore a very specific but very controversial issue of animal meat production; the religious slaughter of animals. It demonstrates how the current regulatory regime in Australia addressing halal and kosher slaughter practices is contradictory, inadequate and ineffective. Chapter 4 discusses how attempts by governments in the European Union, the United Kingdom and New Zealand to regulate halal and kosher slaughter practices have met with hostility and failure.

Part 2 of this thesis concludes by demonstrating that the current legal and regulatory regime concerning food animals in Australia is founded upon contradictory policy goals that attempt to protect some animals from acts of cruelty while simultaneously encouraging the efficient exploitation of animals by corporations for the purposes of developing and maintaining profitable primary industries.

In the absence of a generally accepted philosophy of animal ethics and in circumstances of a regulatory and legal policy regime permitting the economic exploitation of animals, attention focuses on the use of alternative legal and regulatory regimes, including the Australian Consumer Law ("the ACL") as a potential means of advancing food animal welfare.

Part 2 therefore concludes by suggesting that if the source of food animal exploitation lies in the underlying principles of neo-classical economics; that is, in the efficient exploitation of animals to satisfy consumer demands, then at least one solution may also emerge from those same dynamics; the notion of consumer sovereignty driving fair trading practices, particularly truth in labelling initiatives and the prohibition of misleading or deceptive conduct in welfare labelling associated with food animal products.
The potential use of the ACL is especially relevant given the recognition that it is the 'purchasing power of consumers (that) is the key determinant of meat consumption'.\(^9\) It is exactly this potential purchasing power that is behind the Commonwealth government’s intention, expressed in the *Labelling Logic Report*, to use the ACL as the principal means of addressing animal welfare and religious slaughter issues associated with food animal products.

The ability of the ACL to be deployed in this way and the implications for the use of the ACL in regulating halal and kosher slaughter practices will be explored in Part 3 of the thesis.

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Chapter 3

The Corporate Animal Farm – Exploitation of Animals

Chapter 3, Section I: Present & Future Demand for Food Animal Products

Australians consume a significant amount of food animal products, principally meat, each year. This demand is reflected in the gradual increase in Australian meat production for both domestic and export markets over the last 10 years. The Australian Bureau of Statistics' livestock products report for the September 2011 quarter indicated that total red meat production in Australia increased by one per cent to 751 000 tonnes compared with the previous quarter while chicken meat production for the same quarter amounted to 251 000 tonnes.10

The Scale of the Slaughter

To give these figures some perspectives, and in relation to the 2010 figures, Meat and Livestock Australia reports:11

Over the 12 months to September 2010, fresh meat purchases increased 3% to about 133 million serves/week. Contributing to the trend was a rise in beef (by 4%), lamb (up 2%) and chicken purchases (up 6%) to 52 million serves/week, 22 million serves/week and 38 million serves/week, respectively.12

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11 Meat and Livestock Australia (MLA) is a corporation whose members are Australian cattle producers. MLA is the corporate entity that acts as the cattle farmer's advocate in the development of Commonwealth primary industry policies. It also provides marketing and research on behalf of its member cattle farmers.
Australia also exports a significant amount of cattle and sheep to Muslim countries for slaughter according to religious ‘halal’ procedures. According to Animals Australia, some 22 million sheep and cattle have been exported to Kuwait alone over the past 20 years.\textsuperscript{13}

Australia’s exports of beef and sheep generally continued to grow throughout 2011. Beef exports during 2011 increased by 22\% to 165 000 tonnes when compared to the previous quarter with sheep exports increasing by 2\% to 644 000 tonnes.\textsuperscript{14}

The number of animals that are raised each year in Australia solely for the purpose of slaughter for human consumption is truly staggering. Yet most Australians are unaware of the way in which this process occurs. Australian animal advocacy group Voiceless states:

more than 5 million pigs, 13 million hens and 420 million meat or ‘broiler’ chickens are raised for food production in Australia every year. Most of these animals spend their lives crammed together in giant factory farms.\textsuperscript{15}

By 2050, the United Nations Population Division predicts that the world's population will reach somewhere between 8 - 11 billion people.\textsuperscript{16} Much of this population growth will occur in developing countries where a growing middle class, with more disposable income is expected to generate substantial demand for meat products as part of their diet.\textsuperscript{17} This is particularly so in China and India where demand for meat products is quickly growing.\textsuperscript{18}

\textsuperscript{13} Animals Australia, \textit{Eye on Live Export}, on <www.animalsaustralia.org> (cited 21 August 2011).
\textsuperscript{15} Voiceless, \textit{Lifting the Veil of Secrecy: The Animal Behind your Food}, May 2007
\textsuperscript{17} Philip Thornton, 'Livestock Production: Recent Trends, Future Prospects' (2010) \textit{Philosophical Transactions of the Royal Society} 2854 - 2855.
\textsuperscript{18} Jean-Francois Hocquette and Vincent Chatellier, 'Prospects for the European Beef Sector Over the Next 30 Years' (2011) \textit{Animal Frontiers} 20.
In order to meet this expected demand for food generally and meat products particularly, the United Nations Food and Agricultural Organisation estimates that agricultural output will need to increase by 70% but must do so in circumstances of a world-wide decline in agricultural land because of climate change, dwindling fossil fuel supplies and the general movement of people off the land and into cities, urban and suburban areas.¹⁹

Most suggestions for meeting these challenges involve increasing the output of CFAO's through more efficient breeding and production techniques rather than advocating plant-based diets or even artificially grown meat products.²⁰ In these circumstances, the challenge for most Western countries will be to increase the efficiency of existing CFAO's in order to produce sufficient meat products for domestic consumption and emerging foreign demand for meat products.

For example, the National Farmers Federation ('the NFF'), the peak industry representative body for farmers in Australia has specifically noted the strategic advantages available to Australian meat and grain producers in satisfying future demand from developing countries. In its NFF Farm Facts: 2012 Report, the NFF observes:

The prospects for agriculture are huge, with the need to feed, clothe and house a booming world population. Expanding Asian societies need food and fibre like never before and, due to their growing affluence, are demanding produce of the highest quality. The challenge for Australian agriculture and our farmers will be in meeting this booming need for food and fibre through increasing production. Agriculture has an enormous uptake of new technology.²¹

Australia, North America and other Western countries are therefore proposing to meet the expected increase in world demand for food animal products generally, and meat products particularly, by increasing the efficiency and productivity of agricultural practices generally and CAFOs specifically particularly through technology.\footnote{Markus Vinnari and Petri Tapio, 'Future Images of Meat Consumption in 2030' (2009) 41 Futures 269.}

In the process, attention is being drawn to the suffering that food animals inevitably experience as a result of the growth in corporate exploitation of more efficient and productive intensive animal husbandry practices.\footnote{Bill Winders and David Nibert, 'Consuming the Surplus: Expanding 'Meat' Consumption and Animal Oppression' (2004) 24(9) Journal of Social Policy 76.} And the role of corporations in the pursuit of profits through efficiency is central to this enterprise.

Chapter 3, Section II - Corporations as Persons, Animals as Property

Most of the animal meat produced in Australia for both domestic consumption and export is processed by a few dominant corporations. The Australian chicken meat industry is a virtual duopoly. According to the Australian Chicken Meat Federation ('ACMF'): 'the two largest (companies) Baiada Poultry and Inghams Enterprises, supply more than 80 per cent of Australia's chicken meat'.\footnote{Australian Chicken Meat Federation Inc, The Australian Chicken Meat Industry: An Industry in Profile, 2012 at 13. <http://www.chicken.org.au/industryprofile/> Accessed on 29 March 2012.}

The beef industry is dominated by four producers. Swift Australia, Cargill Australia, Teys Brothers and Nippon Meats supply almost 50% of meat products in Australia.\footnote{Top 25 Red Meat Processors, 'Feedback', Meat & Livestock Industry Journal Supplement, October 2005.}
And in 2011, the Australian Competition and Consumer Commission ('the ACCC') cleared a proposed acquisition of Teys Brothers by Cargill Beef Australia; an acquisition that permitted the merger of Australia’s second and fourth largest beef processors leading to a further concentration of corporate production of animal food products.²⁶

The quantities of chickens, cattle and pigs slaughtered and processed by these corporations each year is enormous. In 2010 – 2011, almost 500 million chickens were slaughtered²⁷ and by 2015, cattle processing is expected to reach 2.4 million tonnes.²⁸

These industries are made possible in Australia by a legal system that characterises sentient, feeling animals as property without enforceable rights, and non-sentient corporations as legal persons with rights to own and exploit property. Section 124(1) of the Corporations Act 2001 (Cth) provides that corporations have the legal capacity and powers of an individual and of a body corporate, including the power to own property.

Darian Ibrahim explains the consequences of this characterisation: 'corporate personhood and animal thing-hood allow for the corporate ownership of animals. Corporate ownership of animals exists wherever animal use has been institutionalised, but it figures most prominently in animal agriculture'.²⁹ Beginning in the second half of the 20th century, corporations began owning and exploiting large numbers of animals to produce food for people at profit. In this process, the primary responsibility of corporation is to shareholders, manifesting as duties to trade profitably.³⁰

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²⁶ ACCC will not Oppose Teys Bros and Cargill Beef Australia Proposed Merger, ACCC Media Release dated 6 July 2011.
²⁸ Farm Facts, 2011, National Farmers Federation, Canberra, Australia, 10.
The Privileging of Profit Over Welfare

In these circumstances, the welfare of animals exploited by corporations is therefore a relative consideration necessarily balanced against the imperative of the profit motive. In *Department of Local Government & Regional Development v Emanuel Exports Pty Ltd*\(^3\)\(^1\) Magistrate C.P. Crawford noted that the relationship between corporate profit motives and suffering of animals was a balancing act; 'in the context of this case, that commercial gain has to be balanced against the likelihood of pain, injury or death to relevant sheep shipped in the second half of the year'.\(^3\)\(^2\)

Achieving this balancing act may be difficult when the profit motive is pressing. In his text *Diet For a New America*, John Robbins quotes livestock auctioneer Henry Pace:

> We're no different from any other business. These animal rights people like to accuse us of mistreating our stock, but we believe we can be most efficient by not being emotional. We are a business, not a humane society, and our job is to sell merchandise at a profit. It's no different from selling paper-clips, or refrigerators.\(^3\)\(^3\)

And so consumers are not readily placed to think about the often difficult animal husbandry practices associated with efficiently producing animal meat. One reason for this is the significant lack of connection between the way animals are portrayed in promotional material and the clinical, plastic-wrapped meat products purchased from the supermarket. Consumers don't make the explicit connection between the slaughter of another sentient being — an animal — and the meat that is then consumed. It's a form of consumer 'cellophane fallacy' that disassociates the consumer from the method of production of the consumer's food.\(^3\)\(^4\)

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\(^3\)\(^1\) *Department of Local Government & Regional Development v Emanuel Exports Pty Ltd* (Unreported decision of 8 February 2003, WA Magistrates Court).

\(^3\)\(^2\) Ibid 99.


\(^3\)\(^4\) The 'cellophane fallacy' is a term used in competition law (antitrust) that refers to an error in market definition. Named after the decision of the United States Supreme Court in *United States v El Du Pont de Nemours & Co* 351 US 377 (1956), the cellophane fallacy is incurred if the price that is employed in the 'hypothetical monopolist test' in market
While consumers might prefer to think of animals as living carefree lives on verdant open-air farms, the reality is very different. In fact, the number of animal farmers in Australia has declined dramatically. For example, between 1980 and 2007, the number of Australian pig-farmers declined by 90 per cent. However, during that same period, the average pig herd increased by 900 per cent while pig-meat production almost doubled.\(^{35}\)

If the number of pigs being harvested for their meat has increased so dramatically, while the number of farms has decreased by 90 per cent, then where are the pigs being raised and slaughtered? The reality is that large corporations are now involved in industrial-scale intensive animal ‘farming’. These corporations do not raise pigs on lush, green pastures. Instead, they employ intensive farming techniques where the animals are removed from their natural environment and confined or caged in great numbers to live under controlled conditions.

Most farmed animals in Australia are confined in CFAOs described as:

... a system of raising animals using intensive production line methods that maximise the amount of meat produced while minimising costs. Industrial animal agriculture is characterised by high stocking densities and/or close confinement, forced growth rates, high mechanisation and low labour requirements.\(^{36}\)

Australian Animal Advocacy Group ‘Voiceless’ states that ‘more than 5 million pigs, 13 million hens and 420 million meat or ‘broiler’ chickens are raised for food production in Australia every year. Most of these animals spend their lives crammed together in giant factory farms’.\(^{37}\)

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Producing animal meat or harvesting eggs using these intensive production methods is legal in Australia.

Commonwealth *Model Codes of Practice* ('MCOPs') relating to beef cattle, poultry and pigs permits the industrial processing of animals for human consumption. These MCOPs were issued by the Primary Industries Ministerial Council ('PIMC'), now the *Standing Committee on Primary Industries* ('SCoPI') whose stated objective is 'to develop and promote sustainable, innovative and profitable agriculture, fisheries / aquaculture and food and forestry industries'.

In other words, the goal of the Commonwealth Authority responsible for creating welfare standards for food animals in Australia is to create profitable and exploitable food animal and animal product industries. When the primary purpose is the creation and maintenance of profitable industries, animal welfare is subordinated to economic efficiency.

For example, a concern for animal welfare is nowhere mentioned in the PIMC / SCoPI's objectives statement. As a result, the very policies that are intended to establish and protect food animal welfare standards permit animal husbandry practices that would otherwise amount to cruelty.

How does this situation manifest in Australia's legal and regulatory framework of food animals?

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Chapter 3, Section III - Australian Legal & Regulatory Framework

*Animal law in Australia is a complex and multi-faceted area.*

There is a bewildering amount of regulation across the nine different Australia jurisdictions concerning food animals generally and the production of chicken, beef and pork meat specifically. Despite its lack of Constitutional power the Commonwealth government has created MCOPs initially issued under the auspices of the *Primary Industries Ministerial Council* (‘the PIMC’) now SCoPI relating to the management of these food animal industries.

Each State and Territory has incorporated the content of these MCOPs to a greater or lesser extent in jurisdiction-specific regulation in the form of their own *Codes*, legislation or policies.

However, the difficulty is that there is no consistency in the extent to which Commonwealth MCOPs are incorporated into the legal framework of the States and Territories. There is no consistency in the legal effect of these MCOPs even if they are adopted, and for those that are, there is no consistency in their coverage.

Before exploring the regulation of chicken, pork and beef meat production, it is therefore necessary to understand the legal and regulatory complexity of the Australian animal law framework. The principal reason for this complexity is the lack of a national regulatory regime that applies consistently throughout Australia. In turn, the lack of a national regulatory regime is the result of the absence in the Commonwealth Constitution of a power expressly permitting the Commonwealth government to nationally regulate animals and economic activity involving animals.

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Lack of Express Constitutional Power

Before Federation in 1901, various colonies in Australia had already enacted different forms of animal welfare legislation. Beginning with Van Dieman's Land (Tasmania) and then New South Wales these forms of animal welfare legislation were implemented throughout the late 1800s.41

These early forms of colonial legislation, principally the Police Acts, were broadly modelled on English animal welfare legislation intended to prohibit cruelty to animals.

Throughout the 1850s and 1860s, colonial animal welfare legislation was amended so that it not only became more focussed but also carved out exemptions for a number of primary industry practices including the extermination of rabbits, foxes and wild dogs as well as hunting, trapping or shooting any wild animal.42

Upon Federation, Australia's Constitution came into effect. However, during the Constitutional Conventions that preceded the drafting of the Constitution, there was no direct discussion of a power with respect to animals but only indirect discussion within the context of freedom of trade between States.43

Consequently, the Constitution does not directly address the issue of animal welfare with the result that the Commonwealth government does not possess express Constitutional power to legislate for the provision of animal welfare.

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42 Ibid.
Despite this lack of express power, the Constitution does provide the Commonwealth Government with several indirect powers to regulate animals. The quarantine power in s 51(ix); the fisheries power in s 51(x), the trade & commerce power in s 51(l) and the external affairs power in s 51(xx) of the Constitution provide the Commonwealth Government with the capacity to indirectly regulate animals.44

Accordingly, the Commonwealth Government indirectly regulates animals in international trade, creates treaties that involve animals (such as the Convention on International Trade in Endangered Species), regulates the export of animals, protects biosecurity, customs and imports and manages feral animals and other invasive species.

While there is no express power in the Constitution permitting the direct regulation of animals, it should be noted that Kirby J in ABC v Lenah Game Meats Pty Ltd45 held that free discussion of governmental and political issues of animal welfare is protected by the implied freedom of political communication in the Constitution.

The law directly regulating animals is therefore found mostly in State and Territory legislation. Although the common law classifies animals as property46 in reality, the regulation of animals and animal welfare involves a complex network of Commonwealth, State and Territory legislation, MCOPs, Regulations and Subordinate legislation. And at the local government level, regulations or local laws exist concerning the registration of domestic pets, animal control and other issues.

This lack of express Constitutional power carries several consequences, set out below and discussed throughout this Chapter, for any systematic exploration of animal law and regulation in Australia:

44 Deborah Cao, Animal Law in Australia and New Zealand, (Lawbook Company Limited, Australia, 2010) 100.
45 ABC v Lenah Game Meats Pty Ltd (2001) 208 CLR 199.
46 Saltoon v Lake [1978] 1 NSWLR 52.
First, principal regulatory authority for animals and animal welfare rests with the States and Territories. However, the eight different States and Territories throughout Australia have separate and often inconsistent regimes regulating animals and animal welfare.

Second, in the States, there is an added layer of government in the form of local government. Pursuant to State Local Government Acts, local government councils have been given responsibility to manage animals in their jurisdiction and have issued many regulations and local laws in doing so.

Third, despite a lack of express Constitutional power, the Commonwealth government has attempted to provide national legal and policy leadership on issues of animal management and animal welfare by issuing Strategies, MCOPs and Standards. However these various instruments do not actually have the status of law. They are essentially aspirational documents.

Fourth, as a result, these Commonwealth initiatives have been implemented to a greater or lesser extent by the States and Territories. In some States, these initiatives have been incorporated into animal-specific legislation. In others they have not. In some States, compliance with a Commonwealth MCOPs is mandatory, in others it is not. The result is an inconsistent, complex and often patch-work regime of animal management and regulation.

Fifth, even where all States and Territories possess similar legislation concerning a particular issue of animal regulation (such as animal welfare or pest regulation), there are often many differences in the content of the legislation making it difficult to identify a consistent regulatory strategy.
Sixth, this means that in almost all cases, in order to understand the way that, for example, animals as pests are regulated it is necessary to excavate many different layers of Acts, Regulations, Codes, Standards and Subordinate legislation in each individual State and Territory.

Finally, the many different Acts, Regulations, Codes, Strategies and Subordinate Legislation have necessitated an equally difficult and complex bureaucratic structure across the Commonwealth, States and Territories. Many different and related government departments are responsible for the design, implementation and review of animal regulations. Identifying them all can be extremely difficult.

In these circumstances, one of the more difficult challenges associated with animal law in Australia is initially finding a way into this policy and legislative jungle. Because the *Australian Animal Welfare Strategy* anticipates the Commonwealth government assuming policy and regulatory leadership for animal law, the starting point is to identify relevant Commonwealth Acts, Codes, Strategies and Subordinate legislation relevant to any given issue. It then becomes necessary to identify the extent to which Commonwealth strategy is adopted and implemented by relevant State or Territory Acts, Codes or Subordinate legislation.

**At the Commonwealth Level**

The Commonwealth *Department of Agriculture, Fisheries and Forestry* (‘DAFF’) is the principal regulatory agency at the Commonwealth level with portfolio responsibility for animals.\(^47\) DAFF has assumed responsibility for developing a general overarching strategy for the regulation of animals in Australia.

The **Australian Animal Welfare Strategy**

This overarching strategy is called the *Australian Animal Welfare Strategy* ('the AAWS') and forms the basic policy platform for State and Territory regulation of animal welfare. The AAWS was initially endorsed by the *Primary Industries Ministerial Council* in May 2004. A revised edition titled *Australian Animal Welfare Strategy and National Implementation Plan 2010 – 2014* was issued in August 2011.\(^{48}\)

Advising the Minister for DAFF is the *National Consultative Committee on Animal Welfare* ('NCCAW').\(^{49}\) The NCCAW's task is to develop general guidelines for animal welfare. Once developed, the Minister for DAFF 'formally reports' these guidelines to State and Territory ministers responsible for animal welfare for 'their consideration and appropriate action'.

In 2005, the Commonwealth Government gave four years of funding to enable the AAWS to be implemented. To do that the *Australian Animal Welfare Strategy Advisory Committee* ('the AAWSAC') was established. Its task is to oversee the gradual implementation of the AAWS. The process of implementing the AAWS is guided by the *National Implementation Plan of the Australian Animal Welfare Strategy* ('National Implementation Plan') which was endorsed by PIMC / SCoPI, in April 2006.

Until September 2011, the overall coordination of the National Implementation Plan was under the regulatory oversight of the *Primary Industries Standing Committee* (PISC) that in turn, reported back to the then PIMC / SCoPI.


As part of this implementation process, six 'sectoral groups' were established, each with specific areas of responsibility for the comprehensive reach of the AAWS.

Those six sectoral groups are as follows:

(1) animals used for work, sport, recreation or display;
(2) animals in the wild;
(3) companion animals;
(4) livestock/production animals;
(5) aquatic animals; and
(6) animals used in research and teaching.

These groups have completed their reports and a summary of their findings can be found in the August 2006 Final Summary Report on Priorities for Action from Inventories of Animal Welfare Arrangements.50

In August 2011, DAFF released the Australian Animal Welfare Strategy and National Implementation Plan 2010 – 2014. This latest edition of the AAWS is intended to be the lead policy document informing State and Territory regulatory initiatives concerning animals and animal welfare.

Australian Animal Welfare Strategy and National Implementation Plan

The purpose of the AAWS is intended to:

Outline directions for future improvements in the welfare of animals and to provide national and international communities with an appreciation of animal welfare arrangements in Australia.51

51 Australian Animal Welfare Strategy and National Implementation Plan, Department of Agriculture, Fisheries and Forestry, Canberra, August 2011, 3.
This purpose is intended to be achieved through the strategic implementation of an overarching vision described in the following terms:

All Australians value animals and are committed to improving their welfare. Its mission is to deliver sustainable improvements in the welfare of animals. \(^{52}\)

How is this to be achieved? The AAWS states:\(^{53}\)

The AAWS takes a multifaceted approach to delivering improved animal welfare, recognising that there are multiple areas of action and engagement. Under the four major areas of work, the strategy has the following aims:

- **Animals**: The primary aim is to identify, understand, prioritise and act on things that have a direct impact on the welfare on animals.

- **National systems**: Efforts will be made to reduce inconsistencies in the approaches to regulation and compliance used by different jurisdictions in Australia.

- **People**: The delivery of improved animal welfare relies on people and their capacity to make and implement decisions, and this will guide investments to improve skills and understanding.

- **International**: International awareness of the importance of animal welfare is growing. The strategy is a demonstration that Australia has a structured, national approach to animal welfare and allows our representatives to speak with authority.

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\(^{52}\) Ibid 7.

\(^{53}\) Ibid 14.
The AAWS aspires to achieve certain measurable outcomes and benefits flowing from the implementation of these four overarching strategies.

These outcomes are described as including:\(^5\)

Outcomes and benefits expected to flow from the strategy have been identified across four primary areas of work: animals, national systems, people and international. The benefits include the following:

- Animals will experience better levels of care and management.

- Governments and others investing in the development and implementation of animal welfare policies and systems will see greater efficiency and value through streamlined processes and reduced duplication.

- Animal welfare issues will be subjected to balanced debate and consideration within the community.

- Australia's animal welfare systems, expertise and international reputation will be enhanced through active international engagement and partnerships.

These are worthy goals.

However, in the absence of any Constitutional power behind it, the AAWS is essentially an *aspirational document* proposing a vision to implement a mission to achieve certain outcomes and benefits through a cooperative process involving all stakeholders working to achieve ongoing and sustainable improvements in animal welfare.

\(^5\)Ibid 7.
There are many difficulties in the way of realising these outcomes and benefits. An initial challenge at the Commonwealth level is the significant numbers of Councils, Departments, Committees and Working Groups that are involved with implementing the AAWS Strategies.

For the purposes of food animal welfare, the most important Committee is the Standing Council on Primary Industries / Primary Industries Ministerial Council. This is because SCoPI / PIMC is responsible for creating the MCOPs and Australian Welfare Standards regulating animals. It is SCoPI / PIMC that provides Commonwealth policy leadership in animal regulation; policy that is then implemented to varying degrees at State and Territory level.

The Standing Council on Primary Industries / ‘PIMC Committee Structure’

Until September 2011, a self-appointed body of Australian Commonwealth, State, Territory and New Zealand Ministers for agriculture, food, fibre, forestry, fisheries and aquaculture formed the Primary Industries Ministerial Council (‘the PIMC’). It was the PIMC that developed the MCOPs intended to ‘develop and promote sustainable, innovative and profitable industries in these commodities’.55 The PIMC was supported in its functions by the Primary Industries Standing Committee (‘PISC’)

However, in September 2011, the entire bureaucratic structure was (once again) rearranged by agreement of the Council of Australian Governments (‘COAG’). The PIMC is now called the Standing Council on Primary Industries (‘SCoPI’) and its task remains unchanged.56

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However, SCoPI now works within a new regulatory framework of an extra 12 bureaucratic 'Standing Councils' intended to 'address a small number of significant strategic priorities that align with COAG's reform agenda.'

Sitting alongside these Committees is the Animal Health Committee ('AHC') which provides advice to AHA, PISC and SCoPI / PIMC. Within the AHC is the Animal Welfare Working Group ('AWWG') which is responsible for the development of national standards for animal welfare in the form of Model Codes of Practice.

There are currently 22 MCOPs that are in process of being updated and converted into Australian Animal Welfare Standards and Guidelines incorporating both national welfare standards and industry 'best practice' guidelines for each species or enterprise.

Standards and Guidelines that are currently in development include; (1) land transport of Livestock, (2) Cattle, (3) Sheep, (4) Horses and (5) Exhibited animals.

Yet another body, the Animal Health Committee ('AHC') provides technical and scientific advice to PISC on matters of animal health and its members are the Chief Veterinary officers of the States and Territories as well as related animal health bodies such as CSIRO.

At the State and Territory Level

Earlier, it was noted that State and Territory governments have principal legislative responsibility for animal regulation. However, State and Territory animal regulation is intended to implement Commonwealth government policy initiatives in the form of MCOPs created by the PIMC.

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As a result, State and Territory animal regulation attempt to give Commonwealth policy the status of law by incorporating that policy in State or Territory legislation.

This process and its complexity can be demonstrated by taking the regulation of animal welfare in Queensland as an example. The Department of Employment, Economic Development and Innovation (‘DEEDI’) exercises responsibility for animal welfare in Queensland. It has legislative oversight of the Animal Care and Protection Act 2001 (Qld) (‘the Animal Welfare Act’). The Animal Welfare Act prescribes certain Australian Animal Welfare Codes of Practice (‘Codes of Practice’) which in effect give legislative force to the contents of MCOPs that have been produced at the Commonwealth level and issued under the auspices of SCoPI / PIMC.

However, the legal status and application of these Codes of Practice is uncertain to the point of incomprehension. In discussing Codes of Practice and their application in Queensland, the DEEDI candidly admits: ‘There is no single answer to the question; are Codes legally binding in Queensland.’ In fact, when this question is investigated, there are presently four forms of legal application of Codes of Practice.

First, there are ‘adopted’ Codes of Practice that are not compulsory but simply used as references for standards of care for animals. Second, there are parts of adopted Codes of Practice that have been made compulsory by virtue of the Animal Welfare Act. Third, there are ‘compulsory codes’ under the Animal Welfare Act whose provisions are mandatory. Finally, there are also Codes of Practice that are neither compulsory nor adopted under the Animal Welfare Act. These Codes of Practice have no legal status.


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Complicating matters a little is the fact that from 2010 and at the Commonwealth level, MCOPs will be replaced by *Australian Animal Welfare Standards and Guidelines* ('Standards and Guidelines'). The *Animal Welfare Act* thus differentiates between *Standards* for animal welfare that are compulsory and *Guidelines* that take the form of recommended practices only.

Accordingly, it is often necessary to identify and work with several different documents of uncertain legal status and of inconsistent legal effect across several different levels of government relevant to any given legal or regulatory issue concerning animals.

This is particularly obvious in the regulation that applies to the production of food animal food products in the chicken, pork and beef industries.

**Chapter 3, Section IV - The Production of Chicken Meat and Eggs**

Australians love to eat chicken meat and eggs. The statistics noted earlier indicated that in 2010 – 2011 almost 500 million chickens were slaughtered for their meat while hundreds of millions of eggs are consumed by Australian's each year; largely produced from CFAOs. There is a plethora of Commonwealth, State and Territory regulatory instruments relevant to the poultry industry. None of it apparently eases the suffering of chickens.

A general overview of these instruments illustrates the complexity involved in identifying the regulatory framework of the poultry industry.
Poultry Regulation Generally

It is difficult to identify with any degree of certainty all of the Acts, Regulations, Codes of Practice, Standards, Industry Guidelines and Recommendations in each State and Territory that regulate the chicken meat and egg industries. Most States have multiple 'layers' of regulation concerning the same practice (such as egg laying fowls) making it both time-consuming and difficult to identify all of the overlapping Commonwealth and State regulatory requirements.

The starting point is the Commonwealth Model Code of Practice for the Welfare of Animals – Domestic Poultry (4th Ed) ('MCOP - Poultry') issued by the PIMC in 2002. The MCOP-Poultry is 'intended to help people involved in the care and management of poultry to adopt standards of husbandry that are acceptable'.


All States and Territories except South Australia have incorporated the MCOP - Poultry into their jurisdiction in one form or another and with differing legal effect.

However, some States have chosen not to adopt the MCOP - Poultry but have instead created their own Poultry Codes.

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For example the Victorian Department of Primary Industries issued a Code of Accepted Farming Practice for the Welfare of Poultry in December 2003 that is loosely based upon the MCOP - Poultry.

The Victorian government also amended its Planning and Environment Act 1987 (Vic) to include the Victorian Code for Broiler Farms (2009) as part of the Victorian Planning Provisions of that Act. Supplementing these Codes are the Prevention of Cruelty to Animals (Domestic Fowl) Regulations 2006 (Vic).

In Western Australia, broiler chicken farms were until recently, regulated by the Chicken Meat Industry Act 1977 (WA) and associated Chicken Meat Industry Act (Participation in Growth Expansion) Regulations 1978 (WA). In addition, the Western Australian Department of Local Government and Regional Development has also published its own Code. The Code of Practice for Poultry in Western Australia issued in March 2003 is also based on the MCOP - Poultry.

However, in 2010 these Western Australian Acts and Regulations were repealed. From 2011, the Australian Competition and Consumer Commission authorised WA broiler chicken farmers to collectively bargain with their contracted processors and the above Acts were repealed.61

Complicating matters is the fact that even where some States have explicitly adopted the MCOP - Poultry, they have also enacted poultry-specific legislation or subordinate regulations that operate along-side the MCOP - Poultry.

For example, NSW has enacted the Poultry Meat Industry Act 1986 (NSW), the Poultry Meat Industry Regulation 2008 (NSW). There is also a Code of Practice for the Conduct of Negotiations Between Processors and Contract Growers issued by the NSW Poultry Meat Industry Committee.

In NSW, these instruments are in turn supplemented by Part 2A of the *Prevention of Cruelty to Animals (General) Regulation 2006* (NSW) titled ‘Confinement of Fowl for Egg Production’.

Queensland has adopted the MCOP - Poultry and has also enacted very specific regulations concerning ‘domestic fowl’ in Chapter 3 of the *Animal Care and Protection Regulation 2002* (Qld). Likewise, the ACT has adopted the MCOP - Poultry but has also created offences relating to ‘Commercial Egg Production’ in Part 6 of the *Animal Welfare Regulation 2001* (ACT).

Yet, other States have neither specific *Codes* nor legislation but ‘Guidelines’ of uncertain legal status. For example, Primary Industries and Resources SA promotes a document called *Guidelines for the Establishment and Operation of Poultry Farms in South Australia* dated March 1998 and prepared by the SA Government in conjunction with private enterprise. However, Part 3A of the *Animal Welfare Regulations 2000* then creates regulations relating to ‘domestic fowls’.

All of these different *Guides, Guidelines, Codes of Practice* and *Standards* embody the provisions of the MCOP - Poultry to a greater or lesser degree.

**Broiler Chicken Meat Production**

The processing of chickens for their meat and eggs involves very different techniques and processes. At chick hatcheries throughout Australia day-old chicks are firstly separated by gender. Strong female chicks are identified and separated for use for either egg or meat production.

Weak female chicks or male chicks are not suitable for egg production and usually not exploitable for their meat. Instead they are killed.
Section 14.1 of the current MCOP – Poultry provides that ‘culled or surplus hatchlings awaiting disposal must be treated as humanely as those intended for retention or sale. They must be destroyed humanely by a recommended method such as carbon dioxide gassing or quick maceration.’ Each day, hundreds of thousands of freshly hatched male chicks and weak female chicks are separated out by sorters and fed by conveyer belt into a machine that grinds them into slurry. 62 The separated out strong female chicks are then used for the production of meat or eggs.

Chickens intended to be raised for their meat are referred to as ‘broiler hens’. They are bred to grow in size and weight very quickly in order to efficiently increase the feed / weight ratio.

Most of these chickens are stored under artificial light and temperature conditions in huge sheds providing an artificial environment and containing up to 60 000 chickens. 63 Through intensive feeding practices, these chickens are ‘harvested’ sometimes within 30-35 days of arrival.

The commercial structure of the chicken meat industry in Australia typically involves a large processor / supplier such as Baiada Poultry or Inghams Chickens entering into supply contracts with corporations that grow the chickens for them. The structure of the industry was generally described by the Australian Competition Tribunal in Re VFF Chicken Meat Growers’ Boycott Authorisation in the following terms:

In Victoria, as elsewhere in Australia, chicken meat processors deliver day old chicks to growers and collect the grown chickens after about five to eight weeks. The processors provide feed and veterinary requirements but otherwise the growers care for the chickens and manage their growth. Processors and growers enter into contracts under which growers’ services are supplied. 64

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Managing this corporate relationship often involves a complex supply chain. For example, in *Baiada Poultry Pty Ltd v The Queen* the High Court considered an appeal involving an industrial accident at a CAFO operated by a company operated by the Houbens. The Houbens were contract growers for Baiada Poultry Pty Ltd ('Baiada').

After the Houbens' chickens reached 32 days of age, they were ready for harvesting. Baiada Poultry then engaged another contractor company called DMP Poultech Pty Ltd to catch and pack the chickens into crates. However, Baiada then engaged yet another contractor company, Azzopardi Haulage Pty Ltd to transport the packed chickens to its slaughter facility at Laverton in Victoria.

After taking delivery of the day old chicks, the growers ensure the chickens reach optional harvesting weight in the shortest possible time through a combination of selective breeding, forced feeding and artificial lighting regimes. In fact, there are corporations that specialise in breeding animals with genetic characteristics enabling them to convert feed into weight within a very short timeframe. For example, US corporation Cobb-Vantrass Inc has created for export to world-wide chicken meat markets, a broiler chicken marketed under the brand ‘Cobb 700’. The Cobb 700 is marketed in the following terms:

The Cobb 700 has been selected to achieve meat yield more efficiently than any other breed. In a high yield market the primary function of a broiler is to produce meat, and most importantly, breast meat. A new measurement to evaluate the efficiency of producing breast meat yield is **Breast Meat Feed Conversion** – the amount of feed required to produce a pound or kilogram of breast meat. The Cobb 700 consistently provides the lowest Breast Meat Feed Conversion offering more saleable meat per bird at a lower cost of production, a new standard in high yield.66

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65. *Baiada Poultry Pty Ltd v The Queen* [2012] HCA 14 (30 March 2012)
The emphasis is on efficiency of feed-weight conversion. Consistent with neo-classical economics, the principal goal of owners of chicken-meat factories is economic efficiency, expressed through animal husbandry techniques permitting processors to gain the most weight from their chickens for the least expenditure made on feed for them.

In order to increase efficiency, chicks are housed in giant sheds and exposed to artificial lighting cycles. The use of fluorescent or other artificial lights are intended to distort natural sleeping and feeding patterns in order to maximise weight gain and to control aggression.67

The permanent confinement in high-density sheds combined with constant exposure to artificial feeding and lighting regimes causes suffering to the chickens for the month or so that they have to live before being harvested and slaughtered.

In terms of overcrowding, or stocking densities, Stephanie Buijs et al68 explained the reason broiler chickens tended to stand or lie close to the walls of indoor sheds or pens. They noted that this behaviour increased as more and more chickens were crowded into the sheds. Their conclusion was that this behaviour was a fear-based response as an adaptation to violence associated with over-crowding.

This violence often takes the form of cannibalism and other self-destructive practices. Glatz et al note ‘cannibalism, egg eating, feather picking and vent picking are common traits where birds are housed together under high light intensity.

Beak trimming is an animal husbandry practice commonly carried out in the poultry industry involving the removal of part of the top and bottom beak of a bird to blunt the beaks enough so that pecking cannot do any damage. Beak trimming and toe removal, intended to mitigate these destructive behaviours are therefore permitted by the MCOP-Poultry and described below.

In terms of artificial lighting regimes, Deep and Schwean-Lardner et al demonstrated how low light regimes exerted a negative effect on broiler chickens in the form of increased ulcerative foot-pad lesions and underdeveloped eye size.  


The Report concluded that 'it is obvious that rapid growth which is the result of genetic selection and intensive feeding and management systems is the main cause of various skeletal disorders and metabolic diseases that have become important causes of mortality'.

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73 Ibid 30.
Accelerated growth rates are achieved in chicken muscle and fatty tissues and not in bone density or internal structural support. Consequently, by the time many broiler chickens reach optimal harvesting weight their leg and bone structures are under-developed or fragile. Often many chickens are lame suffering ruptured tendons and other metabolic disorders, and the constant indoor confinement often leads to respiratory diseases and death.

The management practices that cause these deformities, diseases and death are permitted by the MCOP – Poultry in order to increase the efficient production of chicken meat. For example, clause 12.5 advises that in the event of feather picking (a stress indicator) or cannibalism, adjustments should be made, including the elimination of shafts of natural sunlight.

And while antibiotics are not used to accelerate growth, the Australian poultry industry uses a large quantity of antibiotics to combat bacterial infection caused by high-density confinement and prophylactically to prevent the spread of infection. When used this way, antibiotics are included with chicken feed to ensure that birds do not get sick.

When it is time for harvesting, broiler chickens are captured by clean-up crews that are legally permitted by the MCOP-Poultry to carry up to 5 chickens in each hand; usually dangling by their underdeveloped and fragile legs that quickly break.

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74 From Nest to Nugget, November 2008, Voiceless at 12.
The chickens are then packed into cages of sometimes up to 28 chickens per square metre. After they arrive at a processing factory, the chickens are quickly killed. The process is described by Animals Australia in the following terms:

When the trucks arrive at the slaughterhouse, chickens are pulled from the crates and shackled upside down by their feet into metal stirrups on an overhead conveyor. The conveyor carries them into the killing room where their heads pass through an electrified water bath intended to stun them. As they pass along further, an automatic knife cuts their throat, and then they proceed into a scalding tank to loosen their feathers before plucking.

Unfortunately things do not always run smoothly. Some birds lift their heads and miss the electrified water bath and they are therefore still fully conscious when they reach the automatic knife. Some birds may also miss the knife and are then lowered into the 50 degree scalding tank while still alive. Back-up people are supposed to cut the throats of the chickens that miss the automatic knife, but due to the emphasis on speed in the processing plants this may not always occur. There are no animal welfare inspectors onsite to ensure that the slaughter process is humane.

Because the emphasis is on speed and efficiency, slaughter is an automated process lacking any form of direct welfare supervision.

The welfare difficulties involved in this automated process and associated suffering experienced by the animals were explored by Hindle et al who described the suffering experienced by broilers, hens, and ducks as a result of variations in the electrical current used and in the resistance caused by multiple animals being stunned simultaneously.

All of these practices are permitted by the MCOP – Poultry in order to increase the efficiency of the capture and kill of chickens.

79 Ibid clause 4.2.3, 7.
80 Animals Australia: Broiler Chickens Fact Sheet (undated) <http://www.animalsaustralia.org/factsheets/broiler_chickens.php#toc5>
Battery Hens and the Endless Supply of Eggs

In 2010 Australia’s flock size of egg producing chickens was almost 21 million birds. During the same period, some 345 million dozen eggs were produced with a gross production value at market of $1.5 billion. The chicken egg industry maintains extremely efficient methods of production. Chickens that are used to produce eggs for human consumption are also housed, fed and treated in ways that maximise the economically efficient output of each chicken.

Similar to broiler chicken processing, corporations use intensive factory farming methods such as artificial lighting and feed cycles to maximise egg production. Several hens are stored in tiny cages that are stacked on top of each other in tiers in huge indoor factory sheds.

These cages are sloped to facilitate feeding but in the process, result in foot and claw problems.

Being confined in this way causes hens to develop adverse behaviour such as pecking and cannibalism. In order to prevent or at least limit the damage caused by this behaviour, the MCOP-Poultry permits chicken farmers to de-beak chicks. Because the beak is a chicken’s principal sensory organ, many egg-producing chickens live in a permanent state of disfigurement and disorientation.

A further motivation for de-beaking chickens is to avoid injury caused by overcrowding. Appendix 1 to the MCOP - Poultry permits multiple chickens to be housed in cages of 550 square centimetres per chicken.

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83 Ibid 12.
To provide some perspective, this A4 sheet of paper has an area of 625 square centimetres. A standard laying hen is at least 40-cm high when she stands erect and is approximately 45-cm long and 18-cm wide, without her wings extended. Her body space takes therefore takes up an area of about 810 square centimetres.

The chickens in these cages are entirely female. After hatching, chicks are separated according to gender and health. Pursuant to the MCOP-Poultry, unhealthy female chicks and male chicks can be fed into a high-speed grinding machine while still alive. Millions of chicks are slaughtered in this way before they produce either eggs or meat. They are simply regarded as unwanted by-products.

The Australian Egg Corporation’s Ambit Claim on ‘Free Range’

The current debate over what level of stocking density constitutes ‘free-range’ has recently become extremely important. In September 2011, the Australian Egg Corporation (‘the AEC’) proposed new Draft Egg Standards (‘the AEC Draft Standards’) that in a cruel parody of the term, would permit the label ‘free range’ to be applied to eggs produced by farms that permit a stocking density of up to 20 000 chickens per hectare.87

This stands in stark contrast to the MCOP-Poultry that permits a stocking density of 1500 birds per hectare for non-cage meat chicken farms.88

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A “hectare” is 10 000 square metres (100m x 100m). The current MCOP-Poultry currently permits a stocking density of 1 chicken per 6 square metres in an outdoor setting in order to be considered ‘Free Range’. The AEC Draft Standards would permit a stocking density of only 0.5 of a metre for each chicken, representing a 91.6% reduction in available space while legally advertising that eggs produced in these conditions are free-range!

In support of its Draft Standards, the AEC issued a media release on 31 May 2012 proclaiming ‘Australian Consumers Support Free Range Stocking Density Changes’. According to the AEC, more than 80% of consumers across Australia were satisfied with the proposed stocking density changes.

So certain is the AEC of consumer support for the Draft Standards that it has applied to the Australian Competition and Consumer Commission to register the Egg Standards Australia Certification Trademark under the Trade Marks Act 1995 (Cth).

If successful, the AEC will be legally permitted to represent that eggs produced from chicken farms with the higher stocking density are “free range eggs” and will be permitted to charge a price premium for them.

At the time of writing this thesis, the ACCC has delayed approving the AEC’s Draft Standards while it conducts public consultations into the competition and consumer issues associated with the application.

While the AEC is attempting to use the trade mark approval process to legally increase stocking densities, several Australian governments are attempting to legislate against the consequences of the AEC’s proposals.

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89 Above n 86, Appendix 2, 28.
In 2011, NSW Greens MP Dr John Kay introduced the *Truth in Labelling (Free-Range Eggs) Bill 2011* into the NSW Parliament. The Bill has passed the Legislative Council and was introduced into the Legislative Assembly in November 2011. At the time of writing, the Bill has not yet been passed. If enacted, it will require a person who advertises that eggs are ‘free-range’ to comply with certain space, stocking density and care requirements.

If passed, the *Truth in Labelling (Free-range Eggs) Bill 2011* (NSW) would confine the use of ‘free range’ to chickens produced on farms using a stocking density consistent with the MCOP-Poultry.

In April 2012, the *Food (Labelling of Free-Range Eggs) Amendment Bill 2012* (SA) (‘the Food Bill’) was introduced into the South Australian Parliament. The *Food Bill* is drafted in similar terms as the NSW *Truth in Labelling (Free-Range Eggs) Bill 2011* in requiring a minimum stocking density of 1500 birds per hectare if eggs from these farms are labelled ‘free-range’.

Other States have attempted to introduce similar legislation. In 1997, the ACT government enacted the *Animal Welfare (Amendment) Act 1997* (ACT) banning battery cages. However, the Act was never enforced because of allegations by other States that it beached *National Competition Policy Principles*.

Another attempt by the ACT Greens to introduce the *Eggs (Cage Systems) Legislation Amendment Bill 2009* (ACT) was also defeated. Similar legislation in Tasmania was defeated in 2010.

However, even if successfully introduced, the relationship of these proposed Egg Standards to the protection offered by State *Animal Welfare* Acts is difficult and uncertain.
Relationship with State and Territory Animal Welfare Acts

The difficulty in identifying the numerous and often over-lapping Commonwealth, State and Territory MCOPs, Acts and Regulations relevant to the poultry industry is complicated by the uncertain relationship that these MCOPs, Acts and Regulations have with State and Territory Animal Welfare Acts and the Regulations that are made pursuant to those Acts.

Understanding this relationship is important because these Animal Welfare Acts are the principal source of legal as opposed to aspirational protection for animals from acts of cruelty. The trouble is that while these Animal Welfare Acts do prohibit acts of cruelty, they also exempt conduct that is permitted under MCOPs such as the MCOP-Poultry. Sharman notes:

> As each jurisdiction’s animal welfare law purports to apply to all animals, prima facie, chickens appear to be protected from cruelty. Despite this, any close examination of State and Territory animal welfare legislation reveals that chickens, like many other animals used for food production purposes, fall largely outside the reach of the law when it comes to the most meaningful of protections. 91

For example, s. 13 of the Animal Care and Protection Act 2001 (Qld) provides that the Regulation may make a Code of Practice about animal welfare. Part 2 of Schedule 1 of the Animal Care and Protection Regulation 2002 (Qld) designates most existing MCOPs as ‘Voluntary Codes of Practice’ including the MCOP - Poultry.

However, the MCOP-Poultry is voluntary and its standards are not compulsory for farmers producing chickens to be processed for meat. Not only are Queensland chicken farmers exempt from compliance with the standards in the MCOP-Poultry but s. 40 of the Animal Care and Protection Act 2001 (Qld) creates an ‘offence exemption’ for an offence if the offence was constituted by doing an act permitted by a code of conduct.

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How does this work in practice?

Assume that a person in Queensland confines their pet chicken in a dark garage, inside a cramped cage without access to sunlight, dirt or the capacity to scratch, turn around or interact with other chickens. That person would surely have breached their duty of care toward the chicken imposed by s. 17(1) of the *Animal Care and Protection Act 2001* (Qld).

Section 17(3) of the Qld Act states that a person breaches the duty of care provision if he or she fails to take reasonable steps to provide for the animal’s needs for accommodation for the animal or to permit the animal to display normal patterns of behaviour — s 17(3)(a)(ii) and (iii).

However, if that same person also owned a battery hen farm, raising chickens for egg production in the manner and in the conditions discussed earlier and permitted by the MCOP - Poultry, the same conduct would be legal. Recall the character in Michael Moore’s film *Roger & Me* in which rabbits were offered for sale under the sign; ‘Rabbits or Bunnies, Pets or Meat for Sale.’

Why are conditions like these not considered to breach relevant *Animal Welfare Acts*? Because (for example) s. 40 of the *Animal Care and Protection Act 2001* (Qld) creates an ‘offence exemption’ if the offence was constituted by doing an act permitted by a code of conduct. And the current MCOP -Poultry permits this treatment of chickens in Australia.

In addition, each State and Territory *Animal Welfare Act* creates specific exemptions for conduct associated with the slaughter of animals for food. For example, although the *Prevention of Cruelty to Animals Act 1979* (NSW) prohibit acts of cruelty, defences are available for conduct directed toward the slaughtering of animals for food generally and for religious rituals specifically.
Section 24(1)(b)(ii) of the Act provides that

24 Certain defences

(1) In any proceedings for an offence against this Part or the regulations in respect of an animal, the person accused of the offence is not guilty of the offence if the person satisfies the Court that the act or omission in respect of which the proceedings are being taken was done, authorised to be done or omitted to be done by that person:

(b) in the course of, and for the purpose of:

(ii) destroying the animal, or preparing the animal for destruction, for the purpose of producing food for human consumption, in a manner that inflicted no unnecessary pain upon the animal.

In this way, industrial scale egg and chicken meat farming in all States and Territories of Australia are systematically exempt from scrutiny under relevant Animal Welfare Acts. It might be thought that the existence of MCOPs are drafted to ensure that the production of chicken meat and eggs (as well as other meat-animals) protects the welfare of the animals.

However, it is important to remember that these MCOPs were issued by the Primary Industries Ministerial Committee. The PIMC, now SCoPI, is in fact constituted by representatives of the very corporations that profit from the commercial exploitation of animals. And as is clear from an examination of the MCOP- Poultry, animal welfare is subordinated to economic efficiency and profit.
Similar conclusions can be drawn about the application (or lack of application) of State and Territory Animal Welfare Acts; ‘the animal welfare statutes of each jurisdiction permit a series of encroachments on bodily liberty and bodily integrity in the interests of maximising production’.  

Chapter 3, Section V - The Production of Pig Meat

Australia’s pig meat industry is not as extensive as the chicken, egg and beef industries. In its 2010 Australian Pig Annual, Australian Pork Limited reports that the Australian herd size is approximately 2 300 000 pigs.  

The reality is that between a high of almost 40 000 pig producers in Australia in 1970, by 2008, there were only 1351 producers. And yet during this time, average sows per herd increased from under 20 in 1970 to almost 180 in 2009.  

This trend is indicated in the decrease in Australian pig farmers. Between 1970 and 2008, the number of Australian pig farmers decreased by 94%. Yet during the same time, pig meat output grew by 130%. In 2009 – 2010, over 5 million pigs were slaughtered for their meat.  

The explanation for these trends is the decline of small-scale pig farmers and the corresponding growth of large corporate pig factory farms using intensive farming techniques to breed and grow pigs for slaughter.  

Most pigs slaughtered for food in Australia are therefore part of an integrated corporatised system of breeding, growing and slaughtering.

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94 Ibid 10.  
95 Ibid.  
96 From Paddocks to Prisons, December 2005, Voiceless, Australia, 1.
Of the total 5 million pigs slaughtered, some 3 million are part of an integrated enterprise including production and primary procession, and that the remaining pigs sold for slaughter are sourced either through saleyards (5 per cent), spot market or forward and general contracts.97

These pigs intended for slaughter are kept indoors in large factory-sheds. This is because Australia’s climate with its high summer temperatures and regular droughts make it difficult to manage large pig herds outdoors.98

The Model Code of Practice for the Welfare of Animals – Pigs 3rd Ed, 2008 (‘MCOP – Pigs’)99 permits animal husbandry practices that facilitate the efficient production of pig meat, but results in cruelty toward the animals.

For example, breeding pigs (sows) will spend the majority of their time in small, confined metal cages called ‘sow stalls’. These stalls are intended to reduce competition amongst pigs for food and to enable producers to house a higher density of pigs in their factory-farms.

Once in these stalls, sows are unable to take a step forward or backward and cannot turn around. This is because under the MCOP - Pigs, the legal size of a sow stall is 0.6m x 2.2m.100

Just before giving birth, a sow is then moved into an even smaller container called a ‘farrowing crate’ measuring 0.5m x 2m.101 The heavily pregnant sow lies on a bare concrete floor and after giving birth, is unable to carry out instinctual nesting behaviours. Their piglets are separated from their mothers by metal bars intended to protect them from being crushed; a threat created by the use of the crates in the first place.

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97 Australian Pork Limited: Submission to the ACCC Grocery Inquiry into the Competitiveness of Retail Prices for Standard Groceries; March 2008, 6.
101 Ibid.
After they are born, piglets are routinely ‘mutilated by having their teeth clipped or sensitive body parts such as their tails cut off without anaesthetic. They are permanently separated from their mothers and moved to crowded pens, often on bare concrete floors until they are taken away to become pork, ham and bacon.' These practices; teeth clipping, tail docking as well as surgical castration, intended to facilitate efficient production of pork products to meet consumer demand, are permitted by the MCOP - Pigs.

Although sow stalls are outlawed in Sweden, England, the European Union, New Zealand and some States of America, Australia pig producers in most States and Territories continue to use them. However, the government of Tasmania has announced that it will prohibit sow stalls from 2017. Because it is cheaper to house pigs in sow stalls, Australian Pork Limited, the peak industry body for Australian pork producers, initially responded to the Tasmanian initiative stating that it was 'appalled by the decision' before then announcing in November 2010 that it would voluntarily move away from sow stalls by 2017.

Pig Meat Regulation & Animal Welfare Acts

Like the MCOP – Poultry discussed above, the MCOP-Pigs is purely a voluntary document that has little legal effect. In fact, the MCOP – Pigs has no legal effect in Queensland, New South Wales, the ACT, or the Northern Territory. A breach of the MCOP – Pigs is only an offence in South Australia.

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The same provisions of the State and Territory *Animal Welfare Acts* discussed above concerning the production of chickens also apply to the production of pigs. That is; the specific defences relating to the production of animals for food is exempt.\(^{108}\)

Australian Pork Limited, the industry representative body states that:

> The Australian pork industry takes animal welfare very seriously. Our farmers have a strong commitment to the welfare of their animals and are constantly working towards improvements in this area.\(^ {109}\)

The industry takes animal welfare ‘very seriously’ except perhaps when it is actually forced by government to spend money on welfare initiatives like phasing out sow stalls. Then it is ‘appalled’. To understand why, it must be recalled that Australian Pork Limited represents the economic interests of pig producers. In fact, several members of its own Board of Directors own and operate pig factory farms. As with the poultry industry, there is a direct conflict of interest between an industry representative body dedicated to increasing the efficiency and profits of its members and the welfare of pigs also determining welfare standards of those same animals.

This conflict is clearly demonstrated by the circumstances surrounding former Australian Pork Limited Director Mr Neil Ferguson who is simultaneously the General Manager of Westpork Pty Ltd, one of Western Australia’s largest pork producers. In 2009 and again in 2011, legal proceedings were instituted against Mr Ferguson by the Western Australian *Department of Local Government and Regional Development* for large-scale and systematic breaches of the *Animal Welfare Act 2002* (WA).\(^ {110}\)

\(^{108}\) See *From Paddocks to Prisons*, December 2005, Voiceless, Australia, 11 – 12.


Chapter 3, Section VI - The Production of Beef Meat

As at June 2011, the Australian cattle herd was numbered at about 27 million cattle with approximately 8 million cattle slaughtered for food consumption by humans.111

In Australia, the beef cattle industry is dominated by four producers; Swift Australia, Cargill Australia, Teys Brothers and Nippon Meats. These large corporations supply almost 50% of meat products in Australia.112

In 2011, the Australian Competition and Consumer Commission ('the ACCC') cleared a proposed acquisition of Teys Brothers by Cargill Beef Australia; an acquisition that permitted a merger of Australia’s second and fourth largest beef processors113 leading to a further concentration of corporate production of animal flesh food.

In order to increase efficiency, most industrial beef-farming takes place through the use of feedlots, vast open areas of land where thousands of cattle are penned close to feed and water troughs.

Like the chicken meat and egg industry, the use of intensive feedlots is to maximise the weight gain in the cattle.114

At the Commonwealth level the regulation of cattle is contained in the Model Code of Practice for the Welfare of Animals - Cattle115 (‘the MCOP-Cattle’) and the National Guidelines for Beef Cattle Feedlots in Australia.116

113 ACCC will not Oppose Teys Bros and Cargill Beef Australia Proposed Merger, ACCC Media Release dated 6 July 2011.
The MCOP – Cattle contains similar provisions to the other MCOPs considered above in permitting efficient but cruel animal husbandry practices involving cattle. Practices such as castration, spaying, tail docking and dehorning are legally permitted under the MCOP – Cattle.117

In a manner similar to the MCOP – Poultry and the MCOP-Pigs, State and Territory Animal Welfare Acts exempt practices authorised under the MCOP – Cattle that would otherwise constitute acts of cruelty. These practices were discussed above.

Conclusion - Evaluating Australia’s Animal Law Regime

The complexity and confusion of Australia’s animal law regulatory regime has been repeatedly criticised for its failure to both protect the welfare of the vast majority of animals in Australia and to achieve meaningful advances in animal welfare.118

There are several reasons for these criticisms but they are commonly distilled by the literature into four major faults: 119

1. The complexity of the regulatory regime;

2. The existence of an inherent conflict of interest in the bodies responsible for drafting MCOPs and Standards;

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116 Primary Industries Standing Committee; National Guidelines for Beef Cattle Feedlots in Australia, 2002, Canberra, Australia.
119 Ibid.
3. The inconsistent and often contradictory language and structure of animal welfare laws; and

4. The lack of a coherent and adequately resourced strategy to enforce animal welfare laws.

These alleged deficiencies are interrelated. Because Australia’s regulatory regime is so complex, inconsistencies and contradictions often arise. This complexity also means that most animal welfare policies are not created by Parliament, but by governmental departments through committees that are composed of both corporate and primary industry representatives.

Thus a conflict of interest exists in which animal welfare is subordinated to the development of profitable primary industries. The lack of a national or overarching animal welfare law or regulator means that enforcement of existing animal welfare laws is left to a charitable organisation; the RSPCA; an underfunded private charitable organisation.\(^{120}\)

**The Complexity of the Regulatory Regime**

Earlier this Chapter explored the way in which animal laws across Australia have been created and administered through a complex network of Departments, Councils, Committees and Working Groups. It noted that although the Commonwealth government does not have direct Constitutional power to create laws relating to animals, it has assumed a leadership role in creating animal welfare and related policies.

It attempts this through the creation of the *Australian Animal Welfare Strategy* and *Model Codes of Practice* that are progressively being translated into *Welfare Standards*.

\(^{120}\) Deborah Cao, *Animal Law in Australia and New Zealand*, (Lawbook Co, Sydney, NSW, 2010) 140.
None of these Strategies or Model Codes of Practice or Animal Welfare Standards have the status of law; they are not legislative instruments like statutes. It is not possible for any authority to institute legal proceedings alleging that a person has, for example, breached a provision of the Australian Animal Welfare Strategy or any of the Model Codes of Practice or Standards.

It is the responsibility and discretion of the States and Territories to give legal effect to these Commonwealth Strategies and Model Codes of Practice through State or Territory laws that apply them.

In theory this co-operative approach overcomes the lack of Constitutional power in the Commonwealth government to directly legislate for animals. However in practice, the universal application of these Commonwealth Strategies and Model Codes of Practice has been inconsistent and in some cases, duplicated in State legislation and Codes.

Not all of the Commonwealth Model Codes of Practice and Welfare Standards have been adopted and applied across the States and Territories. And even where these MCOPs or Standards have been adopted, they are inconsistently applied. In some States compliance is mandatory and in others, it is voluntary. And even where a State or Territory has specifically incorporated a Commonwealth Code of Practice or Animal Welfare Standard, the extent of the incorporation and its legal effect are often very confused.

The continual re-arranging of the bureaucratic structure regulating animal law in Australia, most recently in September 2011, from the PIMC structure to the SCoPI structure supplemented by 12 Standing Committees, simply contributes to the complexity.
Conflicts of Interest

Commonwealth Model Codes of Practice and Animal Welfare Standards are created by a variety of non-statutory entities and issued by different Committees.

Most were issued under the auspices of the Primary Industries Ministerial Council a committee composed of the Primary Industries Ministers from each State and Territory, now the Council of Australian Governments Standing Committee on Primary Industries ('SCoPI'). The objective of SCoPI / PIMC is 'to develop and promote sustainable, innovative and profitable agriculture, fisheries/aquaculture, and food and forestry industries'.\textsuperscript{121}

In other words, the imperative of the SCoPI / PIMC is the profitable development of primary industries and not the welfare of animals. Where there is a conflict of interest, the welfare of animals is subordinated to efficient primary industry practices and market forces.\textsuperscript{122}

Conflicts of interests are evident from the very beginning of the creation of Model Codes of Practice and Animal Welfare Standards.

The body responsible for actually creating the Codes and Standards was the Animal Welfare Working Group ('the AWWG') that was a sub-committee of the Animal Health Committee.\textsuperscript{123}

\textsuperscript{121} <http://www.mincos.gov.au/about_pimc>
\textsuperscript{123} <http://www.dfat.gov.au/facts/animal_welfare.html>
In 2011, the AAWG became the *Animal Welfare Committee* (*the AWC*) as a sub-committee of the *Animal Welfare and Product Integrity Task Force* within the Commonwealth Department of Agriculture, Fisheries and Forestry.¹²⁴

Attempting to identify the relevant Committee, Working Group or Department responsible for developing animal welfare related documents can be confusing and the task is not made any easier by the continual bureaucratic restructuring of relevant regulatory entities.

Whatever form the current and future bureaucratic structure may take, its emphasis is not animal welfare but primary industry productivity.

The reality is that Commonwealth *Model Codes of Practice* and *Animal Welfare Standards* are created by Committees composed of representatives of both Government departments whose principal focus is not animal welfare and primary industry representatives whose principal focus is the economic and profitable development of primary industries.¹²⁵

This conflict of interest exists at all levels of government. For example, Elizabeth Ellis notes that NSW representatives are drawn from the Animal Welfare Branch of the Department of Primary Industries whose stated goal is to act ‘in partnership with industry and other public sector industries in New South Wales’.¹²⁶

¹²⁶ Above n 122, 13.
Confused and Inconsistent Language and Structure

Even where a *Model Code of Practice* or *Animal Welfare Standard* has been incorporated into State or Territory legislation, in many cases there are inconsistencies in the relationship of the adopted Code or Standard with other State or Territory *Animal Welfare Acts*.

For example, while each State and Territory has enacted *Animal Welfare Acts* prohibiting acts of cruelty toward animals, these same Acts also create specific exemptions or defences for conduct toward animals that is permitted under a *Model Code of Practice* or *Animal Welfare Standard*. The effect is to place most of the animals in Australia beyond the reach of *Animal Welfare Acts* even though those Acts are specifically intended to provide for animal welfare.

For example, the recitals of the *Animal Care and Protection Act 2001* (Qld) ('the Queensland Act') state:

...An Act to promote the responsible care and use of animals and to protect animals from cruelty, and for other purposes.

Section 15(1) of the Queensland Act then provides that a regulation may require a person to comply with the whole or part of a *Model Code of Practice*.

However the *Animal Care and Protection Regulation 2002* (Qld) provides that almost all of the *Codes of Practice* and *Animal Welfare Standards* are completely voluntary; they are not enforceable in Queensland. In addition, s 40 of the Queensland Act then creates a specific offence exemption for conduct that was permitted by a *Code of Practice* (that is not enforceable in any case).
Lack of Effective Centralised Enforcement

Adding to this complexity, confusion and conflict of interest is the lack of a single enforcement authority responsible for the national regulation of animals and animal welfare. In reality, enforcement of animal welfare and animal related issues is fragmented across different government departments and private associations such as the RSPCA.

However, the RSPCA is in fact a collection of 8 different private charitable associations incorporated under different State and Territory Associations Incorporation Legislation. The RSPCAs in each State and Territory have limited enforcement powers and funding.\(^{127}\)

The difficulty in detecting and prosecuting contraventions of Australia’s animal protection laws is exacerbated by State and Territory initiatives such as the *Prevention of Cruelty to Animals (Prosecution) Act 2007* intended to limit the standing for those persons entitled to prosecute contraventions of animal welfare laws.

Complexity, confusing and inconsistent language, lack of comprehensive enforcement and an inherent conflict of interest in Australia’s regulatory regime combine to ensure that food animals remain some of the most vulnerable sentient beings in contemporary society. In fact, it almost seems that the number of animals protected under the current regulatory regime is indirectly proportional to the number of committees, departments, consultative groups and documents explaining how hard Australian governments are working to protect the welfare of animals!

And food animals are likely to remain particularly vulnerable given an expanding world population and an enlarging middle class in Asia with higher incomes driving an increase in demand for animal food products.

Agricultural producers are predicting significant economic gains to be made through the export of food animal products and other agricultural resources. In fact the National Farmers Federation quotes the Australian Prime Minster as anticipating 'the potential for a new golden era of Australian agriculture given the rise of Asia'.\(^{128}\)

Economic efficiency is the key to realising this potential golden era. Large vertically integrated corporations managing CAFOs throughout Australia will attempt to realise even higher productivity and efficiency gains from the animals they process.

Under the profit-oriented SCoPI / PIMC, existing MCOPs and future Animal Standards will continue to permit the handling and exploitation of animals in ways that involve cruel practices in pursuit of efficiency.

Animals in these CFAOs are commodities, units of production intended to maximise the profit of agricultural corporations as they exploit emerging world markets, satisfying increasing consumer demand for food animal products.

Constitutionally unable or perhaps more likely, politically unwilling to mandate Australia-wide application of MCOPs and Animal Standards, the Commonwealth government continues to preside over a complex and inefficient regime in attempting to pursue contradictory policy objectives.

While the Commonwealth *Australian Animal Welfare Strategy* purports to encourage the welfare of animals, State and Territory governments work under the SCoPI / PIMC structure to produce MCOPs and Animal Standards that permit animal husbandry practices that would be illegal under State and Territory *Animal Welfare Acts*.

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These exemptions assist the SCoPI / PIMC in fulfilling its stated policy objective of ensuring efficient and profitable primary industries.

While food animals generally experience conditions that cause suffering, the experience of animals that are slaughtered according to religious ritual is even worse. This is because Australian law permits animals that are to be slaughtered according to Islamic halal and Jewish kosher processes to remain un-stunned and fully conscious while being slaughtered. And although governments in the European Union, the United Kingdom and New Zealand recognise the welfare difficulties associated with the religious slaughter of animals, legislative attempts to regulate these practices in favour of consumer choice have singularly failed.

At least these governments attempted some form of regulation to address the issue of suffering experienced by animals during religious slaughter. Although the Australian government is aware of these difficulties, and despite consumer demand expressed over five years to address them, at its October 2011 meeting, the final in its current incarnation before transitioning to the SCoPI, the PIMC eventually decided not to regulate the religious slaughter of animals.

In a masterful display of bureaucratic procrastination, the PIMC simply stated that officials have been asked to continue discussions with religious groups in order to settle an ‘applicable risk management framework’.129

The suffering experienced by animals slaughtered for religious purposes, the attempts of governments to regulate these practices and the issues they raise are discussed in Chapter 4.

Chapter 4

Religious Slaughter & Regulatory Conflict

Introduction

In Australia animals whose meat is intended for general consumption are required by Commonwealth Codes and Standards to be stunned before they are slaughtered.\(^1\) Chicken, pigs and cattle are required to be unconscious or insensible when they are killed in order to minimise the suffering associated with the slaughter process.

However, not all animals that are slaughtered for consumption in Australia are in fact stunned before being killed because of religious requirements relating to the preparation and consumption of certain animal-based food. In particular the Jewish and Islamic religious traditions contain very specific requirements concerning the slaughter and consumption of animals. The production of kosher and halal meat according to Jewish and Islamic religious rituals, respectively, involves cutting an animal’s throat while it is fully conscious and then permitting the animal to exsanguinate.

A regulatory conflict or inconsistency therefore exists between the requirements for the slaughter of animals generally mandated by Commonwealth Codes and Standards on the one hand, and the specific requirements of the Jewish and Islamic religious traditions for the religious slaughter of animals on the other.

This conflict has not been resolved by Commonwealth, State or Territory governments. Instead, like the general slaughter of food animals discussed in the previous Chapter, Australian governments are attempting to simultaneously facilitate contradictory policies.

Commonwealth Codes and Standards mandate certain slaughter procedures in order to reduce the suffering of animas. However, in the interests of preserving freedom of religion and religious practice, these slaughter procedures are abrogated if animals are intended for religious slaughter.

Similar regulatory conflicts exist in many Western countries.

Recent attempts to address this conflict by governments in the United Kingdom, European Union and in New Zealand have largely failed. Legislative attempts to either prohibit the religious ritual slaughter of animals or to require meat from ritually slaughtered animals to be specially labelled have been defeated by well-coordinated campaigns criticising governments for allegedly contravening rights of freedom of religion and religious practice guaranteed by International Treaty or domestic statute.

Despite the defeat of these initiatives, at the time of writing, the Under-Secretary of State for the United Kingdom Department for the Environment, Food and Rural Affairs has indicated that the UK government is considering introducing domestic legislation that would require the labelling of meat products from animals slaughtered without stunning.\(^2\)

\(^2\) Lord Taylor of Holbeach, Parliamentary Under-Secretary of State, Department for Environment, Food and Rural Affairs, 16 March, 2012, House of Lords Hansard Text, Column WA119.
During the 2012 French elections, then Prime Minister Francois Fillon also publically stated that practices associated with the religious slaughter of animals were out of date while then French President Nicolas Sarkozy announced that he was in favour of labelling food animal products slaughtered according to religious ritual.3

Despite the difficulties associated with the religious slaughter of animals experienced in other Western countries, Commonwealth, State and Territory governments do not have specific legislation or policies that address them. Indeed whether and to what extent the religious slaughter of animals can be either directly or indirectly regulated by Australian or New Zealand governments has not been explored in detail. Only two authors, myself and New Zealand scholar Joel Silver have published recent research into the legal and regulatory framework associated with the religious slaughter of animals.4

In Australia, the Commonwealth and several State governments have recently begun to approach these issues through food labelling initiatives including the 2011 Labelling Logic Report5 and the Food Amendment (Beef Labelling) Act 2009 (NSW) (‘the NSW Food Amendment Act’) that became operative in late 2010.6

At both levels of government, the core of these regulatory initiatives is the prohibition of misleading and deceptive conduct associated with statements made by producers on general food labels or on meat-product labels.

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6 Food Amendment (Beef Labelling) Act 2009 (NSW), effective 31 August 2010.
In fact, the Commonwealth’s *Labelling Logic Report* specifically notes that statements made on labels associated with the religious preparation of products are considered ‘consumer values’ best left to industry self-regulation where failures are addressed through the ACL; ‘as a general principle, food labelling for such generalised values issues is best left to market responses to consumer demand and is best covered by the consumer protection laws’.7

At the Commonwealth level, the *Food Standards Australia New Zealand Act 1991* (Cth) (‘the FSANZ Act’) is intended to prevent misleading and deceptive conduct by ensuring that consumers have adequate information to make informed food choices.8

At this level of government, enforcement of food labelling is therefore the joint responsibility of the *Australian Competition and Consumer Commission* (‘the ACCC’) under the *Australian Consumer Law* (‘the ACL’) and the *Australian Quarantine Inspection Service* (‘AQIS’).9

At the State level, at least in New South Wales, regulations issued pursuant to s 23A of the NSW Food Amendment Act prescribe an industry developed labelling standard called the *AUS-MEAT Domestic Retail Beef Register* (‘the AUS-MEAT Register’) in establishing standards for the purposes of beef labelling.

A person who does not comply with the standards of the AUS-MEAT Register or who does so inconsistently engages in misleading or deceptive conduct in breach of s 23B of the NSW *Food Amendment Act*.

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8 *Food Standards Australia New Zealand Act 1991* (Cth), s 3(c).

Chapter 4, Section I begins by placing this discussion in context by posing several social, cultural and legal questions associated with the regulation of religious ritual slaughter of animals within Australia. How does the regulatory conflict identified earlier arise? That is, how is the practice of halal and kosher means of slaughter of animals exempted from requirements contained in generic animal welfare legislation and Commonwealth Codes and Standards? Given the existence of this conflict, what regulatory responses are open to Commonwealth, State or Territory governments to address it? Does the Australian Consumer Law have a role to play in doing so?

These are difficult questions because answering them involves teasing out the complex and emotive relationship between well-established human rights claims to freedom of religious practice, the extent to which both the Australian Constitution and State and Territory Human Rights legislation protects those rights, the promotion of consumer welfare policy embodied in Commonwealth legislation such as the ACL and the various food labelling policy initiatives outlined above but particularly the Labelling Logic Report.

In exploring these questions, Section II evaluates the effectiveness of the Australian legal framework in guaranteeing freedom of religion and religious practice. It argues that neither the Constitution nor State and Territory Human Rights Acts would function as a prima facie obstacle to Commonwealth or State and Territory governments attempting to regulate the practice of the religious slaughter of animals through legislation such as the ACL.

If there is no Constitutional reason prohibiting Commonwealth or State governments from regulating the religious slaughter of animals, Section III investigates whether it would be possible to completely prohibit the practice of the religious slaughter of animals.
It explores the experience of the New Zealand government in attempting to do so. Because that attempt was defeated on religious grounds, the religious justification for the ritual slaughter of animals, including the difficult scientific debate about the extent to which animals feel pain during the slaughter process is discussed.

Section III concludes that despite recent and more sophisticated scientific studies suggesting that animals experience more pain when slaughtered by religious ritual, the practice is not likely to be prohibited. Consistent with the conclusions reached in Part 1 of this thesis, the lack of a philosophical consensus attributing sufficient weight to the interests of animals would not displace recognised human rights claims to freedom of religious practice. This conclusion stands despite the relatively weak legal protection of religious freedom in Australia.

If the practice cannot or will not be prohibited outright, the issue becomes whether the Commonwealth, State and Territory governments can introduce product labelling initiatives or employ existing regulatory mechanisms such as the ACL to enable consumers to make informed purchasing decisions when it comes to buying meat products from animals slaughtered according to religious ritual.

Section IV explores attempts by the European Union and the United Kingdom to introduce legislation that would require meat products from animals slaughtered through religious rituals to be labelled as such.

Section IV also explores this issue in the context of the 2010 Commonwealth Review into food labelling laws; the Labelling Logic Report and the requirements of the New South Wales Food Amendment (Beef Labelling) Act 2009 (NSW).
Chapter 4 concludes by demonstrating how the framework for a regulatory approach based on preventing misleading or deceptive conduct is already anticipated by the Commonwealth and some State governments.

In this way, labelling initiatives and the strategic use of the ACL shifts the emphasis of the debate away from intractable arguments between recognised human rights claims to freedom of religious practice on the one hand, and uncertain animal rights or welfare interests on the other.

Repositioning the debate in this way positions the emphasis on consumer welfare. Religious slaughter of animals continues, but labelling initiatives and the use of the ACL to prevent misleading or deceptive conduct will enable consumers to make informed decisions about the meat products they choose to buy.

The discussion throughout Chapter 4 highlights the importance of Labelling Logic's intention to use the ACL to prohibit misleading or deceptive conduct involving labelling claims associated with meat products. Part 3 of this thesis then takes up the task of exploring the theory and law associated with the ACL as it attempts to do so.
There is now a significant body of literature demonstrating the close link between religious beliefs and the choices consumers make in their purchasing decisions.\textsuperscript{10}

Studies into the relationship between religion and consumer preferences also demonstrate the formative role that religion plays in influencing the choice of food consumption.\textsuperscript{11}

In an explicitly multicultural society such as Australia, those cultural and religious preferences and practices of consumers are specifically recognized by the Commonwealth Government's current Multicultural Policy. That policy affirms:

\begin{quote}
Multiculturalism is in Australia's national interest...It enhances respect and support for cultural, religious and linguistic diversity....It also allows those who choose to call Australia home the right to practice and share in their cultural traditions and languages within the law and free from discrimination.\textsuperscript{12}
\end{quote}

In this social context, issues associated with the religious slaughter of animals raise very complex considerations, similar to those that arose during the campaign against religious slaughter of animals in 19th century Europe involving:

\begin{footnotesize}
\end{footnotesize}
a complex and explosive discourse raising anthropological, theological, scientific and political questions... (addressing) fundamental issues regarding liberal democracy, ethics, religious freedom and tolerance, the status of minority groups with different religious sensibilities from those shared by the majority of a society’s citizens and of course, animal welfare.  

These dimensions of the debate necessarily inform any attempt to address the two regulatory options to be explored in Sections III and IV of this Chapter.

Nevertheless, these factors can be subsumed within and then addressed through three interrelated dimensions; the practical, the legal and the philosophical.

First the practical; why do the practices of the religious slaughter of animals raise concerns? Second, the legal: to what extent can governments attempt to either directly or indirectly regulate the practice of religious slaughter of animals? And third, the philosophical: to what extent should the religious ritual slaughter of animals be qualified or defeated given the stated goal in the Australian Animal Welfare Strategy to improve the welfare of animals as sentient beings?

These three dimensions are interrelated in the sense that the way animals are treated is largely determined by the legal and regulatory framework of society. Australia’s legal and regulatory frameworks are, in turn, a product of the way animals are characterised; in this case, the way philosophy characterises the relationship between animals and humans.

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13 John Efron, 'The Most Cruel Cut of All? The Campaign Against Jewish Ritual Slaughter in Fin-de-Siecle Switzerland and Germany' (2007) 52 Leo Baeck Year Book 167.
Whether, and to what extent Australian governments manage to address these three dimensions is one important measure of its success in realising multiculturalism as part of the nation’s stated liberal democratic orientation.\textsuperscript{14}

However, the issues associated with the legal regulation of the religious slaughter of animals are far from theoretical and are of significant commercial importance to producers, retailers and consumers.

The legal and commercial consequences associated with the religious slaughter of animals, the sale of meat products from those animals and the potential for misleading and deceptive conduct is clearly demonstrated by recent troubles experienced by the Dutch supermarket chain Albert Heijn.\textsuperscript{15}

In 2006, the supermarket chain began the retail sale of halal products to cater for the growing Muslim population in the Netherlands. Albert Heijn stores were selling halal and non-halal meat products without differentiating them. A Dutch consumer group objected to the sale of meat derived from animals slaughtered without prior stunning and then sold to consumers, some of whom would not be aware that they were purchasing meat from animals that had not been stunned prior to slaughter.


Albert Heijn's response was to retail meat from animals that had been slaughtered after reversible stunning, a practice permitted by some halal certification schemes.

However, Muslims began to boycott Albert Heijn's meat products because they did not believe that the meat was 'really' halal because stunning was involved. Compounding these difficulties was a complaint made to the Dutch Advertising Standards Authority against the Albert Heijn chain for impliedly representing that halal meat produced after reversible stunning was kinder to animals!

Religious Ritual Slaughter of Animals in Jewish and Islamic traditions

Both the Jewish and Islamic traditions regulate the kind of food that may be consumed as well as the method by which animals for food are to be slaughtered. In the Islamic tradition, for meat to be declared halal, it must be slaughtered according to a certain religious ritual.

The Quran requires Muslims to abide by what is halal; that is, what is permitted. Halal stands in opposition to haram; that which is forbidden. An example is the injunction to eat food that is halal. Sura 6/121 states:

Do not eat of any flesh that has not been consecrated in the name of Allah for that is sinful. 

In addition, Sura 6/119 provides:

How is it with you that you do not eat that over which Allah's name has been mentioned, seeing that he has distinguished for you that which he has forbidden you unless you are constrained to it.

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17 Quran, Davidson, N.J (Trans) (Penguin Classics, Middlesex, United Kingdom, 1975), Sura 6/121.
18 Ibid Sura 6/119.
Therefore meat which has not been properly slaughtered is declared haram (forbidden) because it is against Allah's will to slaughter animals improperly. Proper slaughter of an animal involves restraining it, intoning a prayer to Allah into its ear before cutting its throat and permitting the animal to bleed to death while fully conscious.

Whether and to what extent the practice of slaughter without pre-stunning is required by Islam is itself a controversial issue.

There appears to be no consistent agreement on the issue with the result that some Islamic scholars insist on the practice whereas others do not.\textsuperscript{19} This inconsistency is reflected in the difficulties experienced by the Albert Heijn supermarket chain discussed earlier.

In the Jewish tradition, animals must be slaughtered according to the shechita method in order to produce kosher meat. Shechita is the term given to the Jewish religious practice of slaughtering animals and poultry in a manner that renders meat ritually fit for consumption. The slaughter process involves a trained worker (called a 'shochet') using a very sharp knife to cut the trachea, oesophagus, carotid arteries and jugular vein of an un-stunned, fully conscious animal that then exsanguinates or bleeds out.

Jewish dietary law requires that cattle and other animals be slaughtered in a particular way called shechita. The animal must be killed by a trained Jewish male called a shochet, using a single cut of a sharp knife, called a chalef. The cut must sever the carotid arteries; in practice animal anatomy dictates that the cut sever the oesophagus and trachea as well. The critical difference is that animals slaughtered according to Jewish law cannot be stunned before slaughter. Muslim dietary law requires a similar method of slaughter, though some Muslim authorities accept pre-slaughter stunning that is temporary.\textsuperscript{20}


\textsuperscript{20} Jeff Welty, 'Humane Slaughter Laws' (2007) 70 Law & Contemporary Problems 175, 177.
Shechita United Kingdom’s May 2009 publication ‘A Guide to Shechita’ states:

The time-hallowed practice of shechita, marked as it is by compassion and consideration for the welfare of the animal, has been a central pillar in the sustaining of Jewish life for millennia. 21

Existing Legal Regulation of Animal Slaughter in Australia

The lack of express Constitutional power to legislate for animal welfare discussed in the previous Chapter means that the slaughter of animals for food is regulated by a complex network of Commonwealth and State legislation, Codes of Practice and Regulations. 22

Despite their status as property, animals are provided with a prima facie measure of protection against cruelty by State and Territory Animal Welfare Acts. 23 For the purposes of analysis this Chapter will refer to the provisions of the New South Wales Prevention of Cruelty to Animals Act 1979 (NSW) (‘the POCTA Act’).

Although it need hardly be said, the slaughter of animals at abattoirs necessarily involves conduct calculated to destroy their lives. 24

Why aren’t these practices ‘legally’ cruel and thus in breach of Animal Welfare Acts?


24 Above n 20, 176 – 182.
The answer involves exploring two further questions; (a) how is animal slaughter generally exempted from scrutiny under State and Territory Animal Welfare Acts? and (b) how are particular practices involving the religious slaughter of animals exempted from those Acts, as well as the more specific regulation of animal slaughter at abattoirs?²⁵

Prohibition Against Cruelty

The animal welfare legislation in each State and Territory prohibit acts of cruelty toward animals.²⁶ For example, sections 5 and 6 of the POCTA Act prohibit acts of cruelty and aggravated acts of cruelty toward animals. Section 5 provides;

5 Cruelty to animals

(1) A person shall not commit an act of cruelty upon an animal.

(2) A person in charge of an animal shall not authorise the commission of an act of cruelty upon the animal.

(3) A person in charge of an animal shall not fail at any time:

²⁶ Deborah Cao, Katrina Sharman and Steven White Animal Law in Australia and New Zealand, (Lawbook Co, Thomson Reuters, Sydney, 2010) 115.
(a) to exercise reasonable care, control or supervision of an animal to prevent the commission of an act of cruelty upon the animal,

(b) where pain is being inflicted upon the animal, to take such reasonable steps as are necessary to alleviate the pain, or

(c) where it is necessary for the animal to be provided with veterinary treatment, whether or not over a period of time, to provide it with that treatment.

Section 6 provides:

6 Aggravated cruelty to animals

(1) A person shall not commit an act of aggravated cruelty upon an animal. Maximum penalty: 1,000 penalty units in the case of a corporation and 200 penalty units or imprisonment for 2 years, or both, in the case of an individual.

Additional provisions in both the POCTA Act and the Crimes Act 1990 (NSW) prohibit other forms of conduct toward animals that would cause pain and distress. These include protection from being transported in a way that causes unreasonable, unnecessary or unjustifiable pain and protection from being mutilated in a certain way.

27 Prevention of Cruelty to Animals Act 1979 (NSW); Sections 4, 5, 7, 8, 9, 10, 12 and 16; Crimes Act 1990 (NSW) s 530.
28 Above n 26, 192 – 194.
Exemptions for General Slaughter of Animals for Food

Although the POCTA Act prohibits acts of cruelty, defences are available for conduct directed toward the slaughtering of animals for food generally and for religious ritual slaughter specifically. Section 24(1)(b)(ii) provides;

24 Certain defences

(1) In any proceedings for an offence against this Part or the regulations in respect of an animal, the person accused of the offence is not guilty of the offence if the person satisfies the Court that the act or omission in respect of which the proceedings are being taken was done, authorised to be done or omitted to be done by that person:

(b) in the course of, and for the purpose of:

(ii) destroying the animal, or preparing the animal for destruction, for the purpose of producing food for human consumption, in a manner that inflicted no unnecessary pain upon the animal,

Religious Slaughter Exemptions

In a similar manner, a specific defence under the POCTA Act is created for the slaughter of animals according to the religious rituals of both the Jewish and Islamic traditions.
Section 24(1)(c)(i) of the POCTA provides:

24 Certain defences

(1) In any proceedings for an offence against this Part or the regulations in respect of an animal, the person accused of the offence is not guilty of the offence if the person satisfies the Court that the act or omission in respect of which the proceedings are being taken was done, authorised to be done or omitted to be done by that person:

(c) in the course of, and for the purpose of, destroying the animal, or preparing the animal for destruction:

(i) in accordance with the precepts of the Jewish religion or of any other religion prescribed for the purposes of this subparagraph.

In this way, the destruction of animals generally for the purposes of domestic food consumption and the religious slaughter of animals undertaken at commercial abattoirs is not characterised as an act of cruelty.
Other Specific Exemptions for Religious Slaughter of Animals

Despite these general exemptions, the treatment and slaughter of animals intended for human consumption are also heavily regulated by several over-lapping Commonwealth Codes and Standards. Three of these are relevant to this discussion:


Each of these Standards and Codes regulates the slaughter of animals intended for human consumption and each provides a *specific exception* for the religious ritual slaughter of animals.

Clause 17.10 of the CSIRO Standard provides that before they are killed, animals must be stunned in a way that ensures they are unconscious and insensible to pain and do not regain consciousness. The method of killing is referred to as 'sticking', defined in cl 3.1 of the CSIRO Standard to mean 'the severing of the large blood vessels to induce effective bleeding.'
However, cl 7.12 of the CSIRO Standard provides that animals do not have to be pre-stunned where there is an ‘approved arrangement’ for the purposes of ritual slaughter. ‘Ritual slaughter’ is defined in cl 3.1 to mean the slaughter of animals (a) in accordance with Islamic rites in order to produce Halal meat or (b) in accordance with Judaic rites in order to produce Kosher meat.

The CSIRO Standard is also given legal force in various States and Territories of Australia through State and Territory Food Regulations. For example, in New South Wales, cl 24 of the *Food Regulation 2010 (NSW)* provides that abattoirs must comply with the CSIRO Standard in slaughtering meat (other than poultry, rabbit, ratite or crocodile meat).

In addition to the CSIRO standard, the SCARM Code, cl 2.6, outlines the process for stunning animals before slaughter. Specifically, cl 2.6.1.6 of the SCARM Code provides that ‘stunning for religious slaughter should be encouraged.’

In terms of slaughtering and exporting halal meat, the Australian Quarantine and Inspection Service (‘AQIS’) has developed specific guidelines that operate alongside the three Codes and Standards discussed above.

In terms of stunning, cl 5.2 of the AQIS Guidelines incorporate the requirements of the AMIC Standards. AMIC Standard 6 is titled ‘Humane Slaughter Procedures’ and contains 7 principles. Principle 4 states that ‘animals must be effectively stunned before sticking commences’.

These Codes and Standards are given legislative force in States and Territories through relevant Food Regulations. For example, cl 64(1) of the NSW Food Regulation 2010 expressly incorporates the requirement that animals must be stunned before sticking that is contained in the CSIRO Standard.

Under this scheme the only exception to the requirement that animals be stunned prior to slaughter appears to be where an abattoir has entered into an ‘approved arrangement’ pursuant to cl 17.2 of the CSIRO Standard.

The AQIS Guidelines on halal production identify ‘Approved Islamic Organisations’ that have sole responsibility for the production of halal meat. Possessing the status as an Approved Islamic Organisation is an important right that has been the subject of litigation.

For example, in Ayan v Islamic Co-ordinating Council of Victoria Pty Ltd the Court considered an allegation that the peak Islamic Approval Organisation had delisted another halal operator in an attempt to gain a monopoly over the production of halal meat.

Pausing a moment to summarise a complex regulatory scheme; State and Territory Animal Welfare Acts prohibit acts of cruelty toward animals. However, these same Acts create exceptions where animals are to be slaughtered for the purposes of producing food or for religious slaughter.

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But in doing so, the *Animal Welfare Acts* require the animals to be slaughtered in a manner that ‘inflicts no unnecessary pain’. The various *Codes* and *Standards* outlined above therefore require animals to be stunned prior to slaughter. This is why most Western countries require animals to be stunned so that they are rendered insensible to the pain of slaughter.

However, commercial reality does not always follow regulatory intent.

**Australian Abattoirs Not Stunning Animals**

Many animal welfare organisations assumed that all Australian abattoirs were complying with the stun requirements mandated by these Codes and Standards, even where animals were slaughtered for halal or kosher consumption. For example, then president of the RSPCA, Hugh Wirth alleged that since 1989 AQIS had assured the RSPCA that no religious slaughter without stunning was being conducted in Australia.\(^{30}\)

However, in early 2007 the RSPCA (Victoria) received a complaint alleging that workers at Midfield Meats Warrnambool abattoir were not stunning some animals prior to slaughter.\(^{31}\) Subsequent investigation revealed that Midfield Meats and three other Victorian abattoirs at Kyneton, Carrum and Geelong had entered into ‘approved arrangements’ with AQIS allowing the religious slaughter of animals without the prior stunning mandated by the various Codes and Standards.\(^{32}\)

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\(^{32}\) Ibid.
Intense media coverage of the allegations prompted the then Commonwealth Agriculture Minister, Mr Peter McGauran, in the Howard Government to postpone making a decision on the issue of approved arrangements for non-stun slaughter of animals pending a review of the practice. Mr McGauran stated:

The ritual slaughter will continue under the existing guidelines to the standard and I would expect the review to take only a matter of a few months. There is a matter of urgency because animal welfare standards have been rightly raised, but I stress that the abattoirs, both tier one and export abattoirs are within the law and have been approved by AQIS.  

In effect, the Minister was confirming that this conduct was lawful in Australia and unlikely to change in the near future.

Since the 2007 Commonwealth Election, responsibility for the proposed Review was inherited by Mr Tony Burke, Minister for Agriculture, Fisheries and Forestry in the Labour Government until September 2010. During the February 2010 Parliamentary sittings, Mr Burke admitted that neither he, nor the Primary Industries Ministerial Committee ('PIMC'), were intending to revoke exemptions already grated by AQIS permitting the slaughter of animals without prior stunning for halal purposes.

In September 2010, after yet another Commonwealth Election, Mr Burke was replaced by Mr Joe Ludwig. As at the date of writing this thesis, the 2007 Review is at least technically on foot, but no findings or recommendations have been released, five years after it was commenced.

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The issue is of concern because there have been documented cases in both Australia, the United States and Indonesia of halal and kosher slaughtering practices degenerating into acts of unnecessary cruelty toward animals that defies justification on any grounds, religious, cultural or otherwise.

For example, in October 2010, Councillor Gary Lucas of the Liverpool City Council in Sydney received majority support to lodge a motion at the Local Government Association Annual Conference seeking to ban backyard religious slaughter of animals in New South Wales. The Council motion was prompted by a complaint from a resident who witnessed ‘about 30 men (racing) through the paddock, tackling these terrified sheep to the ground and slit their throats. They then hacked them to pieces.’

This Australian example of outright and unchecked cruelty sits alongside other offences against animal welfare statutes perpetrated in the United States. For example, at the AgriProcessors Inc kosher meat abattoir in the State of Iowa, during 2004, a meat processing worker (who was actually working for the People for the Ethical Treatment of Animals; ‘PETA’) secretly filmed workers torturing and butchering kosher animals in gross violation of the US Human Methods of Slaughter Act (7 USC, 1901).

A subsequent investigation by the United States Department of Agriculture resulted in PETA’s film and allegations being referred to the Assistant US Attorney for the Northern District of Iowa.

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Other relevant examples of cruelty, independently of the 2011 ABC ‘Four Corners’ Program include the 2010 joint Meat & Livestock Australia and LiveCorp Report into the handling and slaughter of export cattle to Indonesia which indicated that the average number of cuts taken to slaughter the cattle was 4 and, in one case, 18 cuts were needed.  

The Imperative for Australia

The Australian Commonwealth Government’s stated commitment to multiculturalism means that it will need to navigate and find an appropriate balance between freedom of religious practice and a clear call from consumers for transparency in relation to the treatment of the animals processed for consumption.

Both the Commonwealth and several State governments have recently begun to approach these issues through food labelling initiatives including the 2011 Labelling Logic Report and the Food Amendment (Beef Labelling) Act 2009 (NSW) (‘the NSW Food Amendment Act’) that became operative in late 2010.

41 Food Amendment (Beef Labelling) Act 2009 (NSW), effective 31 August 2010.
These issues have assumed heightened importance given both the recent Commonwealth Joint Standing Committee *Inquiry into Multiculturalism in Australia*\(^2\) and the Australian Human Rights Commission Report *Freedom of Religion and Belief in 21\(^{st}\) Century Australia*\(^3\) released on 21 March 2011 as part of the broader Commonwealth *National Action Plan to Build Social Cohesion, Harmony and Security*.

Australia is not the first country to struggle with these issues. Since 2010, governments in the United Kingdom, the European Union and New Zealand have attempted to address them through legislative initiatives.

These attempts failed, largely due to challenges from Jewish and Islamic Representative Organisations arguing that such initiatives infringed fundamental human rights to freedom of religious thought and practice.

Accordingly, in order to establish a context for evaluating the two regulatory options set out earlier (ban religious slaughter or introduce labelling requirements regulated through the ACL) it is important to resolve an important threshold issue: to what extent does the Australian legal framework protect freedom to engage in religious practices?

It is only if the existing legal framework is permeable and would permit some degree of regulation, that these regulatory options can be realistically considered.

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Chapter 4, Section II – The Legal Protection of Religious Freedom in Australia

Constitutional Protection


Titled Article 18: Freedom of Religion and Belief the 1998 Report concluded that despite Australia’s ratification of international instruments, such as the International Covenant on Civil and Political Rights, the actual level of protection provided by Commonwealth law to freedom of religion was relatively weak.

There are a number of reasons for this conclusion, including the relatively weak nature of s.116 of the Australian Constitution that does not in fact guarantee freedom of religion and the inconsistent coverage of human rights provisions contained in State and Territory Statutes.

48 Section 46 of the Tasmanian Constitution protects freedom of religion and only the Australian Capital Territory’s Human Rights Act 2004 (ACT) s 14; and Victoria’s Charter of
These rights-specific legislative protections are supplemented by Commonwealth, State and Territory Anti-Discrimination legislation that prohibit acts of discrimination on several grounds, including race and religious belief. However, there is little uniformity in the anti-discrimination legislation as to both the characterisation and protection of religious belief and practice.\textsuperscript{49}

Any attempt by the Commonwealth government to directly prohibit the practice of religious slaughter of animals is likely to be challenged on the grounds that it offends s.116 of the Constitution. Yet it is an open question as to whether s.116 of the Constitution would function in the same manner as the First Amendment\textsuperscript{50} to the United States Constitution.

Although s.116 of the Constitution is drafted in similar language, it has not been developed or refined in litigation involving religious issues to anywhere near the same extent as the First Amendment.\textsuperscript{51} The most recent decision of the High Court concerning s 116 of the Constitution; Williams \textit{v} Commonwealth of Australia does not involve the ‘establishment’ provisions of s 116.\textsuperscript{52}

\textbf{State Human Rights Legislation}


\textsuperscript{49} Above n 44, 286.

\textsuperscript{50} The First Amendment reads: ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.’


\textsuperscript{52} Williams \textit{v} Commonwealth of Australia [2012] HCA 23 (20 June 2012).
An unexplored question is whether the religious slaughter of animals might be prohibited by State or Territory legislation. Unlike the Commonwealth, the States and Territories are not confined in their ability to make laws with respect to religious matters. The High Court in Attorney General for Victorian v The Commonwealth of Australia noted that while the effect of s.116 of the Constitution prevented the Commonwealth from establishing a religion, it does not so limit the States and Territories. The Court concluded:

The plaintiffs' claim that it represents a personal guarantee of religious freedom loses much of its emotive and persuasive force when one must add 'but only as against the Commonwealth'. The fact is that s.116 is a denial of legislative power to the Commonwealth, and no more. No similar constraint is imposed upon the legislatures of the States. The provision therefore cannot answer the description of a law which guarantees within Australia the separation of church and state.53

However, Tasmania, the Australian Capital Territory, and Victoria have expressly protected freedom of religion and religious practice. Both s.14 of the Human Rights Act 2004 (ACT) and s.14 of the Charter of Human Rights and Responsibilities Act 2006 (VIC) express the right to freedom of religion and religious practice in similar terms.

The ACT legislation provides:

14. Freedom of thought, conscience, religion and belief:

(1) Everyone has the right to freedom of thought, conscience and religion. This right includes—

(a) the freedom to have or to adopt a religion or belief of his or her choice; and

(b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community and whether in public or private.

(2) No-one may be coerced in a way that would limit his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

The other States and Territories do not have legislative human rights protections. Accordingly, it is unlikely that any legislative attempt by, for example, the New South Wales Government to require compulsory labelling of halal or kosher meat pursuant to the *Food Amendment (Beef Labelling) Act 2009* (NSW) could be challenged under human rights legislation. And, given the approach of the High Court in *Attorney General for Victorian v The Commonwealth of Australia* neither would that legislation appear to be open to challenge under s.116 of the Constitution.

Does this mean that States or Territories that have enacted explicit human rights protections are unable to prohibit or regulate the religious slaughter of animals? This question has to be approached with the awareness that the rights guaranteed by human rights legislation can in fact be constrained in certain circumstances. For example, s.28 of the *Human Rights Act 2004* (ACT) provides:

28 Human rights may be limited

(1) Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.
(2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:

(a) the nature of the right affected;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relationship between the limitation and its purpose;
(e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

Section 7 of the Charter of Human Rights and Responsibilities Act 2006 (Vic) is expressed in similar terms permitting justifiable limitations.

In Auckland Hebrew Congregational Trust Board v Minister of Agriculture, one of the grounds of challenge to the New Zealand government’s attempt to prohibit the practice of shechita was that the prohibition did not fit within the ‘justified limitations’ provision of the New Zealand Bill of Rights Act 1990 (NZ); a provision that is similar to the limitation provisions in the ACT Act described above. Although the High Court of New Zealand did not decide the issue, the larger philosophical question remains: to what extent should religious slaughter practices be protected by human rights legislation?

Framing the larger question in terms of Human Rights legislation becomes; ‘can legislation prohibiting or limiting the practice of religious slaughter of animals be ‘demonstrably justified in a free and democratic society?’ This question moves the discussion beyond solely legal questions and into the realm of morals, values and ethics; that is, it asks what behaviours and practices should either be encouraged or prohibited in a ‘free and democratic society’?

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54 Auckland Hebrew Congregational Trust Board v Minister of Agriculture [2010] NZHC 2185 (25 November 2010).
Consequently, it appears that neither the Constitution nor the various Human Rights Acts would function as a prima facie obstacle to the Commonwealth, State or Territory governments attempting to regulate the practice of the religious slaughter of animals.

It therefore remains to evaluate the two regulatory responses posed earlier either an outright prohibition on the practice of the religious slaughter of animals or indirect regulation through product labelling.

Chapter 4, Section III – Response 1: Prohibit the Religious Slaughter of Animals

The New Zealand Experience

On 28 May 2010, the New Zealand Minister for Agriculture, Mr David Carter issued the Animal Welfare (Commercial Slaughter) Code of Welfare 2010 (‘the NZ Code’).

The NZ Code is intended to ‘assist those involved in commercial slaughter to identify and address animal welfare requirements’ by prescribing 24 Minimum Standards for the management and care of animals that are to be commercially slaughtered.

Like the various Australian Codes and Standards regulating the commercial slaughter of animals, Minimum Standard No.6 of the NZ Code relates to the stunning of large mammals.

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It provides that prior to slaughter, all large mammals must be stunned so that they are immediately rendered insensible and must be maintained in that state until death supervenes. This includes a method of stunning resulting in immediate insensibility and death.

However, unlike the Australian Codes and Standards, the NZ Code does not provide for exceptions to the Minimum Standard for stunning in relation to animals that are to be slaughtered for religious purposes. In other words, there is no procedure whereby an NZ abattoir can enter into an ‘approved arrangement’ with the relevant NZ Authority to slaughter animals for halal or kosher meat without prior stunning of those animals.

The Minister’s decision to refuse such an exemption, specifically in relation to the Jewish Shechita method of slaughter, was made against an earlier recommendation of the National Animal Welfare Advisory Committee (‘NAWAC’).

In April 2009, NAWAC had prepared a Report into the then draft NZ Code recommending:

that a dispensation be granted under Section 73 of the Animal Welfare Act 1999 to allow Shechita, the Jewish method of slaughter, to be practised in order to meet the direct needs of the New Zealand Jewish community. This is necessary to allow Jewish people to manifest their religion and belief (as provided for in the New Zealand Bill of Rights Act (1990) and because NAWAC considers that Shechita does not meet the minimum standard for commercial slaughter.56

Following the Minister's decision, representatives of the Orthodox Jewish Communities in Auckland and Wellington instituted proceedings against him in the High Court seeking orders for judicial review of the Minister’s decision to issue the NZ Code without an exemption for shechita slaughter.

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In *Auckland Hebrew Congregational Trust Board v Minister of Agriculture*, the plaintiffs sought leave to cross-examine the Minister for Agriculture on an affidavit he had provided explaining his reasons for issuing the NZ Code without an exemption for shechita slaughter.

In support of their application, the plaintiffs alleged that the prohibition in the NZ Code against shechita slaughter did not fall within the 'justified limitations' provision of the *New Zealand Bill of Rights Act 1990* (NZ) ('the NZ Rights Act'). Section 5 of the *NZ Rights Act* provides:

Subject to Section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The plaintiffs alleged that the practice of shechita was permitted under Sections 13, 14 and 15 of the *NZ Rights Act*. Those sections provide (inter alia) for the freedom of religion and belief, freedom of expression and the right to manifest religious belief or worship, observance, practice or teaching.

Although the plaintiff's application to cross-examine the Minister was ultimately refused, the Minister did include a new Minimum Standard in the NZ Code permitting shechita slaughter. On 10 December 2010, Mr Carter issued 'Minimum Standard 15A' that permitted poultry to be slaughtered without prior stunning.

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57 *Auckland Hebrew Congregational Trust Board v Minister of Agriculture* [2010] NZHC 2185 (25 November 2010).
Issues Informing the Debate

Although statutes such as the New Zealand Bill of Rights Act 1990 and Australian statutes such as the Charter of Human Rights and Responsibilities Act 2006 (Vic) and the Human Rights Act 2004 (ACT) protect freedom of religion and religious practice those freedoms are not absolute.

They are not absolute because the very statutes creating those rights and freedoms also contain exceptions permitting laws to be made that restrict them, where such restrictions can be ‘demonstrably justified in a free and democratic society.’

In these circumstances, the question becomes ‘could an attempt by Commonwealth, State or Territory governments to prohibit the religious slaughter of animals be ‘demonstrably justified in a free and democratic society?’

Those who argue that religious slaughter practices should be prohibited suggest that religious freedom is not an absolute value and that religious rights can be modified or eliminated where it is in the interests of the State to do so. Accordingly, it is argued that religious practices that cause animals pain or death should not be tolerated.

In response, others argue that animal welfare itself is not an absolute value and that the human right to practice one’s religion outweighs any interests, if any, that animals may have.

59 For example - Charter of Human Rights and Responsibilities Act 2006 (Vic), s 7; Human Rights Act 2004 (ACT), s 28
And consistent with the discussion in Part 1 of the thesis, it is suggested that even if society is committed to animal welfare, that commitment must defer to human rights. Accordingly, it is argued that to suggest the issue takes the form of a contest between equal rights holders is mistaken since animals and humans do not have equivalent rights.

It is beyond the scope of this thesis to fully explore all aspects of these ethical and moral issues and I have written about them in more detail elsewhere.62

However, in the debate over whether the Commonwealth, State or Territory governments ‘should’ prohibit the religious ritual slaughter of animals two aspects are prominent; first the issue of whether religious ritual slaughter of animals causes ‘unnecessary pain’ and second the need to balance toleration of religious freedom as an expression of multiculturalism, with Australia’s stated commitment to animal welfare, expressed in the *Australian Animal Welfare Strategy*.63 The first issue tends to be argued on the basis of science while the second provokes moral and ethical argument.

**Scientific Arguments as to Pain and Suffering during Slaughter**

Is it possible to resolve the debate by evaluating which method of slaughter is more painful to the animals? Should religious slaughter practices be prohibited if it can be unequivocally established that religious slaughter methods that do not require stunning cause more pain to animals than general slaughter methods that do require stunning?

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Proponents of religious slaughter argue that killing animals with a sharp knife and permitting them to exsanguinate actually reduces the suffering those animals experience compared with more conventional methods of slaughter involving prior stunning. According to Shechita UK, the cutting of an animal’s throat:

..causes an instant drop in blood pressure in the brain and immediately results in the irreversible cessation of consciousness. Thus, shechita renders the animal insensible to pain, dispatches and exsanguinates in a swift action, and fulfils all the requirements of humaneness and compassion.

Early scientific studies by Levinger, Shore and Grandin suggested that animals slaughtered by Jewish Shechita methods bled out faster than stunned animals and suffered fewer incidents of convulsions when compared with electric bolt stunning.

On these views, the single cut initiates an ‘immediate and irreversible’ drop in cranial blood pressure leading to immediate insensibility to pain. If the claim is true then the animal feels no pain and death is immediate.

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After considering these and particularly Jewish-oriented studies, Lerner and Rabello, scholars from the Ramat Gan School of Law in Israel and the Hebrew University of Jerusalem respectively, concluded:

As long as it is not possible to determine with certainty that the amount of suffering caused by one method is considerably greater than that caused by another...it is difficult to accept any reason whatsoever why kosher shechita should be banned. 69

However, it is important to note that these studies are now almost 20 years old. More recent studies carried out with more advanced medical diagnostic equipment have added a considerable degree of certainty in demonstrating that animals do in fact feel pain when their throats, oesophagus, arteries and veins are cut and then left to bleed out. While the animals cannot bellow in pain (because their throats have been cut), there is evidence that they convulse, choke on their own blood, attempt to stand up after initially collapsing and then thrash about.

Furthermore, electroencephalographic (EEG) studies indicate that there is no ‘immediate drop’ in cranial blood pressure following incision and that it can take up to 2 minutes for an animal to die.

During this time, the animal is fully conscious, in extreme distress and does not quickly bleed out. In 2004, Anil et al were able to contradict Levinger’s earlier study that purported to demonstrate that animals bled out faster when they were slaughtered without stunning.70

Also in 2004, the EU Scientific Panel on Animal Health and Welfare published the findings of its extensive scientific study into the welfare aspects of animal slaughter methods.

The Panel concluded:

Cuts which are used in order that rapid bleeding occurs involve substantial tissue damage in areas well supplied with pain receptors. The rapid decrease in blood pressure which follows the blood loss is readily detected by the conscious animal and elicits fear and panic. Poor welfare also results when conscious animals inhale blood because of bleedings into the trachea.\(^{71}\)

These findings were independently confirmed by a 2009 study ‘A Scientific Comment on the Welfare of Sheep Slaughtered Without Stunning’ undertaken by Professors with Monash University, the University of Melbourne, the Victorian Department of Primary Industries and Massey University in New Zealand. The study concluded:

Taken together the conclusions above indicate that because the slaughter of sheep by ventral-neck cutting without prior stunning is likely to cause pain, slaughter of sheep without stunning poses a risk to animal welfare in the period between the time of the neck cut and the time of loss of awareness.\(^{72}\)

That study demonstrated that pain originated from the sliced nerves in the animal’s throats and were transmitted to the brain despite the loss of blood pressure. As a result, the authors of the study were able to detect brain signals corresponding with pain up to 2 minutes after the animal’s throat was cut.

In other words, more advanced diagnostic medical equipment indicated that there was no instant loss of consciousness or insensibility to pain following the incision through the animal’s throat.


The loss of blood did not prevent pain signals being transmitted to the brain from the nerve endings in the animal's throat. The evidence suggests that the animal remains conscious, aware of their injury and in great pain for up to 2 minutes after their throats had been cut. Award winning co-author of the study, Associate Professor Craig Johnson concluded that their work 'is the best evidence yet that it is painful.'

More recent scientific studies confirm the study's results. For example, a 2009 New Zealand study concluded that there was a period following slaughter where the neck incision represented a 'noxious stimulus'; that is, a pain-causing event. Likewise, a 2010 Royal Veterinary College study demonstrated the agonies suffered by animals whose throats had been cut without stunning for halal meat production.

Significant concerns have also been expressed about the way Australian export cattle are handled and slaughtered in some Islamic nations. According to Animals Australia, some 22 million sheep and cattle have been exported to Kuwait alone over the past 20 years.

Exports of beef and sheep continued to grow throughout 2010 with Australian producers supplying wealthy Islamic nations. Of these Islamic nations, Indonesia is one of Australia's largest importers of live cattle. In 2009, 80% of Australia's cattle exports went to Indonesia.

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78 RSPCA; RSPCA Response to Independent Study, 21 December 2010, 1.
In 2010 Meat and Livestock Australia and LiveCorp commissioned a report into the processing of Australian animals in Indonesia. The Report drew together the observations of four veterinary experts who visited abattoirs on the Indonesian islands of Sumatra and Java over a seven day visit in 2010. The Report discloses horrific cases of animal suffering in the process of ritual halal slaughter:

At an abattoir in Sumatra the neck was cut with a knife using a hard impact to sever the skin above the larynx and then up to 18 cuts were made to sever the neck and both arteries.  

In fact, the Report concluded that it took slaughtermen an average of 4 attempts to sever the animal's trachea, larynx, cartoid arteries and jugular vein while the cattle exhibited signs of distress. The full extent of the abuses associated with the religious slaughter of animals in Indonesia was only revealed after the ABC's 2011 Four Corners Program *A Bloody Business* prompting the temporary suspension of live cattle exports to Indonesia.

There is one theme that consistently emerges from these studies and reports. As human understanding of animal physiology and psychology has increased and as medical technology has become more refined, our understanding of the pain experienced by animals in the slaughter process has become more refined. And that understanding suggests that religious slaughter methods cause more pain and suffering to animals than conventional slaughter methods.

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79 Meat & Livestock Australia, LiveCorp: Live Trade Animal Welfare Partnership 2009 / 10; Final Report; Indonesian Point of Slaughter Improvements; May 2010 at 32.
81 Ibid 37.
Despite this, Lerner and Rabello conclude that the evidence as to the relative pain associated with ritual religious slaughter versus slaughter with stunning, is insufficient to support an argument that religious slaughter should be prohibited. The authors point out that ‘virtually all Jewish authorities are firmly convinced that stunning might even cause more suffering to the animal’.  

These views are supported by Joel Silver’s recent research into the kosher slaughter of animals. Silver argues that all animal slaughter involves some degree of pain and distress. As such, it is unrealistic to speak of ‘humane slaughter’. Instead, Silver argues that strategies intended to ensure risk management intended to reduce suffering should be the goal of regulation.  

Silver concludes that ‘overall the distinct risks of Shechita are manageable.’

If there is insufficient scientific evidence suggesting that it is more probable than not that animals experience more pain and suffering as a result of religious slaughter methods, then are there other non-scientific countervailing reasons why those practices should be prohibited?

**Moral and Ethical Issues**

Whether Commonwealth or State and Territory governments should regulate the practices of religious slaughter of animals is an issue that can only be approached within the context of Australia’s liberal democratic society.

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83 Ibid 682.
Australian society is characterised as pluralistic and multi-cultural. Multicultural democratic societies attempt to accommodate a range of religious and cultural practices, even to the point of tolerating the lifestyles and practices of minority groups that are completely foreign to the majority.

Earlier, it was noted that the animal slaughter practices of the majority of Australian abattoirs mandated by Commonwealth Codes and Standards that require stunning cannot be harmonised with the Jewish tradition and the tradition of some Muslims that require the religious ritual slaughter of un-stunned animals. This inconsistency sits uneasily within Australian society that is attempting to simultaneously improve the welfare of animals through progressive Animal Welfare Acts.

The earlier discussion introducing the Australian Animal Welfare Strategy noted that the Commonwealth government has expressed a commitment to improving the welfare of animals. That Strategy, endorsed by the Primary Industries Ministerial Council, expressly provides:

All animals have intrinsic value. The Australian approach to animal welfare requires that animals under human care or influence are healthy, properly fed and comfortable and that efforts are made to improve their well-being and living conditions. In addition, there is a responsibility to ensure that animals which require veterinary treatment receive it and that if animals are to be destroyed, it is done humanely.84

The growing recognition of the intrinsic value of animals is also reflected in the various State and Territory Animal Welfare Acts that impose both positive and negative duties to care for animals. It is fair to say that one of the values that Australian society is seeking to develop is kindness in the way animals are treated.

However, to what extent is ‘religious freedom’ an absolute value? Does a society’s commitment to religious tolerance justify practices that are cruel to animals? Is it possible for a claim of religious freedom to degenerate into licence to abuse animals? To what extent can society enact animal welfare legislation that functions as either a direct or indirect constraint on the free exercise of religion?

There are many ways in which to evaluate these questions. This Chapter approaches them by investigating the relationship between animal welfare interests and human interests in freedom of religious practice in an explicitly multicultural society. In this way, it is possible to ‘approach the problem of ritual slaughtering (by) describing it as a conflict between two rights-holders, the religious individuals and the animals that are being slaughtered’. 85

Further complicating a moral or ethical evaluation of religious slaughter practices is the recognition that the debate is not just about whether members of the Jewish or Muslim traditions can or cannot eat meat. Rather, it involves ‘the actual freedom to perform shechita since shechita is not simply a way to provide permitted food, but a manifestation of a religious belief and a way of life’. 86

As in all Western democratic societies animals are not granted legal rights under the Australian legal framework; they have the legal status of property. Yet this legal characterisation as property sits uneasily with animals’ undoubted sentience and capacity to feel pain and happiness.

85 Above n 81, 21.
<http://www.governo.it/bioetica/eng/opinions/Ritual_Slaughtering_and_Animal_Suffering_2_4.pdf>
Some European countries such as Germany and Switzerland have attempted to navigate this unease by recognising the inherent worth of animals in their Constitutions.\textsuperscript{87} However, even in those countries, animals are not accorded legal rights and a Swiss proposal in 2010 to provide animals with rights of legal representation failed.

Part 1 of this thesis demonstrated that the source of this reluctance to endow animals with legally enforceable rights stems from the anthropocentrism that underpins Western liberal societies, with the accompanying view that it is the human person who stands at the centre of all considerations.

That view holds it is only human sufferings and preferences that must be taken into account, that it is only humans who are owed direct moral duties because humans are the only beings capable of higher cognitive processes and thus capable of asserting and responding to rights claims.

This distinction between humans and animals as rights holders is therefore the product of a long line of ancient and contemporary thought about animals, the nature of rights and what it means to be a rights holder. And if the primacy of human rights to religious practice prevents the direct prohibition of the religious slaughter of animals, then what of indirect regulation?

Chapter 4, Section IV: Response 2 – Indirect Labelling

Legislation

If Commonwealth, State and Territory governments take the view that attempting to ban these practices through legislation is too contentious, would it be better to leave some of the work to the market, by requiring halal or kosher meat products to be specially labelled? Labelling would have the effect of distinguishing meat from animals slaughtered after stunning from meat produced from animals that have been stunned before slaughtering.

This allows consumer sentiment and ethical choice to influence industry practice. It subtly shifts the emphasis of the argument from cruelty to animals, to issues concerning consumer rights. The question therefore modulates from:

Can the Jewish and Muslim communities legally slaughter according to their rites? (to) Do consumers have the right, if they wish, not to buy and consume meat of animals resulting from non-stunned ritual slaughter? 88

Characterised this way, future arguments about ritual slaughter are not likely to be fought explicitly between religious groups and animal advocates. Instead, the arguments are likely to be fought on the basis of consumer rights and consumer protection. This is the intention of the Labelling Logic Report.

However, this approach comes with its own set of complexities. On the one hand, legally requiring halal / kosher meant to be labelled would differentiate this type of meat from other forms of meat. But could this be construed as a form of religious discrimination?

On the other hand, why shouldn't consumers be entitled to exercise free, ethical choices when purchasing meat?

This matter has caused heated debate in the European Union and the United Kingdom and is a debate yet to be navigated by the Commonwealth, State and Territory governments. At its October 2011 meeting, the Primary Industries Ministerial Council avoided these difficult issues. Instead, it opted for 'continued discussions' in the search for 'an applicable risk management framework'.<sup>89</sup> Such a framework has yet to be created.

**Halal and Kosher Meat in General Circulation – The United Kingdom Experience**

In both the European Union and the United Kingdom, halal and kosher meat has found its way into general consumer circulation. In June 2003, the UK Farm Animal Welfare Council ('FAWC') published its *Report on the Welfare of Farmed Animals at Slaughter or Killing, Part 1: Red Meat Animals*. It outlined the following concern:

> During our consultations concern was expressed to us about meat from animals slaughtered without pre-stunning (including meat from the hindquarters of some animals and meat from rejected animals) being placed, unidentified, on the open market rather than being consumed by the Jewish community.<sup>90</sup>

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In September 2010, a UK media investigation revealed that schools, hospitals, hotels and some famous sporting venues such as Ascot and Wembley were routinely serving halal and kosher meat to the general public.\(^9\) This investigation ignited fierce public debate.

As a result of this investigation, the UK House of Commons, Science and Environment Section produced a ‘Standard Note’ to Members of Parliament detailing further examples of the general distribution of halal and kosher meat.\(^9\) In response, several meat labelling proposals were considered.

At the time of writing this thesis, the Under-Secretary of State for the United Kingdom Department for the Environment, Food and Rural Affairs has indicated that the UK government is considering domestic legislation that would require the labelling of meat products from animals slaughtered without stunning.\(^9\)

In fact, in May 2012, the Member of Parliament for Shipley introduced the *Food Labelling (Halal and Kosher Meat) Bill* into the UK Parliament. The Bill would have required meat products derived from animals slaughtered according to religious ritual to be identified as halal or kosher. The Bill was intended to provide consumers with sufficient information about halal and kosher meat so that they could make an informed choice before purchasing their meat products.


However, the Bill was defeated by a narrow margin of three votes on the basis of allegations of religious discrimination. In attacking the Bill, Labour politician Sir Gerald Kaufman criticised the MP for targeting Muslims and Jews. Sir Gerald, who is Jewish, stated:

This has profound connotations of religious feelings and I would be letting my own faith down, my family, I would be letting my many, many good decent, fine religious Muslims in my constituency down if I did not state my total opposition to this bill.

There is little reasoning in this objection. It is an emotional appeal to religious feeling.

**European Union Labelling Initiatives**

The issue of labelling meat from animals slaughtered by halal or kosher methods was also of significant concern to the European Parliament. In June 2010, it voted to introduce new food labelling laws. On the Proposal for a Regulation of the European Parliament and of the Council on the Provision of Food Information to Consumers, (‘the EU Resolution’) contained ‘Amendment 205’ which required that meat and meat products derived from animals that had been ritually slaughtered, without prior stunning, to be labelled as such. The stated intention behind Amendment 205 was:

EU legislation permits animals to be slaughtered without prior stunning to provide food for certain religious communities. A proportion of this meat is not sold to Muslims or Jews but is placed on the general market and can be unwittingly purchased by consumers who do not wish to buy meat derived from animals that have not been stunned. At the same time, however, adherents of certain religions specifically seek meat from animals which have been ritually slaughtered.

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95 Ibid.
Accordingly, consumers should be informed that certain meat is derived from animals which have not been stunned. This will enable them to make an informed choice in accordance with their ethical concerns.96

Similar to the defeated United Kingdom Food Labelling (Halal and Kosher Meat) Bill, the motivation behind Amendment 205 was to provide sufficient information to consumers to allow them to make informed purchasing decisions consistent with their own ethical values.

Accordingly, what was at issue was labelling, not the ability of European Member States to prohibit the slaughter of animals for religious purposes without stunning. Article 18 of EC Directive No 1099/2009 (24 September 2009) recognises that:

Since Community provisions applicable to religious slaughter have been transposed differently depending on national contexts and considering that national rules take into account dimensions that go beyond the purpose of this Regulation, it is important that derogation from stunning animals prior to slaughter should be maintained, leaving, however, a certain level of subsidiarity to each Member State. As a consequence, this Regulation respects the freedom of religion and the right to manifest religion or belief in worship, teaching, practice and observance, as enshrined in Article 10 of the Charter of Fundamental Rights of the European Union.97

However, European Jewish and Islamic Groups initiated a well-organised campaign against Amendment 205 alleging that it discriminated against religious practice as part of a unspecified ‘pan-European bias against Islam’.98

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The campaign was initially successful and at its December 7, 2010 meeting the EU Council of Ministers rejected Amendment 205.99

However, the debate continues with the European Parliament Committee on the Environment, Public Health and Food Safety voting on 19 April 2011 for amendments to the EU Regulation on the Provision of Food Information:

(50) Union consumers show an increasing interest in the implementation of the Union animal welfare rules at the time of slaughter, including whether the animal was stunned before slaughter. In this respect, a study on the opportunity to provide consumers with the relevant information on the stunning of animals should be considered in the context of a future Union strategy for the protection and welfare of animals.100

Adding to the labelling impetus is the European Union Strategy for the Protection and Welfare of Animals 2012 – 2015 ('the Strategy') issued in February 2012.101 Like other legislative initiatives, the emphasis throughout the Strategy is on the provision of sufficient information to enable consumers to make informed choices. No-where does the Strategy attempt to prohibit religious slaughter practices.

In support of its aims, the Strategy anticipates the use of EU legislation to combat misleading statements associated with animal welfare claims in promoting animal food products:


100 (Regulation (EU) No 1169/2011)

Animal welfare is also a consumer concern. Animal products are widely used, in particular in the context of food production and consumers are concerned about the way animals have been treated. On the other hand, consumers in general are not empowered to respond to higher animal welfare standards. It is therefore relevant to inform EU consumers about the EU legislation applicable to food producing animals and to ensure that they are not deceived by misleading animal welfare claims.\(^{102}\)

However, the relationship between the Strategy and the religious slaughter of animals is not at all clear. Although there is a cryptic reference in the Annexe to the Strategy to a ‘study on the opportunity to provide consumers with the relevant information on the stunning of animals’, nothing more is stated.\(^{103}\)

From 1 January 2013, a new EC Regulation concerning the slaughter of animals will come into effect. Council Regulation (EC) 1099/2009 affirms the general requirement that animals be stunned prior to slaughter but nevertheless permits derogations for the religious slaughter of animals. Thomas Kelch has undertaken an analysis of the implications of this new EC Regulation and, in colourful language, demonstrates how little protection is actually afforded to animals that are to be slaughtered according to religious practices.\(^{104}\)

How might Australian governments navigate these deeply divisive issues?

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\(^{102}\) Ibid 10-11, [3.4.]

\(^{103}\) Ibid 12.

Food standards and labelling regulation in Australia is very complex involving a network of *Intergovernmental Agreements, Codes, Legislative Instruments, Standards* and other policy documents enforced throughout New Zealand, the Australian Commonwealth government and State and Territory governments.

Although it is well beyond the scope of this thesis to explain and then evaluate this Trans-Tasman cooperative regime, a brief explanation is necessary in demonstrating how potentially misleading or deceptive animal welfare claims on food labels might be regulated through the ACL.

The starting point is the *Australia New Zealand Food Standards Code* ('the Food Code') administered through *Food Standards Australia New Zealand* ('FSANZ'). The Food Code itself is not a legislative document. However the Food Code includes certain *Food Standards* ('the Standards') that are given legal status as legislative instruments under the *Legislative Instruments Act 2003* (Cth). Industry compliance with the Standards is therefore mandatory.

In Australia, the Standards are then reinforced through the *Food Standards Australia New Zealand Act 1991* (Cth) ('the FSANZ Act') intended to prevent misleading and deceptive conduct by ensuring that consumers have adequate information to make informed food choices. 105 Actual day-to-day responsibility for the Standards is shared across the Commonwealth, State and Territory governments through a series of *Intergovernmental Agreements* assigning responsibility between the Commonwealth *Department of Agriculture, Forest and Fisheries*, the *Australian Quarantine Inspection Service* and State and Territory *Primary Industries or Health Departments*.

105 *Food Standards Australia New Zealand Act 1991* (Cth), s 3(c).
Importantly, enforcement of the Standards is the joint responsibility of the Australian Competition and Consumer Commission (‘the ACCC’) under the ACL and the Australian Quarantine Inspection Service (‘AQIS’).\(^{106}\)

In this way, the Commonwealth government anticipates misleading or deceptive conduct associated with food labelling to be dealt with at the Commonwealth level by the ACCC and at State and Territory levels by relevant Fair Trading Departments through the ACL as it applies in their jurisdiction.\(^{107}\)

In Australia a major Commonwealth Government Review into food labelling laws was recently concluded. On 23 October 2009, the Council of Australian Governments (COAG) and the Australia and New Zealand Food Regulation Ministerial Council (Ministerial Council) agreed to undertake a comprehensive review of food labelling law and policy. This is the review that resulted in the Labelling Logic Report.

After the first round of consultations during which it received over 6000 public submissions, the Review Panel issued its Issues Consultation Paper on 5 March 2010 (‘the Consultation Paper’) and invited further submissions.\(^{108}\)

Question 17 of the Consultation Paper asked whether ‘there is a need to establish agreed definitions of terms such as ‘natural’, ‘lite’, ‘organic’, ‘free range’, ‘virgin’ (as regards olive oil), ‘kosher’ or ‘halal’? If so, should these definitions be included or referenced in the Food Standards Code?’\(^{109}\)


\(^{109}\) Ibid 6.
The *Labelling Logic Report* released in January 2011 concluded:

> Halal and Kosher are two religiously based specific consumer values claims relating to food preparation and production processes. At this time, alert and informed communities and monitoring by authoritative religious bodies appear to provide the discipline necessary for effective self-regulation. Additional regulation may be considered in the future if monitoring indicates that this self-regulatory approach is ineffective.\(^{110}\)

However, in relation to consumer values issues relating to specific food production methods (including religious slaughter methods) the *Labelling Logic Report* did recommend the Commonwealth government adopt specific values-based definitions in the *Food Standards Code* in order to achieve consistency of definitions.\(^{111}\)

This recommendation was rejected by the Commonwealth government in its December 2011 Response. Instead, the Commonwealth stated that where regulation concerning labelling representations was needed, the mechanisms in the *Competition and Consumer Act 2010* (Cth) were more appropriate to the task.\(^{112}\)

Accordingly, responsibility for the correct labelling of meat that is produced from animals slaughtered by either halal or kosher methods is left to industry participants themselves. Where it is alleged that misleading or deceptive information is contained on labels on meat products derived from animals that have been slaughtered according to religious rituals, then the Commonwealth government anticipates that the matter will be evaluated under the *Competition and Consumer Act 2010* (Cth) and more specifically, under the ACL.


\(^{111}\) Ibid, Recommendation 36, 12.

It would also follow that retailers lower down in the supply chain to whom producers supply the meat may also be liable for misleading or deceptive in relation to incorrectly labelled meat products they sell.

Given the experience in both the European Union and the United Kingdom described earlier in this Chapter, is there evidence that halal or kosher meat has found its way into general circulation in Australia? Recent media investigations suggest that this is the case.\(^{113}\)

If so, should consumers have the right to be able to choose meat from animals slaughtered according to halal or kosher methods as distinct from meat from animals slaughtered after being stunned?

At least one Australian State has attempted to introduce very specific meat labelling laws that relate to halal and kosher meat products, although stopping short of actually requiring halal or kosher meat products to be labelled as such.

**New South Wales Meat Labelling Legislation**

Apart from the Commonwealth *Labelling Logic Report*, the New South Wales Government has enacted a more specific form of labelling law; the *Food Amendment (Beef Labelling) Act 2009 (NSW)* ("the NSW Food Amendment Act"), which came into effect from 31 August 2010. The *NSW Food Amendment Act* is intended to be 'a ‘truth in labelling’ initiative and not a meat grading scheme. Introducing standard beef descriptions is intended to help consumers know more about the beef they’re buying.'\(^{114}\)

\(^{113}\) *Today Tonight Report* Halal Chicken 28 January 2011

Regulations issued pursuant to s 23A of the *NSW Food Amendment Act* prescribe the AUS-MEAT Domestic Retail Beef Register ("the AUS-MEAT Register") for the purposes of beef labelling requirements.

A person who does not comply with the requirements of the AUS-MEAT Register or, who does so inconsistently, engages in misleading or deceptive conduct in breach of s 23B of the *NSW Food Amendment Act*.

AUS-MEAT Limited is in fact a joint venture company created by Meat and Livestock Australia and the Australian Meat Processor Corporation. It is therefore an industry-owned corporation.\(^{115}\) The AUS-MEAT Register (2\(^{nd}\) edition issued on 12 July 2010) establishes minimum mandatory descriptions for the labelling of beef products that are to be supplied into the retail market. This includes beef from animals that have been slaughtered pursuant to religious ritual slaughter. Clause 5.3 of the AUS-MEAT Register provides:

> Where beef product is advertised, packaged or labelled as being Halal or Kosher, a retail business must substantiate, where applicable, that beef products that have been processed in accordance with the appropriate ritual slaughter procedure as set out in the *Australian Standard for the Hygienic Production & Transportation of Meat and Meat Products for Human Consumption* (AS 4696:2007).\(^ {116}\)

Under the AUS-MEAT Register, there is no *general* requirement for beef processors to distinguish beef that has been slaughtered for halal or kosher purposes. However, where a beef processor does sell beef alleged to be ritually slaughtered according to halal or kosher religious rituals, that processor must substantiate that claim.


\(^{116}\) *AUS-MEAT Domestic Retail Beef Register* 2\(^{nd}\) Ed, 12 July 2010, cl 5.3, 9.
It is important to note is that cl 5.3 of the AUS-MEAT Register requires a beef processor not just to substantiate that animals have been slaughtered for halal or kosher purposes, but that the animal has been slaughtered in accordance with the appropriate ritual slaughter procedure as set out in the *Australian Standard for the Hygienic Production & Transportation of Meat and Meat Products for Human Consumption* (AS 4696:2007).

The requirement imposed by cl 5.3 raises confusing issues and two circumstances reveal its ambiguity. First, what is the situation where there is a failure to label meat in a way that informs consumers / enables consumers to make an informed choice about the meat they purchase? And second, what is the situation where an abattoir has an ‘approved arrangement’ to slaughter animals without stunning them? Does this departure require noting on the label?

Would either of these situations amount to misleading or deceptive conduct in breach of s 23B of the *NSW Food Amendment Act* 2010? It is well established that silence; that is, failure to inform can amount to misleading or deceptive conduct.\(^{117}\) It follows that such situations might also give rise to misleading or deceptive conduct, in breach of s 18 of the *Australian Consumer Law*.

These are the questions explored in Part 3 of this thesis.

Notwithstanding the experience in the European Union and the United Kingdom, Commonwealth and State meat labelling initiatives would appear to be a more realistic regulatory response to concerns relating to the practice of the religious slaughter of animals.

Labelling initiatives shift the emphasis of the debate away from the outright prohibition of religious slaughter.

In doing so, the issues at stake go beyond human rights versus animal rights and freedom of religious practice versus animal welfare. Rather, the emphasis shifts to one of consumer choice. Religious slaughter of animals may continue, but labelling initiatives will enable consumers to make an informed choice about the meat products they choose to buy.

Silver argues that labelling kosher and halal meat as ‘slaughtered-without-stunning’ may be discriminatory. Silver argues that ‘if labelling is about consumer’s rights to information, surely the state must provide all relevant information. Indeed, if kosher and halal meat are singled out, it might simply promote social stigma and allow consumers to act upon their misconceptions.‘

These arguments are unconvincing. To suggest that unless all information is provided then no information should be provided, ignores the necessarily selective nature of product labelling. Silver is correct in pointing out that all methods of animal slaughter involve suffering, but religious slaughter involves slaughter procedures that differ from those prescribed by the Australian government.

Such practices also involve the production of food according to religious traditions not shared by a majority of Australian citizens and slaughter practices whose cruelty I suggest is not beyond reasonable doubt given the more recent medical studies discussed earlier.

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In these circumstances, I would argue that Australian consumers do have an interest in being able to choose whether to buy meat products from animals slaughtered according to Islamic or Jewish practices, especially where those practices are contrary to the generally accepted requirements for animal slaughter in Australia. It is not a matter of discrimination, because these practices are not prohibited. Rather, it is about consumer choice.

Conclusion: A ‘Golden Era of Australian Agriculture?’

When the Australian Prime Minster recently remarked that increasing demand for animal food products heralded ‘the potential for a new golden era of Australian agriculture given the rise of Asia’¹¹⁹ she was confident that Australian primary industries could satisfy future demand.

The Prime Minister’s faith appears well founded. Large vertically integrated corporations managing Concentrated Animal Feed Operations (‘CAFOs’) throughout Australia will attempt to realise even higher productivity gains from the animals they process.

Under the profit-oriented Primary Industries Ministerial Council, now SCoPI, existing Model Codes of Practice and future Animal Standards will continue to permit the handling and exploitation of animals in ways that subordinate animal welfare to the pursuit of productive efficiency.

Chapter 1 demonstrated how animals in these CFAOs are commodities, units of production intended to maximise the profit of agricultural corporations as they exploit emerging world markets, satisfying increasing consumer demand for food animal products.

While the Commonwealth *Australian Animal Welfare Strategy* purports to encourage the welfare of animals, State and Territory governments work under the PIMC structure to produce MCOPs and Animal Standards that permit animal husbandry practices that would otherwise be illegal under State and Territory *Animal Welfare Acts*. These exemptions assist SCoPI / PIMC in fulfilling its stated policy objective of ensuring efficient and profitable primary industries.

While food animals generally experience conditions that cause suffering, the experience of animals that are slaughtered according to religious practices is potentially even worse. This is because Australian law permits animals that are to be slaughtered according to kosher and halal ritual to remain un-stunned and fully conscious while being slaughtered.

Chapter 4 demonstrated how Australian governments have yet to adequately address the difficult legal, religious and philosophical issues associated with attempts to regulate the practice of the religious ritual slaughter of animals.

Although it has been aware of the animal welfare issues discussed in this Chapter for at least the last five years, at its October 2011 meeting, the Primary Industries Ministerial Council (now *Standing Council on Primary Industries*) avoided resolving these difficult issues. Instead, it opted for ‘continued discussions’ in the search for ‘an applicable risk management framework’.

But what does ‘an applicable risk management framework’ actually mean?

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At least two regulatory responses are possible; (a) the elimination of the practice of religious slaughter of animals and (b) food labelling initiatives and the use of the ACL to prohibit misleading or deceptive conduct that would enable consumers to make informed decisions about the meat products they intend to purchase.

Evaluating these potential responses in light of the Australian constitutional and statutory framework protecting freedom of religion and religious practice and in light of the difficult experiences of similar regulatory initiatives in the European Union, the United Kingdom and New Zealand involves difficult and potentially divisive issues. Similar attempts in the European Union and New Zealand were defeated through appeals to international and domestic human rights instruments protecting freedom of religion.

Consequently, and despite recent and more sophisticated scientific studies suggesting that animals experience more pain when slaughtered by religious ritual, it is very unlikely that the Commonwealth, State and Territory governments would attempt to prohibit the practice by direct legislative means.

Although Western societies are increasingly aware of issues associated with the treatment of animal interests and welfare, the discussion in Part 1 of this thesis demonstrated that there is no philosophical consensus attributing rights to animals that would displace recognised human rights claims of freedom of religious practice.

It is for this reason that the second regulatory response, meat labelling legislation and the use of the ACL to prohibit misleading or deceptive conduct associated with labelling claims are potentially more realistic strategies.
In fact, the framework for a regulatory approach based on preventing misleading or deceptive conduct was already anticipated by the Commonwealth and some State governments before the introduction and national application of the ACL. At the Commonwealth level, the *Food Standards Australia New Zealand Act 1991* (Cth) is intended to prevent misleading and deceptive conduct by ensuring that consumers have adequate information to make informed food choices.\(^{121}\)

At the State level, and at least in New South Wales, the *Food Amendment (Beef Labelling) Act 2009* (NSW) and associated prescribe the AUS-MEAT Domestic Retail Beef Register for the purposes of beef labelling requirements.

Despite these separate Commonwealth and State legislative schemes preventing misleading or deceptive conduct in relation to meat labelling, the relevant prohibitions in fact mirror the terms of the former s 52 of the Commonwealth *Trade Practices Act 1974* (Cth). And while separate jurisdiction-specific legislation may have been considered necessary in order to overcome the lack of a national consumer protection regime, the coming into effect of the ACL on 1 January 2011 as part of the *Competition and Consumer Act 2010* (Cth) changes the regulatory landscape.\(^{122}\)

Section 18 of the ACL, generally prohibiting misleading or deceptive conduct in trade or commerce and s. 33 of the ACL prohibiting specific misrepresentations about the nature, manufacturing process or the characteristics of goods applies to corporations as a law of the Commonwealth and equally to unincorporated entities through reciprocal State and Territory application legislation.\(^{123}\)

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\(^{121}\) *Food Standards Australia New Zealand Act 1991* (Cth), s 3(c).


From 1 January 2011, Australia now enjoys a national consumer protection regime that (inter alia) prohibits general and specific forms of misleading or deceptive conduct. The *Labelling Logic Report* requires an evaluation of whether it is possible for the ACL to be enforced to prevent producers making misleading statements about the conditions in which meat and egg products are produced. Can the ACL is enforced to require meat produced through the religious slaughter of animals to be clearly identified so that consumers can choose whether to buy those products?

These initiatives shift the emphasis of the debate away from arguments about well-established human rights claims versus uncertain animal rights and freedom of religious practice versus animal welfare to one of consumer choice.

The slaughter of animals according to religious rituals may continue, but labelling initiatives and the strategic use and enforcement of the ACL will enable consumers to make informed choices about the meat products they choose to buy.

The use of the ACL may also prevent misleading or deceptive claims associated with more general food animal products such as eggs and discussed in the previous Chapter. While early indications from the Federal Court suggest that the ACL can be deployed in this way, Part 3 of this thesis now explores the theoretical and legal basis for deploying the ACL in this way.
Part 3 - The Australian Consumer Law

Animals as Beneficiaries of Competition and Consumer Policy?

Introduction

Confined in Concentrated Animal Feedlot Operations ('CAFOs'), packed tightly into layer upon layer of cages to produce eggs and sometimes slaughtered without prior stunning, the welfare of cattle, chickens and pigs is subordinated to the economic profit of the few dominant corporations in Australia supplying food animal products to consumers.¹

These corporations are assisted by the Primary Industries Ministerial Council ('PIMC') whose stated goal is 'to develop and promote sustainable, innovative and profitable industries in these commodities.'² Issued under the auspices of SCoPI / PIMC, Commonwealth Model Codes of Practice ('MCOPs'), Australian Welfare Standards and other Policies relating to chicken, cattle and pigs permit animal husbandry practices that are intended to facilitate the profitable production of food animal products.

While some of these animal husbandry practices, discussed in Part 2 of this thesis are clearly cruel, they are largely beyond the reach of State and Territory Animal Welfare Acts. Exceptions have been created permitting practices that would otherwise fall within the definition of cruelty or aggravated cruelty potentially exposing CAFO or battery hen farmers to criminal prosecution.³

¹ Alex Bruce, Animals as Food, Chapter 9 in Animal Law in Australia: An Integrated Approach, (LexisNexis Butterworths, Australia, 2012) 221.
³ Alex Bruce, Animals and Cruelty, Chapter 8 in Animal Law in Australia: An Integrated Approach, (LexisNexis Butterworths, Australia, 2012) 197.
Although Western societies are increasingly aware of welfare issues associated with the treatment of animals, the discussion in Part 1 of this thesis demonstrated there is no philosophical consensus attributing rights to animals that would support direct legislative initiatives ending the economic exploitation of them.

And legislative attempts in the European Union, the United Kingdom and New Zealand to either displace or regulate the religious slaughter of animals have foundered against human rights claims of freedom of religious practice recognised by domestic Constitutions or International Human Rights Instruments.4

Instead of directly legislating to prohibit certain animal husbandry practices and slaughter without prior stunning, Part 2 of this thesis explained how Australian governments are intending to indirectly regulate food animal products through consumer legislation prohibiting misleading or deceptive conduct. The ACL has suddenly been invested with a significant responsibility.

Why the ACL Has Assumed a Greater Profile

In its December 2011 Response to the Labelling Logic Report, the Commonwealth affirmed this approach; that consumer value issues (such as animal welfare and religious issues) associated with food animal products were best regulated through the mechanisms in the Competition and Consumer Act 2010 (Cth).5

The decision to employ the ACL in this way is consistent with earlier
Commonwealth regulatory initiatives such as the *Food Standards Australia
New Zealand Act 1991* (Cth) intended to prevent misleading and deceptive
conduct by ensuring that consumers have adequate information to make
informed food choices.⁶

It is also consistent with State government initiatives such as the New
South Wales, *Food Amendment (Beef Labelling) Act 2009* and associated
Regulations that prescribe the AUS-MEAT Domestic Retail Beef Register for
the purposes of beef labelling requirements prohibiting misleading or
deceptive statements made on meat product labels.

However, the unstated assumption behind this policy of preventing
deception associated with food labels involves the effective operation of
market forces of supply and demand. It assumes that market dynamics will
facilitate consumers’ desires for accurate information about welfare
friendly food animal products.

In an increasingly competitive market for food products, it is anticipated
that consumer demand for ethically produced animal products will signal
producers to implement food animal welfare practices such as free-range
farms.⁷ In attempting to satisfy this consumer demand, food animal
products accentuating animal welfare will be subject to careful scrutiny
under the misleading or deceptive conduct provisions of the ACL. Product
differentiation based on food animal welfare claims requires careful
substantiation.⁸

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⁶ *Food Standards Australia New Zealand Act 1991* (Cth), s 3(c).
⁷ *Food Labelling Law and Policy Review Panel, Labelling Logic: Review of Food Labelling
⁸ In its *Food Labelling Guide*, the ACCC warns that it has ‘become increasingly concerned
about representation on the labels, packaging and advertisements of food and beverage
It might have been thought that prior to 1 January 2011, the lack of a national consumer protection regime required separate jurisdiction-specific legislation preventing misleading or deceptive conduct. However, the coming into effect of the ACL on 1 January 2011 as part of the Competition and Consumer Act 2010 (Cth) changes the regulatory landscape.\(^9\)

This is why the Commonwealth government’s response to the Labelling Logic Report does not emphasise State legislation such as the NSW Food Amendment (Beef Labelling) Act 2009 or State or Territory Fair Trading Acts. Instead, the focus is on the ACL.\(^10\)

Section 18 of the ACL, generally prohibiting misleading or deceptive conduct in trade or commerce applies to corporations as a law of the Commonwealth and equally to unincorporated entities through reciprocal State and Territory application legislation.\(^11\)

**Two Important Threshold Questions**

However the efficacy of the ACL in preventing misleading or deceptive conduct in relation to food animal product labelling and whether in doing so it will encourage suppliers to improve food animal welfare, rests upon satisfactory answers to two sets of important but related questions. Both sets of questions concern the ability of consumers to influence the animal welfare practices of suppliers of food animal products.

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The first set of questions relate to the theoretical relationship between consumers and their role in the market, the role of consumer protection legislation such as the ACL and food animal welfare. Jeff Leslie and Cass Sunstein confidently suggest that ‘many consumers would be willing to pay something to reduce the suffering of animals used as food'.\footnote{12} Does the literature actually support this suggestion? What exactly is the relationship between consumer protection legislation such as the ACL, consumer buying power and food animal welfare?

And even if there is a relationship how do consumer spending patterns actually influence food animal welfare practices?

In answering these questions, Chapter 5 explores two key aspects of consumer protection theory. Section I explores the way in which consumer protection law and policy is intended to benefit consumers by empowering them to make informed purchasing decisions. It discusses the concept of ‘consumer sovereignty'.

This discussion takes place in the context of the policy approach expressed by the Commonwealth government in its \textit{Labelling Logic Report}\footnote{13} that assumes, at least in theory, if consumers are provided with sufficient information about food animal products, their spending patterns will signal suppliers about associated food animal welfare issues. These are the ‘consumer values issues’ referred to in the \textit{Labelling Logic Report}.

Section II then considers whether consumers, once informed by suppliers about animal welfare issues associated with the food products they are buying are \textit{actually willing}, as Leslie and Sunstein suggest, to pay a price premium to reduce the suffering of animals used as food.

If there is no evidence of this willingness, then even if the ACL is effectively enforced, its capacity to influence suppliers to introduce food animal welfare initiatives will likely be minimal.

However, if the theoretical relationship between consumers, consumer protection legislation and food animal welfare can be established, the second set of questions relate to the legal implementation of that relationship.

In its Labelling Logic Report, the Commonwealth government has clearly signalled its intention for consumer values issues such as animal welfare claims, to be regulated through consumer protection legislation such as the ACL.\textsuperscript{15}

Given the significant consumer protection role expected of the ACL, it is necessary to address several practical legal questions. Does the case law permit an interpretation of ACL s 18 in ways that would prevent producers making misleading statements about the conditions in which meat and egg products were produced? Does the case law permit an interpretation of ACL s 18 in ways that would require meat produced through the religious slaughter of animals to be clearly identified so that consumers can choose whether to buy those products?

The answers to these questions are explored in Chapter 6 and involve an analysis of case law relating to two circumstances of alleged misleading or deceptive conduct; ‘positive’ conduct relating to actual statements made on existing food animal product labels and ‘negative’ conduct relating to the failure to provide specific information on food animal product labels.

\textsuperscript{15} Ibid 49, [3.22].
The analysis in Chapter 6 proceeds by way of a hypothetical scenario involving litigation instituted by the *Australian Competition and Consumer Commission* ('the ACCC') against a national retailer of food animal products.

This approach follows the suggestion of Justice Kirby in 'conceptualising the case' for the purposes of evaluating the merits of an argument where the conceptual bases of arguments for and against a position are expressed at their highest level.\(^\text{16}\)

Throughout Chapter 6, the interaction between the facts of the hypothetical litigation and relevant legal principles enable an evaluation of the ability of the ACL to address the consumer values issues identified by the *Labelling Logic Report*.

Chapter 6 Section I initially introduces the ACL. The national application of the ACL is an important element of the Commonwealth's *Labelling Logic* policy where the Review Panel recommended that because 'national enforcement options have been expanded as a result of recent changes to consumer laws' the ACCC should accord a high priority to concerns associated with food labelling.\(^\text{17}\)

It is therefore important to explain how the ACL is applied throughout all Australian jurisdictions thereby avoiding the need for separate jurisdiction-specific legislation preventing misleading or deceptive conduct.

Section II introduces the facts and particulars of hypothetical litigation instituted by the ACCC against a national retailer of food animal products. This hypothetical litigation functions as an analytical device against which the effectiveness of the ACL can be evaluated.


\(^{17}\) Above n 13, 136, [8.17].
This evaluation begins in Section III as it investigates whether and to what extent the ACL can then be applied by Courts to address claims of alleged misleading or deceptive conduct associated with food animal labels.

In doing so, it explores the methodology established by the Court in *Taco Co of Australia Inc v Taco Bell Pty Ltd*\(^\text{18}\) ("Taco Bell") in evaluating whether conduct is misleading or deceptive or likely to mislead or deceive in breach of ACL s 18. It demonstrates how the consistent approval of the *Taco Bell* principles has enabled Courts to create an evaluative framework in evaluating allegedly misleading conduct.

Section III demonstrates how recent decisions in *Australian Competition and Consumer Commission v C.I. & Co Pty Ltd*\(^\text{19}\) and *Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 2)*\(^\text{20}\) involving specific representations about food animal welfare illustrate the capacity of the ACL to prevent misleading or deceptive welfare claims on animal food products.

However, those decisions are not directly relevant to allegations of a failure to disclose animal-welfare information to consumers.

Section IV therefore explores the difficult legal question of whether and to what extent the ACL can be interpreted to address claims of alleged misleading or deceptive conduct associated with the failure to provide consumers with specific information on food animal product labels relevant to the religious slaughter of animals. Do consumers have a right to be informed whether the meat products they are buying have come from animals that have not been stunned prior to slaughter? Does the failure to inform consumers of this lack of stunning constitute misleading or deceptive conduct by omission in breach of the ACL?

\(^{18}\) *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 24 ALR 177.

\(^{19}\) *Australian Competition and Consumer Commission v C.I. & Co Pty Ltd* [2010] FCA 1511 (23 December 2010).

\(^{20}\) *Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 2)* [1012] FCA 19 (2 December 2011).
In evaluating these issues, Section IV commences by examining the methodology established by the decision of the High Court in *Campomar Sociedad Ltd v Nike International Ltd*21 ("Campomar") in identifying the qualities of the hypothetical consumer against whom allegedly misleading or deceptive conduct is evaluated.

Whether in the circumstances, there was a reasonable expectation that meat from animals slaughtered according to religious ritual, that is, unstunned animals would be disclosed, the qualities of the hypothetical representative member of the class of consumers will be critical.22

Although Section IV provides the theoretical foundations for an argument that a failure to disclose these facts will breach the ACL, it concludes that given the current state of legal uncertainty associated with silence as misleading or deceptive conduct, the argument fails.

Part 3 of this thesis therefore concludes that the ACL can be interpreted and enforced against suppliers of food animal products who engage in misleading or deceptive conduct in relation to positive statements made on food labels. However, claiming that a failure to provide consumers with information relating to the slaughter of food animals breaches the ACL fails.

Accordingly, Part 3 of this thesis concludes that the Commonwealth government's intended policy in regulating consumer values matters, including animal welfare and religious slaughter issues set out in the *Labelling Logic Report* may be limited at best.

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Chapter 5

The Sovereign Consumer

Introduction

In 2006, then Commissioner John Martin of the Australian Competition and Consumer Commission (‘ACCC’) launched the first edition of the ACCC’s *Food and Beverage Labelling Guidelines*. The Guidelines are intended to assist food and beverage providers in understanding the implications of the law relating to misleading or deceptive conduct.

Commissioner Martin made two important points during his presentation that are relevant to the discussion in Part 3 of this thesis. First, Commissioner Martin noted that ‘consumers are becoming increasingly sophisticated and discerning. They are demanding products that offer health benefits, are fresher or are Australian produced’. Second, he noted that ‘products that can highlight such benefits have a better chance of standing out from the pack and grabbing the attention of shoppers on crowded shelves. But this creates temptation for producers and their marketers to ‘push the envelope’ and in some cases break the law in an effort to gain an edge over the competition’.

Over the last five years, Australian consumers *have* become more discerning about the way in which food animals are treated.

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24 Ibid 3.
25 Ibid.
This concern is reflected in both informal and industry sponsored consumer surveys as well as the purchasing decisions made by governments and private corporations supplying food animal products to consumers.

For example, in September 2008, the InterContinental Hotels Group, which owns the Crowne Plaza Canberra, the National Convention Centre and Parliament House Catering Services, announced that it would alter its purchasing decisions to buy eggs pursuant to the Choose Wisely Campaign.27

The same month, the Australian Capital Territory Government announced that by May 2009, ‘all ACT Government agencies including our hospitals, correctional facilities, CIT campuses and schools, will use barn laid or free-range eggs’ pursuant to the RSPCA’s Choose Wisely Campaign.28

And in its 2012 – 2013 Budget, the Tasmanian government introduced the Intensive Animal Farming Development Program under which $2.5 million will be spent over two years in phasing out battery-hen farms and the use of sow stalls.29 In introducing these food animal welfare initiatives, the Tasmanian Treasurer specifically noted that ‘changes in market and consumer demand’ motivated the Budget initiatives.30

Producers and suppliers are also beginning to recognise consumers’ concerns and are attempting to differentiate their food animal products on the basis of animal welfare.

26 These informal and industry-sponsored surveys are discussed below.
28 Ibid.
30 Ibid 12.
Unfortunately, the decisions of the Federal Court in *Australian Competition and Consumer Commission v C.I. & Co Pty Ltd*,\(^{31}\) and *Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 2)*\(^{32}\) confirm Commissioner Martin's fears that in doing so, some producers will attempt to take advantage of these concerns by labelling food animal products in ways that deceive consumers about welfare issues.

However, even if food animal products are accurately labelled, what exactly is the relationship between consumer protection legislation such as the ACL, consumer buying power and food animal welfare? And if this relationship is established then how might consumer spending patterns actually influence food animal welfare? Chapter 5, Section I answers these questions by exploring the concept of consumer sovereignty. It explores the way in which consumer protection laws and policy are intended to benefit consumers by empowering them (thereby making them 'sovereign') to make informed purchasing decisions.

These questions can be considered threshold levels of inquiry. If consumer protection laws such as the ACL do not empower consumers to make informed purchasing decisions then the demand created by consumers' buying power will not exert sufficient influence on the producers of food animal products to improve food animal welfare.

And even if consumers' buying power does influence producers, if they are simply choosing not to buy products from suppliers cognisant of animal welfare concerns, then legislation such as the ACL that prohibits misleading or deceptive conduct legislation will have little effect in advancing food animal welfare initiatives. This issue is explored in Section II.

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\(^{31}\) *Australian Competition and Consumer Commission v C.I. & Co Pty Ltd* [2010] FCA 1511 (23 December 2010).

\(^{32}\) *Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 2)* [1012] FCA 19 (2 December 2011).
A negative response to either of these threshold questions significantly reduces the ability of the ACL to function in a way that influences food animal producers to improve animal welfare and compromises the Commonwealth government’s belief, expressed in its *Labelling Logic Report* that the ACL can effectively regulate consumer values issues associated with food animal products. After all, what is the incentive to do so if consumers either cannot or will not signal their demand for those improvements through their buying power?

Chapter 5, Section I - The Power of the Consumer

This thesis is investigating whether and to what extent the ACL can indirectly improve the welfare of food animals.

The Commonwealth government is proposing to facilitate consumers’ preference for welfare-friendly food animal products by prohibiting misleading or deceptive animal welfare representations made by suppliers of those products.

In its 2011 *Labelling Logic Report*, the Commonwealth has adopted a regulatory approach to food product labelling that involves an issues hierarchy. These hierarchical issues are then intended to guide regulatory initiatives associated with product labelling. In descending order of importance, the Commonwealth intends focussing on; (i) food safety, (ii) preventative health, (iii) new technologies and finally (iv) consumer values issues. Animal welfare claims made by suppliers of food animal products fall into the category of ‘consumer values issues’.

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34 Ibid 97, [6.1].
Consistent with this hierarchical regulatory approach, in addressing concerns associated with ‘consumer values issues’, the Commonwealth government intends that ‘food labelling for such generalised issues is best left to market responses to consumer demand and is best covered by the consumer protection laws.’

However, the effectiveness of this regulatory approach is contingent upon several unstated assumptions. One assumption is that demand for animal welfare friendly food products will signal consumer preferences for animal welfare practices to be adopted by producers suppling food products into the market. Another assumption is that in attempting to satisfy this consumer demand, producers will increasingly seek to differentiate their products on the basis of animal welfare features thereby generating more sales. At least in theory, the more consumers demand welfare friendly products, the more producers will seek to implement animal welfare initiatives. If the ACL is to be effective in addressing consumer values issues associated with food animal welfare issues and, in turn, stimulate supplier-initiated food animal welfare practices, these assumptions need to be tested.

The ACL is located within the *Competition and Consumer Act 2010* (Cth), but what is the relationship between the ACL, consumer protection and competition policy? Exactly how is it intended that consumer buying power will influence the animal husbandry practices of suppliers of food animal products? What is the relevance of this relationship to consumers’ preferences for welfare friendly food animal products? How does a competitive market operate so that suppliers will be made aware of these preferences?

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35 Ibid 97, [6.3].

36 Industry surveys support this market trend. For example, in its 2010 Annual Report the Australian Egg Corporation Ltd indicated that the market for free-range eggs increased from 5.5% in 2000 to around 26.6% in 2009, 3.

In Australia, the principal goal of competition policy is neither the protection of individual traders nor the protection of individual consumers. The High Court in *Boral Besser Masonry Ltd (now Boral Masonry Ltd) v ACCC* stressed; 'the purpose of the Act is to promote competition, not to protect the private interests of particular persons or corporations'.

And I have written elsewhere about how the CCA is even less concerned with the welfare of animals generally or food animals particularly. In protecting and facilitating economic efficiency, consumers are said to benefit from the efficient allocation of society's resources.

If competition policy and consumer protection policy do not work together to ensure that consumers' preferences for animal welfare are communicated to suppliers, or even if those preferences are communicated, if consumers are simply not willing to pay for animal welfare, then the *Labelling Logic* proposals rest on flawed assumptions and the ACL may be a relatively ineffective regulatory tool.

**Labelling Logic & Market Driven Consumer Welfare**

Animal welfare issues featured prominently in public responses to the *Labelling Logic* review; ‘generalised consumer values issues such as human rights, animal welfare, environmental sustainability and country-of-origin labelling were raised in a large number of submissions’.

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37 *Boral Besser Masonry Ltd (now Boral Masonry Ltd) v ACCC* (2003) ATPR 41-915, [87].
The intended approach of the Commonwealth government to these consumer values issues is to leave market forces as the impetus for suppliers to address these values.\textsuperscript{41} How is this to occur?

It is anticipated that market forces will respond to increasing consumer interest in values issues such as animal welfare by encouraging suppliers to differentiate their products on the basis of those values issues; ‘if the label claim provides a supplier with a positive point of differentiation in the market, there is a strong incentive for the supplier to adopt such a claim and for consumers to respond.’\textsuperscript{42} Perhaps it is hoped that Adam Smith’s ‘invisible hand’ may gently push suppliers into creating food animal welfare initiatives?\textsuperscript{43}

This regulatory approach will only work effectively if competitive and informed markets place the consumer at the centre of supply and demand forces. This is the intention of the \textit{Competition and Consumer Act 2010} (Cth) where consumer protection law and theory sits alongside competition law and theory with both functioning to create fair, competitive and informed markets \textit{for the benefit of} Australian consumers.\textsuperscript{44}

How does this work? To begin with, it must be acknowledged that there is no overarching theory of consumer protection that explains these dynamics.

\textsuperscript{41} Ibid 98, [6.5].
\textsuperscript{42} Ibid.
\textsuperscript{43} Adam Smith noted that even though individual traders do not intend to promote the public interest, nevertheless the effect of traders’ commercial activities seems to, in fact, promote the public interest. Smith called this tendency of the economy to guide self-interest into cultivating economic well-being the ‘invisible hand’; Alex Bruce, \textit{Market Definition}, Chapter 3 in \textit{Restrictive Trade Practices Law}, (LexisNexis Butterworths, Sydney, Australia 2010) 19, 21.
\textsuperscript{44} \textit{Competition and Consumer Act 2010} (Cth), s 2.
In fact, one commentator lamented that:

It is almost impossible to cover the ever growing mound of literature on consumer protection problems in different countries. It is quite impossible to survey developments in legislation and case law, be it only for one country. Consumer protection aspects have now been introduced in so many areas of law that it is hard to find out where specific consumer concerns begin.\(^45\)

The fundamental difficulty involves conceptualising ‘consumer protection’ as a discrete discipline and not as simply a sub-set of competition policy or as a body of law derivative from commercial or mercantile law or a body of law that is simply interdisciplinary in nature. Lynden Griggs has therefore astutely observed that consumer protection ‘is a subject looking for the privilege of independent existence, let alone responsibility’.\(^46\)

Complicating the search for clarity in conceptualising consumer protection policy is the sometimes bewildering vocabulary and terminology employed by commentators in discussing consumer protection theories. The literature imports terms from fields as diverse as law, sociology, economics and behavioural studies.

Concepts such as ‘soft regulation’, ‘bounded rationality’, ‘neoclassical attribution’, ‘information asymmetries’, ‘biased contracting’ and ‘shrouded attributes’ have been adapted from other disciplines and then applied to consumer protection issues in an attempt to explore these difficult policy issues.\(^47\)

\(^{47}\) Alex Bruce, Australia's National Consumer Protection Regime, Chapter 1 in Consumer Protection Law in Australia, (LexisNexis Butterworths, Australia, 2011) 1, 6.
It is beyond the scope of this thesis to explain and then unify these different theories into a new normative consumer protection framework. Nor do I think it helpful to attempt the task. The availability of these different theories permits explorations of aspects of consumer behaviour that would not fit neatly into one or other theory. The sheer complexity and subtly of consumer issues lamented above surely requires an interdisciplinary hermeneutic.

For present purposes however, the starting point is to consider the relationship between competition policy and consumer protection theory, especially since the stated purpose of the CCA is to enhance the welfare of Australians though the promotion of both competition as well as the provision of consumer protection. Understanding this relationship clarifies the process by which consumers' preferences for welfare friendly food animal products are signalled to suppliers of those products.

**Competition, Efficient Markets and Consumer Welfare**

Section 2 of the CCA provides:

> The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

Implicit in s 2 is the belief that Australian consumers are in some way better off if markets are competitive; that is, if fair trading is encouraged and consumers are protected from misleading, deceptive and unconscionable conduct.

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The other side of this is the view that anti-competitive markets, or markets in which consumers are not protected from misleading or deceptive practices will result in diminishing consumer welfare. Both the consumer protection and competition provisions of the CCA are intended to enhance the welfare of Australians.

Speaking about s 2 of the then Trade Practices Act (now CCA) then Justice French of the Federal Court (now Chief Justice of the High Court) explained:\(^4^9\)

> If the whole Act is about consumer welfare in a general economic sense, not limited to specific transactions, then the competition provisions and the consumer protection provisions can stand together comfortably under one rubric. Although Part V operates directly to protect consumers against varieties of misleading or deceptive conduct and other unfair trade practices, it can also be seen as supporting the competitive process in a wider sense by ensuring that markets have access to accurate information. The benefits of competitive outcomes reflected in the delivery of better goods and services for lower prices may be defeated if their advantages are obscured by a fog of misinformation.

This vital relationship between competition policy and consumer protection in delivering market based benefits to consumers is increasingly being recognised at an institutional level. For example, in 2007, Commissioner Kovacic of the United States Federal Trade Commission stated that ‘consumer protection laws are important complements to competition policy.’\(^5^0\)

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And in 2009, the United Kingdom Office of Fair Trading issued an entire policy outlining the importance of integrating both in facilitating markets delivering benefits to consumers.\(^5\)

Why is this? A competitive market is considered to be an 'efficient' market in the sense that competition is the mechanism by which society’s resources are efficiently allocated. The then Trade Practices Tribunal in *Re Queensland Co-operative Milling Association Ltd* observed;

> Competition may be valued for many reasons as serving economic, social and political goals. But in identifying the existence of competition in particular industries or markets, we must focus upon its economic role as a device for controlling the disposition of society's resources.\(^5\)

When a market functions efficiently, consumers benefit from price competition amongst retailers of goods and services. This competitive benefit takes two broad forms; *inter brand* competition, and *intra-brand* competition. In an efficient market, a consumer who wants to buy free range eggs, for example, can visit different retailers and compare prices across different brands of eggs (inter brand) and compare prices across a particular brand of eggs (intra brand). All forms of anticompetitive and deceptive conduct have potentially positive and negative consequences for inter and intra brand competition.

A market can really only properly function as a device for controlling the disposition of society's resources if it is working efficiently. Competitive markets display a number of characteristics that illustrate what is meant by the term 'efficiency'. But what is meant by this term and what is the relationship between efficiency and consumer welfare?

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A consistent theme in the development of competition and consumer policy is the concern with efficiency. Competitive markets are efficient markets and efficient markets are said to enhance consumer welfare. In 1989, the Economic Planning Advisory Council explained:

> Competition policy is based on the view that, in general, competitive markets lead to more efficient allocation of resources than do markets in which either buyers or sellers have significant market power. Such markets also promote technical efficiency (the effectiveness with which resources within a firm are utilised) and dynamic efficiency (the speed at which firms respond to changing problems and opportunities) ... When firms are unable to increase their profits through exercising market power, their pursuit of profit is channelled into finding ways to increase their efficiency and into searching for better ways to serve their customers.\(^{53}\)

The idea of evaluating the effectiveness of markets through the lens of efficiency is very much a product of the neo-classical school of economic theory; the prevailing hermeneutical lens through which competition policy generally, and the CCA specifically, is viewed.\(^{54}\)

The neo-classical school of economics makes certain assumptions about the way markets should function in order to promote efficiency and thereby to enhance consumer welfare.

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Neo-classical economics 'assumes that markets free of failures will deliver optimal outcomes for producers and consumers alike. Consumer demand is a major driving force in determining what is produced, the quantity, its price and quality.'\(^55\)

In constructing the framework of such a market, free of failures, economists generally commence with a number of assumptions.

Those assumptions are first, there are many buyers and sellers in the market, second, sellers produce a homogeneous product, third, buyers and sellers are equally informed about price, fourth, there are no barriers to entry, meaning that firms can enter and exit the market and finally, market forces of supply and demand establish the price of the product — suppliers cannot affect the price of the product since no one firm produces more of the product than the others.\(^56\)

Unni Kjaernes succinctly describes the role of the consumer in this mix; 'as sovereign, rational choosers; consumers are driven by an individual utilitarian orientation and seek to maximise personal benefits at the lowest possible cost. Dissatisfied consumers will use their purchasing power and go elsewhere.'\(^57\)

Of course, no real market is perfect and deviations from this optimal competitive model occur in the form of anti-competitive conduct, information asymmetries, such as misleading and deceptive conduct and simple consumer irrationality.

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How is the concept of a perfectly competitive market relevant to an effective consumer protection policy? The relevance is described in this way:

We study the predicted outcomes of the perfectly competitive model not because those predictions conform exactly to the ‘real world’ of our everyday economic experience, but because they provide an independent measuring rod—a benchmark model of economic performance against which economists compare the actual outcomes of real-world market situations ... much of the work of the Australian Competition and Consumer Commission relies on the model of perfect competition as a benchmark against which to test potential or actual breaches of the Trade Practices Act.\(^\text{58}\)

By understanding how perfectly competitive markets function, it is possible to learn how certain forms of corporate behaviour cause ‘market failure’ leading to deviations from the perfect, optimally efficient model.

In such cases, the result is one of imperfect competition that results in a diminution of efficiency which, in turn, leads to consumer detriment; a diminution of consumer welfare compromising the stated object of the CCA. For example, in the context of food labelling, the Labelling Logic Report explicitly draws a connection between information failures and detriments to consumer health.\(^\text{59}\)

But how do these assumptions actually work? To begin with, it is helpful to think of competition in a market as taking place in the context of a tension that exists between firms and consumers.

\(^{58}\) Above n 56, 219.

On the one hand, firms want to make goods or services at as low a cost as possible to themselves, and on the other hand, to sell those goods or services to consumers for as high a price as they can. In this way, firms attempt to widen the margin between their costs of production and sale prices. The difference between the two represents the profit the firm derives from its goods or services.

On the other hand, consumers want to choose between a wide variety of goods and services and also to be able to buy those goods or services as cheaply as possible.

The indicator of this tension is price. Through their purchasing patterns, consumers 'signal' to firms the goods or services that are preferred and the price levels they are prepared to pay for them. In this way, consumers 'activate' competition.

Firms respond to those signals through product innovation, improved service and better allocation of resources as they compete with each other for customers. This process is described by Phillip Williams:

> We may imagine that each participant in the economy has a pile of dollar notes. Each dollar note counts for one vote in determining how the resources of the economy ought to be allocated. If a person spends some votes purchasing brown leather sandals, that expenditure will encourage resources to flow into the production of brown leather sandals. By voting in the marketplace with dollar notes, the consumer has been able to influence the allocation of resources.  

In this sense, consumers are said to activate competition.

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In its 1983 - 1984 Annual Report, the then Chair of the Trade Practices Commission noted:

Consumers not only benefit from competition, they activate it, and one of the purposes of consumer protection law is to ensure they are in a position to do so. This I believe administration is better placed to serve the total interest of consumers if it also has responsibilities to encourage market forces and industry efficiency.\(^6\)

Consumers 'activate' competition because firms compete to produce the goods and services demanded by consumers. At least in theory, competitive markets benefit consumers by providing more choice; a more efficient allocation of resources and price competition.\(^6\)

However, markets are not ends in themselves, but economic processes that facilitate the efficient production and delivery of resources in such a way that benefit consumers. Because competitive markets are considered to enhance consumer welfare and because consumers are said to 'activate' competition, the consumer is thus said to be 'sovereign'.

Given the regulatory\(^6\) and academic\(^6\) validation of consumer sovereignty as an effective hermeneutic with which to understand the relationship between competition policy and consumer protection policy, it is important to explore its implications for food animal welfare and Labelling Logic's assumptions.

The Consumer is Sovereign ('It's Good to be the Consumer')

It is not surprising that consumer protection theory is frequently said to involve the notion of 'consumer sovereignty'. At least in theory, 'the notion of consumer sovereignty, which is the linchpin of neo-classical economics, guarantees an important role for the consumer in (the) market economy.'

In fact, the primacy of the consumer can be traced back to the classical economics of Adam Smith. Smith concluded that 'consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as may be necessary for promoting that of the consumer.'

The implications of the primacy of the consumer and the use of the term 'consumer sovereignty' can probably be traced to the work of William Hutt in his 1936 text Economics and the Public: A Study of Competition and Opinion. Hutt thought that consumers should be aided by the modern state in the exercise of freedom to pursue their own ends, with producers being disciplined through the market to satisfy the wants of consumers. Hutt's emphasis on the primacy of consumers' freedom to pursue their own happiness or ends is reflective of John Stuart Mill's notion of the relationship of the individual to the state.

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65 A good historical exploration of the notion of consumer sovereignty with its implication of consumer as voter can be found in: Stefan Schwarzkopf, 'The Consumer as 'Voter', 'Judge' and 'Jury': Historical Origins and Political Consequences of a Marketing Myth' (2011) 31(1) Journal of Macromarketing 8.


Mills' views will become relevant a little later in this Chapter as a philosophical defence of the principle of consumer sovereignty.

Neil Averitt and Robert Lande are two of the principal United States scholars responsible for establishing the theoretical relationship between consumer sovereignty and competition policy. They conclude that for consumer sovereignty to work effectively, competition policy must ensure that markets (a) present consumers with a range of options and (b) the ability to select freely amongst those options.

Averitt and Lande explain the mechanics of consumer sovereignty in the following way:

Consumer sovereignty is the state of affairs that prevails or should prevail in a modern free-market economy. It is the set of societal arrangements that causes that economy to act primarily in response to the aggregate signals of consumer demand, rather than in response to government directives or the preferences of individual businesses. It is the state of affairs in which the consumers are truly 'sovereign', in the sense of having the power to define their own wants and the opportunity to satisfy those wants at prices not greatly in excess of the costs borne by the providers of the relevant goods or services.

There are several elements to this extract that explain the nature of consumer sovereignty and how competitive and efficient markets facilitate that sovereignty.

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First, it is said that the economy acts 'primarily in response to the aggregate signals of consumer demand.' This is a reference to the signalling process described above. Through their purchasing patterns, consumers 'signal' to firms the goods or services that are preferred and the price levels they are prepared to pay for them.

Second, these consumer signals occur as part of a cause and effect process. If consumer purchasing patterns are the signals, then firms, suppliers and producers respond to those signals through product innovation, improved service and better allocation of resources as they compete with each other for customers. Consumers therefore 'cause' the economy to work in their favour by the pricing 'signals' they send to producers of goods or services. The effect is that producers deliver into the market the goods or services that those consumers demand. This is what is meant by the observation above that consumers 'activate competition'.

Third, the process is interdependent because the quality and quantity of the signals that consumers send, and the goods and services produced are dependent on each other. However, firms can artificially interfere with the price signalling by consumers and in doing so they can manipulate the market to the detriment of consumers.

*From the supply side,* firms can collude to fix prices or to prevent competitive behaviour. In this way, firms can acquire market power not through superior competitive behaviour or through increased competitive efficiency, but simply through eliminating competition. The effect of eliminating competition is to eliminate consumer choice. Less *inter brand* and *intra-brand* competition result in consumers paying higher prices for goods or services than would prevail in a competitive market.

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73 Ibid.
From the demand side, effective consumer choice can be diminished or even eliminated through misleading, deceptive or false conduct. For example, in Colgate Palmolive Pty Ltd v Rexona Pty Ltd, Colgate sought an interlocutory injunction restraining Rexona from continuing an advertising campaign for its brand of toothpaste. In granting the injunction, the Court observed:

There is evidence that Rexona’s advertising campaign may erode the market share enjoyed by the smaller manufacturers of toothpastes......Rexona contended that these matters are irrelevant as the small manufacturers are neither parties to the proceedings nor consumers. In my opinion the possible detriment to the small manufacturers is a relevant consideration....If a corporation is engaging in misleading or deceptive advertising which assists it in gaining a substantial share of a market at the expense of small manufacturers, the interests of those manufacturers must be a relevant consideration.74

Misleading or deceptive conduct can erode or even eliminate a competitor, thereby reducing the level of competition in the market by reducing consumer choice.

Fourth, consumer sovereignty is characterised by consumers ‘having the power to define their own wants and the opportunity to satisfy those wants’.75 In satisfying their wants, neo-classical economics assumes that consumers are ‘rational profit-maximisers’. Consumers are said to be ‘profit-maximisers’ because they carefully evaluate the cost / benefit of a particular good or service in order to maximise the benefit to themselves.

Consumers are said to be 'rational' in that they possess all relevant information necessary to make a prudent and rational decision about whether to enter into the transaction in question.

The idea is characterised as follows: 'A consumer fully armed with relevant information, who is articulate and rational, is a necessary assumption of the neo-classical model.'

However, the reality is that markets are not perfect and consumers are often neither rational nor in possession of sufficient information to make an informed evaluation of the cost / benefits of a particular transaction. And, being human, consumers are subject to a full range of frailties, biases and behavioural issues. In these circumstances, how the 'consumer sovereignty' model operates within imperfect markets composed of imperfect consumers is a real issue.

Imperfect Consumers and Markets

Central to the idea that competitive markets enhance consumer welfare when they are efficient markets is the idea that both consumers and suppliers act rationally and have all of the information necessary to make informed demand and supply decisions.

One of the legal mechanisms giving effect to this idea is the notion of freedom of contract. Parties to a contract are assumed to have negotiated the terms of their contract to best protect and enhance their interests.

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With all relevant information made available to the consumer by the seller, and with the purchaser exercising intelligent control over his or her desires, the contract eventually concluded between them is an efficient means of product distribution.

However neither markets nor consumers are perfect. The idea that consumer contracts should be sacrosanct because of the notion of ‘freedom of contract’ ignores several problems associated with the formation of such contracts.

To begin with, in the 21st Century, there is often a very significant difference in the bargaining power between consumers and the corporations they contract with.

The rise of ‘standard form’ contracts and a ‘take it or leave it’ approach to negotiation often leaves consumers with little power to negotiate the terms of a contract to suit their individual needs and interests. As Barr-Gill notes:

Consumer contracts are characterised by an asymmetry between the two parties; the seller of a good or the provider of a service on the one hand and the consumer on the other. One party is usually a highly sophisticated corporation, the other...an individual prone to the behavioural flaws that make us human. Absent legal intervention, the sophisticated seller will often exploit the consumer’s behavioural biases. The contract itself, commonly designed by the seller, will be shaped around the consumers’ systematic deviations from perfect rationality.78

The ‘consumer’s behavioural biases’ that Barr-Gill refers to are the ‘flaws that make us human’ and preclude consumers from necessarily making efficient and wise choices in their consumption.

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Nevertheless, consumer sovereignty remains the dominant hermeneutical lens through which consumer-directed market failure is addressed.\textsuperscript{79}

Lack of self-control and preferential biases make it easier for consumers to be exploited by corporations. It is here that other schools of economics such as ‘behavioural economics’ make significant contributions.\textsuperscript{80} Likewise, consumers are often not well informed about the goods and services they wish to purchase.

Many consumers do not take the time or exercise the control necessary to educate themselves about the true financial implications of the contract they wish to conclude.\textsuperscript{81} This situation is worsened if the suppliers of the goods or services have engaged in false, misleading or deceptive conduct.

Consumers who do not take the time, or take limited amounts of time to acquire the information necessary to make an optimal and rational decision about acquiring goods or services are then said to be ‘boundedly rational’.\textsuperscript{82} Inadequate, haphazard or incomplete information gathering often leads to confusion and exploitation.\textsuperscript{83} The result is that information asymmetries and poor consumer behaviour distort the competitive function of the market and thus diminish the welfare to consumers as a result.

\textsuperscript{83} See the examples in Lynden Griggs, 'Intervention or Empowerment – Choosing the Consumer Law Weapon I' (2007) 15 Competition and Consumer Law Journal 111.
Vickers notes:

Competition cannot work effectively unless customers are reasonably well informed about the choices before them. Uninformed choice is not effective choice, and without that there will not be effective competition. Informed choice has two elements — knowing what alternatives there are, and knowing about the characteristics of alternative offerings. In particular what matters is the ability of customers to judge the prospective value for money, for them, of the alternatives on offer.84

 Significant differences in bargaining power undermining consumers' ability to protect their interests, the lack of information available to consumers and the consumer's inherent and very human biases and flaws means that markets can therefore never function with the sort of theoretical efficiency necessary to deliver optimal consumer welfare.85

Given these flaws, did the Commonwealth government err in its Labelling Logic Report by assuming that consumer purchasing preferences will signal to suppliers their demand for food animal welfare practices? No, because market forces do in fact respond to consumer demand, even sub-optimal markets.

Consumers continue to activate competition through their demand, even if those demands and the purchasing decisions that motivate them are sub-optimal or even irrational.

However there are also powerful philosophical arguments underpinning the notion of consumer sovereignty.

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A Philosophical Defence of Consumer Sovereignty

Despite the human flaws that may influence the integrity of the neo-classical economic theory underpinning the choices consumers make, there remain compelling philosophical reasons why competition and consumer policy should strive for consumer sovereignty.

Part 1 of this thesis noted that both the deontological theory of Immanuel Kant and the utilitarian theory of Jeremy Bentham and John Stuart Mill emphasised the importance of people over animals. However the privileging of human interests in both philosophical theories implies that people have both duties and interests in becoming autonomous, informed and empowered citizens.

For example, Kant’s 1784 essay *What is Enlightenment* is a blistering attack on the uninformed and docile consumer. Kant forcefully encourages the sort of strong, informed and autonomous consumer that contemporary competition and consumer policies seek to empower:

> Laziness and cowardice are the reasons why such a large part of humanity, even long after nature has liberated it from foreign control (*naturaliter maiorennes*) is still happy to remain infantile during its entire life, making it so easy to act as its keeper. It is so easy to be infantile. If I have a book that is wisdom for me, a therapist or preacher who serves as my conscience, a doctor who prescribes my diet, then I do not need to worry about these myself. I do not need to think, as long as I am willing to pay. 86

On Kant’s view, consumers should make their own decisions about such issues as world-view, ethics and diet.

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It follows that markets should support consumers in their attempts to become autonomous members of society, with governments introducing policies to facilitate the empowering of consumers.\textsuperscript{87} How would governments facilitate consumer empowerment? By ensuring markets function in ways that respond to consumer demand and that consumers are provided with sufficient information about products generally and food products specifically to enable confident and effective choices.

Although it is not as strong an argument, utilitarian philosophy also supports the notion of consumer sovereignty. In writing about freedom, John Stuart Mill considered:

\begin{quote}
The only freedom which deserves the name is that of preserving our own good in our own way, so long as we do not attempt to deprive others of theirs or impede their efforts to attain it Each is the proper guardian of his own health, whether bodily, or mental or spiritual.\textsuperscript{88}
\end{quote}

However, in order for consumers to achieve their own good, governments should ensure that markets provide sufficient information to consumers enabling them to make reliable choices and to protect them from market manipulation and deceptive practices.

It is therefore not surprising to find that contemporary governments have in fact responded to imperfect markets characterised by information asymmetries and consumer ‘bounded rationality’ by legislating for their opposite or relying on existing consumer protection regimes such as the ACL.

\textsuperscript{87} Michael Korthals, \textit{The Ethics of Food Production and Consumption}, 2006, in Lynn Frewer and Han van Trijp (eds) \textit{Understanding Consumers of Food Products}, (Cambridge University Press, United Kingdom, 2006) 624, 629.

Returning to *Labelling Logic’s* Original Assumptions

This explanation of the relationship between competition policy and consumer protection policy, with its emphasis on consumer sovereignty provides answers to the questions posed at the start of this Section concerning the proposed effectiveness of the *Labelling Logic* approach. Australian governments have decided to deploy the ACL and consumer protection strategies to prevent misleading or deceptive claims associated with food animal products.

Provisions in the ACL relating to information disclosure, prohibiting unconscionable conduct, misleading or deceptive conduct and product liability represent attempts to empower consumers to make informed choices about the food animal products they purchase. Empowering consumers in this way is consistent with general market-based disclosure strategies. These strategies serve a two-fold purpose; providing consumers with sufficient information consistent with their sovereign status in the market, and also of stimulating political discourse:

First, they can improve markets by letting consumers know what they are purchasing (and) if consumers also have moral concerns that bear on the use of a product, the market-improving potential of disclosure continues to hold...consumers care about whether their decisions are producing moral or immoral behaviour. Many consumers are willing to pay to produce less in the way of moral damage and more in the way of moral benefit. Second, disclosure requirements can serve democratic functions by enabling citizens to receive information that bears on democratic judgements. Information about animal suffering may have significant effects on the political domain.

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89 Alex Bruce, *Factual Categories of Misleading of Deceptive Conduct*, Chapter 4 in *Consumer Protection Law in Australia*, (LexisNexis, Australia, 2011) 87.

Where consumer choices reflect preferences for food animal products from suppliers who take account of food animal welfare, then this is the market expressing demand for increased food animal welfare initiatives.

It is in this sense that consumers’ purchasing power, their market ‘sovereignty’, has the potential to influence food animal welfare. If they are to remain competitive, suppliers must seek to differentiate their food animal products on the basis of consumer demand for welfare friendly practices. It is in this way that consumers signal a demand for welfare friendly food animal products.91

By relying on consumer-driven market forces to stimulate potential food animal welfare reform and thus satisfy consumer values demands, the Commonwealth, State and Territory governments will, at least in theory, not have to directly intervene to legislate for food animal welfare reform. When this consumer demand is underwritten by the effective enforcement of the ACL, it is intended that consumers will have the information they need to make effective and informed choices about food animal products.

However, even if Australian consumers do have sufficient information at their disposal to make informed choices about food animal products, does the research suggest that consumers will in fact exercise their choices in ways that require producers to care about food animal welfare?92 This is an important question because suppliers will only implement welfare friendly practices intended to reduce the suffering of food animals if consumers are willing to pay a premium for the eventual animal food products.93

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91 This process was specifically averted to in Labelling Logic - Food Labelling Law and Policy Review Panel, Labelling Logic: Review of Food Labelling Law and Policy, 27 January 2011, Commonwealth of Australia, 98, [6.5].
92 Brian Naald and Trudy Cameron, ‘Willingness to Pay for Other Species’ Well-Being’ (2011) 70 Ecological Economics 1325.
93 Ibid.
In his discussion of consumer sovereignty, Michael Korthals notes:

Consumers are not only becoming more concerning about the safety of products for humans, animals and the environment, but also attach moral significance to the way each product is being produced and the norms and values involved. And what is even more striking, they also think it important to express these 'ethical' and political preferences in the market itself and not solely on the political forum.94

Australian consumers have expressed similar concerns in responding to the 2009 Commonwealth Government Review into food labelling laws. After the first round of consultations and after receiving over 6000 public submissions, the Review Panel issued its Issues Consultation Paper on 5 March 2010 ('the Consultation Paper') and invited further submissions.95

Question 17 of the Consultation Paper asked whether 'there is a need to establish agreed definitions of terms such as 'natural', 'lite', 'organic', 'free range', 'virgin' (as regards olive oil), 'kosher' or 'halal'? If so, should these definitions be included or referenced in the Food Standards Code?'96

The Review Panel's Report Labelling Logic released in January 2011 recommended that in relation to consumer values issues relating to specific food production methods (that would include religious slaughter methods) specific values-based definitions in the Food Standards Code should be adopted in order to achieve consistency of definitions.97

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96 Ibid 6.
This recommendation was rejected by the Commonwealth government in its December 2011 Response. Instead, it stated that where regulation concerning labelling representations was needed, the mechanisms in the *Competition and Consumer Act 2010* (Cth) were more appropriate to the task.98

Accordingly, Australian governments are leaving evaluation of the sort of consumer values issues such as animal welfare identified by Korthals, to individual consumers in making purchasing decisions. Where food products (including food animal products) are accompanied by labels that *do* make certain values claims, those claims must be justified. If not, the representations made by those labels to consumers may breach the ACL.

However, even if consumers do have sufficient labelling information to make informed value choices about the food animal products they purchase, does the evidence indicate that consumers will in fact make choices that favour food animal welfare? If there is simply no evidence that consumers are in fact willing to pay for food animal products from suppliers who take account of animal welfare, then it is unlikely that the ACL can seriously advance food animal welfare initiatives. There is simply no incentive for suppliers to spend the money to do so.

**Australian Consumers’ Cognitive Dissonance**

In Australia this issue has only just begun to be investigated. Informal and industry-initiated surveys suggest that consumers are in fact willing to pay a price premium for welfare friendly food animal products.

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In September 2008, Humane Society International published the results of a survey titled ‘Method of Production’ Labelling of Animal-Derived Food Products: A National Approach (‘the HSI Survey’). The HSI Survey indicated that consumer concern for food animal welfare was indicated by increased retail sales of welfare friendly food products in the form of:

(t)he doubling of the free-range egg market in the last six years alone, with the result that it now comprises over 30% of the total retail egg market value, representing an increase of more than 200% since 2000. Similar growth has occurred in the free-range chicken market, with one of Australia’s major chicken-producers, Inglewood Farms, reporting a tripling in sales over a 6 month period in 2005.99

According to the HSI Survey, these sales trends are supported by surveys gauging consumer preferences for welfare friendly products:

Recent surveys have revealed that 63% of participants would be more inclined to buy free-range pig products after becoming aware of factory farming conditions. In the ACT, a 2005 survey revealed that 84% of participants felt that keeping chickens in battery cages was cruel, and 73% supported a prohibition on these cages. Moreover, a survey in Queensland in 2001 showed that many consumers rank the humane treatment of animals ahead of price.100

These industry survey results are reflected in a 2007 survey into the pig and egg industries conducted by Professor Grahame Coleman of Monash University finding that 60% of respondents agreed with the statement that ‘welfare of animals is a major concern ‘while 71% agreed that ‘farm animals is an important consideration’.101

100 Ibid.
A more formal academic study into Australian consumers' willingness to pay for welfare friendly animal products was conducted in 2010 by Iris Bergmann, Tania von der Heidt and Cecily Maller. Their study found that participants expressed concern for the welfare of farm animals on the one hand, but also expressed a desire to continue eating meat from factory farmed animals on the other. Bergmann et al found that most of the study participants therefore experienced different levels of cognitive dissonance in attempting to reconcile these contradictory concerns.

Whether and to what extent the Bergmann et al participants experienced cognitive dissonance again underscores the importance of the role of the ACL in advancing food animal welfare reform which, in turn, is dependent on consumers' willingness to pay for that welfare reform in the form of higher priced food products. But this will not occur if consumers are undecided or internally conflicted about food animal welfare issues at the time of purchase.

It is beyond the scope of this thesis to explore in detail the role of cognitive dissonance theory generally or as it applies to consumer food choices specifically. I have written about cognitive dissonance theory in the context of legal regulation elsewhere. However, there are at least three reasons why it is relevant to briefly address the implications of cognitive dissonance theory to the discussion in this Section of Chapter 5.

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First, there is an important body of literature that examines the relationship between cognitive dissonance theory and consumer choices to eat food animal products. Second, in resolving the experience of cognitive dissonance, the literature emphasises the importance of sufficient and accurate product information available to consumers. And third, the extent to which the experience of cognitive dissonance influences consumers and their purchasing patterns will in turn affect the regulatory approach adopted by the Commonwealth government in its *Labelling Logic* Report. There is simply no incentive for suppliers to satisfy consumer demand for animal welfare values if consumers are conflicted about those animal welfare values.

If, as the Bergmann et al study suggests, Australian consumers do experience cognitive dissonance in holding inconsistent desires for animal welfare initiatives on the one hand and for eating animal products on the other, then the ACL will play a crucial role in ensuring consumers have sufficient and accurate product information enabling them to resolve their dissonance.

What then is the relationship of the ACL to cognitive dissonance theory? There is a substantial quantity of academic literature devoted to cognitive dissonance theory and its implications for consumer choice.

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It was initially developed in 1957 by Stanford University social psychologist Leon Festinger who described it as a distressing mental state experienced when people 'find themselves doing things that don’t fit with what they know, or having opinions that do not fit with the other options they hold'.

Cognitive dissonance theory therefore concerns relationships amongst cognitions and amongst cognitions and consumer behaviour. Most cognitions are described a either ‘cognitively irrelevant’ or ‘cognitively consonant’. That is; where two cognitions are unrelated to each other or fit harmoniously with each other. An example of the former might be: ‘the sky is blue and I think tonight’s dinner will be special.’ An example of the latter might be: ‘I like eating meat and I like chicken meat.’

In both cases, there is no dissonance between the cognitions that can serve as the cause of inner tension in the person holding them.

However, Festinger also identified many instances where people experience dissonance taking the form of inconsistent cognitions or inconsistent cognition and behaviour. Bergmann’s 2010 Australian study is a classic example, where consumers expressed concern for the welfare of animals, while simultaneously expressing a desire to eat meat.

Festinger’s insight was that a person who entertains dissonant cognitions experiences a state of unpleasant psychological tension. In this situation, cognitive dissonance theory holds that the psychological tension possesses drive-like qualities similar to hunger and thirst.

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That is, the experience of cognitive dissonance will drive a person to reduce the dissonance in the same way that a thirsty person will be driven to reduce their thirst. Festinger noted that healthy people experience a need to experience and maintain a psychological homeostasis in their day to day lives.107

Of particular relevance for the use of the ACL in advancing food animal welfare initiatives is how, according to cognitive dissonance theory, consumers are driven to reduce the internal suffering associated with dissonant desires. Festinger identified three principal strategies by which people attempt to reduce the psychological tension they experience as a result of cognitive dissonance.

First, people may alter the importance of certain cognitions. The psychological tension is lessened by affirming the importance of one cognition over the other. Second, people can change cognitions to make one of them consistent with the other, or even eliminate one of the competing cognitions altogether. And finally, people can change their behaviour to make it consistent with one of their cognitions.

All three of these strategies have been used by consumers in resolving the dissonance they experience in expressing concern for the welfare of food animals on the one hand, while simultaneously expressing a desire to continue eating meat from factory farmed animals.108


However, the 2010 Bergmann et al Australian study found that in resolving their cognitive dissonance, participants employed strategies that were based on ‘incomplete knowledge and misinformation such as the lack of awareness of animal experience and the impact of factory farming.’ Although their work is continuing, this initial formal study by Bergmann et al emphasises the importance of accurate and sufficient information to enable consumers to make informed purchasing decisions.

**European Union Citizens’ Willingness to Pay**

While the issue of consumer’s willingness to pay for increases in food animal welfare is in its infancy in Australia, it has been extensively studied in Europe for at least the last 10 years.

A large number of studies and surveys indicate that European consumers are concerned about the welfare of food animals, demand animal welfare-friendly products and are willing to pay a premium for them.

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109 Ibid 3.
For example, a 2005 study indicated that 74% of European citizens believed that they could exert a positive influence on farm animal welfare through purchases of animal-friendly products and more than 60% confirmed that they were willing to pay a price premium to ensure farm animal welfare.\textsuperscript{111} These studies consistently indicate that both access to food animal welfare information and the perception of welfare labelling significantly influences the decisions that consumers make in purchasing food animal products.\textsuperscript{112}

However, the studies also revealed several obstacles to consumers making choices about food animal products consistent with their expressed concern for farm animal welfare and that generated the sort of cognitive dissonance detected by the 2010 Australian study.

The principal reported obstacle involved the lack of information concerning welfare issues available to consumers at the time of purchase.\textsuperscript{113} Without sufficient information concerning farm animal welfare, consumers were unwilling or unable to exercise purchasing decisions that reflected their animal welfare concerns.

A 2010 United Kingdom study by Jacqueline Tawse sought to investigate the apparent discontinuity between consumers' stated belief in the value of animal welfare and their actual purchasing patterns.\textsuperscript{114} Tawse found that it was the lack of information about farm animal welfare that contributed to this discontinuity concluding; 'the success of a farm animal welfare campaign, however, is contingent upon not only its ability to reach a considerable proportion of consumers, but also to present information,

\textsuperscript{111} Laura Andersen, 'Animal Welfare and Eggs – Cheap Talk of Money on the Counter?' (2011) 62(3) \textit{Journal of Agricultural Economics} 565.
\textsuperscript{113} Mayfield, Bennett, Tranter and Woolbridge, 'Consumption of Welfare-Friendly Food Products in Great Britain, Italy and Sweden and how it may be influenced by Consumer Attitudes to and Behaviour Towards Animal Welfare Attributes' (2007) 15(3) \textit{International Journal of Sociology of Food and Agriculture} 59.
which will affect those consumers powerfully enough to alter their buying habits.\textsuperscript{115} These results are consistent with recent studies undertaken in the United States.\textsuperscript{116}

The literature is therefore consistent in concluding that consumers are interested in food animal welfare and are willing to pay a price premium for welfare friendly products.

Apparent consumer irrationality in either experiencing cognitive dissonance or simply not choosing to buy welfare friendly food animal products is explained on the basis of a lack of labelling information. This suggests that the provision of more accurate animal welfare information in food animal labels will drive both consumer demand and animal welfare. For example, a study by Fabio Napolitanno, Antonio Girolami and Ada Braghieri concluded:

\begin{quote}
Two current main trends described within the market of animal based product: 1) consumer tend to rely more and more on extrinsic cues and credence characteristics in the food purchasing decision process, 2) animal welfare is becoming increasingly important in the hierarchy of societal issues. The combination of reliable animal welfare monitoring and effective labelling of animal-based products may then help meeting the increasing demand of specific consumer segments for animal-welfare friendly products while sustaining the welfare state of the animals.\textsuperscript{117}
\end{quote}

The signal importance of accurate and sufficient animal welfare labelling information has also been recognised at the regulatory level.

\textsuperscript{115} Ibid.


In 2009, the European Commission investigated the issue of farm animal welfare labelling information resulting in its inclusion in the current *European Union Strategy for the Protection and Welfare of Animals 2012-2015*. Like the Commonwealth government, the EU Strategy intends to regulate animal welfare labelling claims though consumer protection legislation. Paragraph 3.4 of the EU Strategy notes:

> Animal welfare is also a consumer concern. Animal products are widely used, in particular in the context of food production and consumers are concerned about the way animals have been treated. On the other hand, consumers in general are not empowered to respond to higher animal welfare standards. It is therefore relevant to inform EU consumers about the EU legislation applicable to food producing animals and to ensure that they are not deceived by misleading animal welfare claims.

Again, the EU Strategy emphasises the importance of sufficient and accurate information concerning animal welfare claims available to consumers and the role of effective regulation of misleading or deceptive conduct. All of this research underscores the important role intended for the ACL.

### Conclusion: Theoretical Possibilities & Regulatory Realities

Instead of directly legislating to prohibit certain animal husbandry practices and slaughter without prior stunning, the Commonwealth government is intending to indirectly regulate food animal products through consumer legislation prohibiting misleading or deceptive conduct.

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120 Ibid 11.
In its December 2011 Response to the *Labelling Logic Report*, the Commonwealth stated that consumer value issues (such as animal welfare and religious issues) associated with food animal products were best regulated through the mechanisms in the *Competition and Consumer Act 2010* (Cth).\(^{121}\)

However the use of the ACL in preventing misleading or deceptive conduct in relation to food animal product labelling and whether in doing so, it will encourage suppliers to improve food animal welfare, initially rests upon exploring the *theoretical* basis of the regulatory strategy anticipated in the *Labelling Logic* Report; the relationship between consumers and their role in the market, the role of consumer protection legislation such as the ACL and food animal welfare.

Consumer demand is intended to signal suppliers about the products, services and attributes they desire. Informal, industry and early formal studies in Australia and studies in the European Union clearly indicate that consumers are demanding welfare friendly animal products. These studies indicate that consumers are willing to pay a premium for welfare friendly animal products provided they can be confident that welfare concerns have been heeded. Difficulties associated with consumers' cognitive dissonance or lack of willingness to pay have been attributed to the lack of information necessary for an accurate and informed purchasing decision.

Instead of simply legislating to prohibit certain animal farming practices, Australian governments are intending market forces in the form of consumer demand exerting backwards pressure on animal farmers to implement food animal welfare reforms. This pressure will be mediated through consumer demand.

As suppliers attempt to satisfy this consumer demand, they are increasingly differentiating their products on the basis of animal welfare claims, whether in advertising or on labels.¹²²

Studies in the European Union suggest that this consumer-oriented strategy will work provided it is underpinned by an effective consumer protection regime. In order to avoid cognitive dissonance problems and misinformation, consumers must have sufficient information about the food animal products they are buying and that information must be accurate.

To facilitate this, the Commonwealth government intends the ACL will be enforced to prevent misleading and deceptive animal welfare claims made by suppliers.¹²³ Given that competition and consumer policy as well as consumer literature supports the role of the consumer as sovereign in generating food animal welfare the second set of questions necessarily relate to the legal implications of that relationship.

Given the significant consumer protection role of the ACL, it is necessary to address several practical legal questions. Does the law permit an interpretation of the ACL in ways that would prevent producers making misleading statements about the conditions in which meat and egg products were produced? Does the law permit an interpretation of the ACL in ways that would require meat produced through the religious slaughter of animals to be clearly identified so that consumers can choose whether to buy those products?

The answers to these questions are explored in Chapter 6.

¹²³ Ibid 97, [6.3].
Chapter 6

Translating Consumer Protection Theory into Legal Practice

‘Holding things back does not always amount to concealment; but it does when you want people, for your own profit, to be kept in the dark about something which you know and would be useful for them to know’

It is at least theoretically possible to indirectly regulate consumer values issues associated with food animal products through consumer demand. In preferring this regulatory approach, the Commonwealth government’s Labelling Logic Report assigns significant responsibility to the market in signalling consumer preferences for welfare friendly food animal products to suppliers. The discussion in Chapter 5 explained how the dynamics of a competitive market, underpinned by competition and consumer policy supports the primacy of the consumer as the driver of this process.

Evidence from the European Union, the United States, the United Kingdom and Australia also suggests that consumers would be willing to pay a price premium for welfare friendly food animal products. Informal, industry and formal surveys and studies suggest that consumer experiences of cognitive dissonance or purchasing inconsistency are mitigated by the availability of accurate information about food animal products.

However, theoretical possibility must be translated into workable legal reality if the intended market-based regulatory approach to consumer values issues associated with food animal welfare is to be effective.

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This is especially so if consumer demands are intended not just to generate informed and honest labelling information, but then to actually signal suppliers of consumers' preferences for welfare friendly food animal products.

Does the legal structure of the ACL enable it to be applied consistently across all Australian jurisdictions to achieve this end? How does the law work in enabling the ACL to prevent suppliers making misleading or deceptive animal welfare claims in the sale or their food animal products? Does the case law support an interpretation of the ACL that would require suppliers to disclose the fact that animals may have been slaughtered according to religious practices?

Chapter 6 answers these questions by exploring how current case law might resolve hypothetical litigation instituted by the Australian Competition and Consumer Commission ('the ACCC') against a national retailer of food animal products. This hypothetical litigation involves allegations that the retailer has breached the misleading or deceptive conduct prohibition in ACL s 18 by engaging in both 'positive' conduct in labelling food animal products and 'negative' conduct in failing to disclose to consumers that meat products offered for sale have originated from animals that have been slaughtered according to religious ritual.

Chapter 6, Section I briefly introduces the ACL before Section II introduces the facts of hypothetical litigation instituted by the ACCC against a national retailer alleging that the retailer breached ACL s 18 in making certain animal welfare claims associated with its food animal products.
The basic legal framework by which ACL s 18 prohibits misleading or deceptive conduct is explained in Section III that analyses the case law relevant to evaluating the first set of allegations against the national retailer. That is, allegations of 'positive' conduct; where it is alleged that the national retailer has breached ACL s 18 in making misleading or deceptive animal welfare claims associated with its food products. Section III demonstrates how recent decisions of the Federal Court of Australia in *Australian Competition and Consumer Commission v C.I. & Co Pty Ltd*\(^2\) and *Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 2)*\(^3\) permit an interpretation of the ACL enabling it to prevent misleading or deceptive welfare claims associated with food animal products.

However, those decisions are not directly relevant to the task of evaluating the second set of allegations. That is, where it is alleged that a failure by the retailer to disclose to consumers that meat products offered for sale have originated from animals that have been slaughtered according to religious ritual constitutes misleading or deceptive conduct. Section IV therefore explores the difficult legal question of whether and to what extent the ACL can be interpreted to address claims of alleged misleading or deceptive conduct associated with a failure to inform.

Do consumers have a right to be informed whether the meat products they are buying have come from animals that have not been stunned prior to slaughter? Does the failure to inform consumers of this lack of stunning constitute misleading or deceptive conduct by omission in breach of ACL s 18?

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\(^2\) *Australian Competition and Consumer Commission v C.I. & Co Pty Ltd* [2010] FCA 1511 (23 December 2010).

\(^3\) *Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 2)* [2012] FCA 19 (2 December 2011).
In exploring these questions, Section IV explains the methodology established by the decision of the High Court in *Campomar Sociedad Ltd v Nike International Ltd*[^4] (‘*Campomar’*). As a decision of the High Court, *Campomar* is the principal authority followed by Australian Courts across all jurisdictions in evaluating conduct directed toward the public at large.

This methodology requires identifying the qualities of a hypothetical consumer against whom allegedly misleading or deceptive conduct is evaluated. Section IV also explores the case law that requires the existence of a reasonable expectation of disclosure, (in the present case, that meat has originated from animals slaughtered according to religious ritual) before a failure to disclose can be characterised as misleading or deceptive.[^5]

By exploring the arguments for and against the issue, Section IV demonstrates how the current state of legal uncertainty associated with characterising silence as misleading or deceptive conduct ultimately dooms the ACCC’s case and compromises the larger ability of the ACL to address allegations of misleading conduct by silence or omission.

Part 3 of this thesis concludes in Section V that the ACL can be successfully interpreted and enforced against suppliers of food animal products who engage in misleading or deceptive conduct in relation to positive statements made on food labels. However, claims that a failure to provide consumers with information relating to the slaughter of food animals breaches the ACL are likely to fail.


This thesis concludes that the Commonwealth government’s intended policy in regulating consumer values matters, including animal welfare and religious slaughter issues set out in the Labelling Logic Report is limited. The limitations associated with the case law in interpreting the ACL highlight the importance of the sort of legislative initiatives intended by the European Union and United Kingdom and discussed in Chapter 4 of this thesis.

Although not without controversy, if it is seriously intending to take note of consumer values issues associated with food animal welfare, the Commonwealth government would be wise to supplement the general provisions of the ACL with more specific forms of consumer protection initiatives such as food-specific labelling legislation or Codes of Conduct requiring halal and kosher meat products to be labelled as such. 6

Chapter 6, Section I - Australia's New Consumer Protection Regime

Until 2011, consumer protection and product liability in Australia was regulated by an often confusing patchwork of Commonwealth, State and Territory legislation, regulations and subordinate legislation. At the Commonwealth (Commonwealth) level and since 1974, the Trade Practices Act 1974 (Cth) (‘the TPA’) provided Australia’s principal source of consumer protection legislation. Complimenting and in many places duplicating the TPA were individual State and Territory Fair Trading legislation.

On 1 January 2011, this relatively fragmented landscape of consumer protection and product liability law in Australia fundamentally changed.

6 For example, Section 40F of the Wine Australia Corporation Act 1980 (Cth) specifically prohibits misleading or deceptive claims in relation to wine offered for sale to consumers. Some conduct in relation to the sale of wine is also within the ambit of the Horticulture Code that became effective on 14 May 2007 and is regulated by the Competition and Consumer Act 2010 (Cth).
The Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 ('the ACL Act') completed a process of reform that had been gaining momentum since the early 2000's and that culminated in the creation of a single, nation-wide consumer protection and product liability regime in the form of the Australian Consumer Law.

A National and Consistent Regulatory Regime

In the process, the Australian Consumer Law replaced 17 generic consumer protection laws that existed across States and Territories with a single national Consumer Law found in Schedule 2 to the CCA and implemented as a law of the Commonwealth in Part XI of the CCA and as an ‘applied law’ of the States and Territories in Part XIAA of CCA and for the most part, embedded in Fair Trading legislation.

It is the largest reform of Australian consumer protection laws ever undertaken. I have explained in more detail elsewhere the policy and constitutional background to, and the mechanics of the national implementation of the ACL.7

Chapter 6, Section II – Creating a Hypothetical Scenario

This thesis is investigating whether and to what extent the ACL can advance the welfare of food animals. Consistent with its Labelling Logic Report, the Commonwealth government is proposing to facilitate consumers' preferences for welfare-friendly food animal products by prohibiting misleading or deceptive animal welfare representations made by suppliers of those products.

7 Alex Bruce, Consumer Protection Law in Australia, (LexisNexis Butterworths, Australia, 2011) Chapters 1 and 2, 1 – 50.
For the purposes of evaluating whether and to what extent the ACL can function in this way, a hypothetical scenario is posited. This approach follows the suggestion of Justice Kirby in ‘conceptualising the case’ for the purposes of evaluating the merits of an argument where the conceptual bases of arguments for and against a position are expressed at their highest level.8

**Factual Context**

Accordingly, we assume that a national grocery retailer, Hestia Pty Ltd (‘Hestia’)9 owns grocery retail stores in all States and Territories of Australia. It retails all manner of groceries including food animal products, to consumers. It obtains chicken, beef, pork, lamb and seafood products in bulk from national primary producers. Hestia’s own in-house butchers re-package meat products in styrofoam trays covered in plastic wrap. Labels attached to the plastic covering disclose the relevant cut of meat, its weight, country of origin and ingredients. Consumers simply pick up their desired meat product from the meat section of any Hestia supermarket.

From April 2011, Hestia began selling home-brand generic eggs in all of its stores. The eggs are packaged in Hestia cartons. Labels on the egg cartons depict an image of smiling chickens roaming about green fields against a back drop of a large red barn. On the label are two lines of words; the first line states: ‘Hestia Healthy Choice Eggs’ in bold and capitalised font. A smaller second line of words states ‘Be confident in choosing Hestia Eggs: Free Range is the Healthier Choice.’

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9 In Greek mythology, Hestia is the goddess of the hearth, feasting and animal sacrifice; E.M. Berens, Myths and Legends of Ancient Greece and Rome, (CreateSpace Publishers, United States, 2011) 37.
Since September 2011, Hestia also began to sell a significant amount of halal and kosher chicken and beef meat in order to satisfy demand by an increasingly multicultural Australian society.

In some stores, located in predominantly Muslim suburbs such as Marrickville and Lakenba in Sydney, Hestia places halal meat products in a separate chiller display that specifically advertises halal meat products. However, in the majority of its stores, there is no distinction between halal and general meat products and consumers do not know whether they are buying halal or non-halal meat products.

After an investigation in January 2012 by a national current affairs program, it is revealed that approximately 80% of the ‘Hestia Healthy Choice Eggs’ have been sourced from battery hen farms. The program also includes interviews with consumers who are shocked to learn that the meat products they have been purchasing have originated from animals slaughtered according to Muslim religious ritual that does not permit stunning prior to slaughter.

Predictably, in the weeks following the program, the ACCC receives many complaints about Hestia’s practices from all Australian States and Territories. The ACCC notes that the complaints involve fundamental consumer concerns that fit within its Enduring Perspectives and 2012 Objectives, and are consistent with its Compliance and Enforcement Priorities.10

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In these circumstances, and in June 2012, the ACCC institutes proceedings against Hestia in the Federal Court of Australia alleging that advertising associated with its eggs as well as the failure to inform consumers about the religious preparation of meat products constitutes misleading or deceptive conduct in breach of ACL s 18.

Pleading the ACCC's Causes of Action

It is in these factual circumstances that the central question posed by this thesis can be investigated. However, transposing this theoretical factual scenario into the procedural framework of pleading a cause of action under ACL s 18 in the Federal Court of Australia requires a certain amount of precision. The new Federal Court Rules, issued in 2011, require pleadings to very clearly identify the issues to be resolved by the Court and the facts relied upon in order that the other party is aware of the case that must be met.11

As a general rule therefore, an applicant is required to plead his or her cause of action with appropriate precision and in a manner that enables the factual issues for trial to emerge with clarity and to do so at an early stage in the litigation. In Banque Commerciale SA en Liquidation v Akhil Holdings Ltd, Chief Justice Mason and Justice Gaudron confirmed:

the functions of pleadings is to state with sufficient clarity the case that must be met...In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her, and incidentally, to define the issues for decision.12

Because ACL s 18 is so very broad, a cause of action pleading misleading or deceptive conduct is vulnerable to imprecision and incoherence. Accordingly, it is necessary to plead exactly the nature of the behaviour said to represent the failure to observe that 'norm of conduct'.

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11 Rule 16.02 (1) Federal Court Rules 2011.
In *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd*, the Court underscored the importance of a precise identification of the factual basis of an action based on misleading or deceptive conduct:

It necessarily follows that when the section is sought to be used in litigation as the foundation of a cause of action or claim for some specific form of relief, it is imperative that the factual basis upon which the Section is alleged to be brought into play must be stated with appropriate clarity in a statement of claim.

Experience is showing that the Court must be astute in the prevention of this type of situation by requiring, in the early stages of litigation, that claims based on [s.18] be pleaded with appropriate precision and in a manner that enables the factual issues for trial to emerge with clarity.\(^{13}\)

What is the basis of the ACCC's cause of action? The ACCC alleges that Australian consumers are increasingly aware of animal welfare issues, concern that is reflected in their purchasing patterns. It also notes that the Commonwealth government's intention, expressed in its *Labelling Logic Report*, to regulate consumer values issues associated with food products through the misleading or deceptive conduct provisions of the ACL.

In these circumstances, the ACCC's statement of claim\(^ {14}\) pleads that the respondent, Hestia, has, in trade or commerce:\(^\)

(a) in connection with the supply and promotion of the supply of eggs produced in Australia for consumption and branded 'Hestia Healthy Choice Eggs' engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the *Australian Consumer Law* consisting of Schedule 2 to the *Competition and Consumer Act 2010* (Cth); and

\(^{13}\) *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (1998) ATPR 41-633, 40,978.

\(^{14}\) Rule 8.05 *Federal Court Rules 2011*. 

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(b) in connection with the supply of meat products sourced in Australia and offered for supply, has engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the Australian Consumer Law consisting of Schedule 2 to the Competition and Consumer Act 2010 (Cth);

In particularising its case, the ACCC alleges that the misleading conduct consisted:

(a) in the period from April 2011 until January 2012, producing or causing to be produced, egg cartons in its ‘Hestia Healthy Choice Range’ displaying images of chickens roaming on green pastures, accompanied by labels stating ‘Be confident in choosing Hestia Eggs: Free Range is the Healthier Choice’. In doing so, Hestia represented that eggs from the ‘Hestia Health Choice Range’ were obtained from chickens raised in free-range green outdoor pastures in circumstances where the chickens had at all times, substantial space in an outdoor environment permitting them to roam freely; and;

(b) in the period from September 2011 until January 2012, causing to be sold meat products in circumstances that did not inform consumers that the meat products originated from animals that had been slaughtered according to religious rituals.

The ACCC's originating application seeks a number of orders including injunctive relief, corrective advertising and orders requiring that future sales of meat products will be labelled as ‘Halal’, ‘Kosher’ or ‘Slaughtered According to Religious Ritual’.

Not surprisingly, Hestia intends to vigorously defend the ACCC's action.

Rule 8.03 Federal Court Rules 2011.

Chapter 6, Section III – ‘Free Range Eggs’ – Positive Conduct

The ACCC’s first concern relates to the allegedly misleading or deceptive presentation of the ‘Hestia Healthy Choice Range’ eggs. The evidence establishes that some 80% of the eggs retailed by Hestia under this banner were actually obtained from battery hen farms where the hens were kept in cages.

In its statement of claim, the ACCC alleges that Hestia has engaged in misleading or deceptive conduct in breach of ACL s 18. The general prohibition against misleading or deceptive conduct is one of the most frequently litigated prohibitions in the ACL. The former s 52 of the Trade Practices Act 1974 (Cth) is now s 18 of the Australian Consumer Law and very simply provides; ‘person must not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive’.

This very wide-ranging prohibition has ‘been discussed and applied in innumerable authorities’ and has given rise to an astonishing variety of case-law encompassing almost every aspect of commercial and non-commercial activity. In Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited, the High Court commented on the pervasive nature of litigation involving allegations of misleading and deceptive conduct:

The cause of action for contravention of statutory prohibitions against conduct in trade or commerce that is misleading or deceptive or is likely to mislead or deceive has become a staple of civil litigation in Australian Courts at all levels.

16 AMI Australia Holdings Pty Limited v Blade Medical Institute (Aust) Pty Limited (No2) [2009] FCA 1437, [64] per Flick J.
Far from being confined to straightforward transactions between corporate traders and consumers, the prohibition against misleading or deceptive conduct contained in s 18 of the *Australian Consumer Law* extends to intercorporate commercial activity, governmental activity and into circumstances that other areas of law, such as the law of negligence would have traditionally addressed. Allegations of misleading or deceptive conduct have therefore been pleaded in cases involving obvious examples of everyday commercial activity to extremely obscure conduct.

The bewilderingly wide range of circumstances in which misleading or deceptive conduct has been alleged is perhaps explained by the ease with which ACL s 18 can be pleaded.\(^\text{18}\) There is no need to establish a contractual relationship between the parties. There is no need to establish that the defendant corporation owed the plaintiff a duty of care that has been breached. In fact, the plaintiff does not even have to establish that anyone has *actually* been misled or deceived. All that must be established is that there has been conduct in trade or commerce that is, or is likely to be misleading or deceptive.

**ACL s 18 - What Must be Established?**

The text of s 18 of the *Australian Consumer Law* is relatively straightforward; there are 3 elements that must be satisfied in order to establish a contravention:

1. A corporation or person engages in conduct;

2. In trade or commerce; that is

3. Misleading or deceptive or likely to mislead or deceive.

\(^{18}\) The High Court noted 'Its frequent invocation, in cases to which it is applicable, reflects its simplicity relative to the torts of negligence, deceit and passing off' Ibid.
At this point, it should be noted that although s 52 of the TPA is now s 18 of the *Australian Consumer Law*, all of the case-law relating to the interpretation of the former s 52 will continue to guide the Courts in evaluating conduct alleged to breach s 18 of the *Australian Consumer Law*.

The *Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 Cth*, specifically states:

Section 18 of the ACL replaces the repealed Section 52 of the TP Act. The substance of the drafting of the prohibition has not been changed, other than changing the reference to 'a corporation' to 'a person'. Accordingly, the well-developed jurisprudence relating to s 52 of the TP Act is relevant to the interpretation or understanding of the meaning and application of Section 18 of the ACL.\(^ {19}\)

Most of the case law discussed in this Chapter involves conduct evaluated under the former s 52 of the TPA. However, for the sake of clarity, I will substitute '[s.18]' for 's.52' in relevant case-law extracts. There is no material difference in the sections and the substitution is intended for ease of conceptualising the argument as involving ACL s 18 rather than s 52 of the TPA.

While it is true that the elements of ACL s 18 are clear, the interpretation and application of those elements has not been straightforward. The High Court in *Parkdale Custom Built Furniture Proprietary Limited v Puxu Proprietary Limited* admitted:

The words of [s.18] have been said to be clear and unambiguous....Nevertheless they are productive of considerable difficulty when it becomes necessary to apply them to the facts of particular cases. Like most general precepts framed in abstract terms, the Section affords little practical guidance to those who seek to arrange their activities so that they will not offend against its provisions.\(^ {20}\)

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\(^ {19}\) *Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 Cth*, 37, [3.11].

These difficulties often arise in satisfying threshold requirements for successfully establishing a contravention of ACL s 18. First, the conduct of the person or corporation must be assessable under the *Completion and Consumer Act 2010* (Cth). Second, the conduct must be 'in trade or commerce'; third, there must be an identifiable 'class of consumers' who are alleged to have been misled; and fourth, the conduct must have in fact caused the misled state of mind, and to succeed in recovering damages, the loss or damage must have been caused by the allegedly misleading or deceptive conduct.

In working through these requirements the Courts have developed a methodology in relation to the former s 52 of the *Trade Practices Act 1974* (Cth) that enables conduct to be evaluated. There are certain elements built into that methodology that must be examined in interpreting ACL s 18.

**A Norm of Conduct Not an Imposition of Liability**

Section 18 of the *Australian Consumer Law* does not actually create a cause of action. It simply establishes a standard of conduct; a person must not in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive. The Court in *Brown v Jam Factory Pty Ltd* noted:

> Section [18] does not purport to create liability at all; rather it establishes a norm of conduct, failure to observe which has consequences provided for elsewhere in the same statute or under the general law.  

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When the Court mentioned ‘consequences provided for elsewhere in the same statute’ it was referring to the remedies and orders available under the then *Trade Practices Act 1974* (Cth) for a contravention of Part V of the TPA that included s 52. Likewise, the ‘norm of conduct’ provided for by ACL s 18 does not of itself establish the consequences for a breach. The remedial provisions for a contravention of ACL s 18 are found in other parts of the ACL; principally in Chapter 5 and include injunctive relief and damages.

**Conduct ‘In Trade or Commerce’**

For the purposes of this thesis, and consistent with the authoritative interpretation of that term by the High Court in *Concrete Constructions (NSW) Pty Limited v Nelson*, the sale for profit of food animal products by Hestia is conduct that is in trade or commerce for the purposes of the ACL. Consistent with the decision in *Concrete Constructions*, the retail sale of products is an activity that of itself bears a trading or commercial character.

Accordingly, I do not think it is necessary to explain in detail in this thesis the case-law interpreting the phrase ‘in trade or commerce’. I have discussed this case law in detail elsewhere.

Having established that the relevant conduct of Hestia was ‘in trade or commerce’ the next step is to inquire whether it was in fact misleading or deceptive or likely to mislead or deceive.

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22 ACL s 232.

23 ACL s 236.


When is Conduct ‘Misleading or Deceptive’?

Conduct is misleading or deceptive when it ‘leads into error’. The High Court in *Parkdale Custom Built Furniture Proprietary Limited v Puxu Proprietary Limited* explained:

The words of [s.18] require the Court to consider the nature of the conduct of the corporation against which proceedings are brought and to decide whether that conduct was, within the meaning of that section, misleading or deceptive or likely to mislead or deceive...One meaning which the words 'mislead' and 'deceive' share in common is 'to lead into error'.

The Full Federal Court in *Astrazeneca Pty Ltd v Glaxosmithkline Australia Pty Ltd* formulated the requirement as follows:

In order to determine whether there has been any contravention of [s.18] of the Act, it is necessary to determine whether or not the conduct complained of amounted to a representation which has or would be likely to lead to a misconception arising in the minds of that section of the public to whom the conduct (which may include refraining from doing an act) has been directed.

Whether evaluating the conduct of corporations or of persons, there are three threshold issues that need to be addressed before the prohibition in ACL s 18 can be established.

1. Whether conduct is ‘in trade or commerce’;

2. The *Taco Bell* methodology for evaluating misleading or deceptive conduct; and

3. The *Campomar* methodology employed for evaluating the relevant ‘class of consumers’ alleged to have been misled.

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28 *Taco Co of Australia Inc v TacoBell Pty Ltd* (1982) 24 ALR 177.
These foundational methods or principles influence whether ACL s 18 even applies (because the conduct in question might not be 'in trade or commerce') and if it does, who might have been misled (identifying the 'class' of consumers through the Campomar methodology) and then whether that conduct is misleading or deceptive in breach of s 18 of the *Australian Consumer Law* (the *Taco Bell* methodology).

**The *Taco Bell* Methodology**

Conduct is misleading or deceptive if it 'leads into error'. But what is the method by which conduct is considered to have led into error and therefore breached ACL s 18? What processes does the Court undertake in making its assessment? In *Apotex Pty Ltd v Les Laboratoires Servier (No 2)*, the Court stated:

In *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 24 A LR 177 at 202 Deane and Fitzgerald JJ outlined a series of propositions to be considered in assessing whether conduct is misleading or deceptive under [s 18] of the Act:

- It is necessary to identify the relevant section(s) of the public by reference to whom the question of whether conduct is or is likely to be misleading or deceptive falls to be tested;

- Once the relevant section of the public is established, the matter is to be considered by reference to all who come within it, including the astute or the gullible, the intelligent or not so intelligent, educated or not educated and men and women of various ages and vocations;
• Evidence that some individual has in fact formed an erroneous conclusion is admissible and may be persuasive but is not essential. Regardless, such evidence does not of itself conclusively establish the conduct to be misleading or deceptive, the test is objective and the Court must determine for itself;

• It is necessary to inquire why any proven misconception has arisen. It is only by this investigation that the evidence of those who are shown to have been led into error can be evaluated and it can be determined whether they are confused because of misleading or deceptive conduct on the part of the respondent. 30

Application of the Taco Bell Methodology

This process of evaluation, sometimes referred to as the ‘Taco Bell Steps’ has been adopted and elaborated upon, either explicitly or implicitly by almost all decisions in which the Court is required to evaluate whether conduct is misleading or deceptive or likely to mislead or deceive.

For example, in Domain Names Australia Pty Ltd v .au Domain Administration Ltd, the Full Court stated:

It has long been established that:

• When the question is whether conduct has been likely to mislead or deceive, it is unnecessary to prove anyone was actually misled or deceived...

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• Evidence of actual misleading or deception is admissible and may be persuasive but is not essential...

• The test is objective and the Court must determine the question for itself...

• Conduct is likely to mislead or deceive if that is a real or not remote possibility, regardless of whether it is less or more than 50%.

See also AMI Australia Holdings Pty Ltd v Bade Medical Institute (Australia) Pty Ltd.

In other cases, Courts have not explicitly set out the Taco Bell steps, but have implicitly adopted them. For example, in Astrazeneca Pty Ltd v Glaxosmithkline Australia Pty Ltd, the Full Court referred to Taco Bell in explaining its approach to the evaluation of the conduct under challenge in that case.

The Full Court stated:

For [s.18] of the Act to be enlivened it is sufficient that the conduct complained of, in all the circumstances, answers the statutory description, that is to say, that it is misleading or deceptive or likely to mislead or deceive. It is unnecessary to go further and establish that any actual or potential consumer has taken or is likely to take any positive step in consequence of the deception. That is not to say that evidence of actual misleading or deception and steps taken in consequence thereof is not likely to be both relevant and important on the question whether the relevant conduct in fact answers the statutory description.

32 AMI Australia Holdings Pty Ltd v Bade Medical Institute (Australia) Pty Ltd. (2009) 262 ALR 458, 472.
A similar re-formulation of the *Taco Bell* steps was adopted by the Court in *Johnson & Johnson Pacific Pty Limited v Unilever Australia Limited (No 2)*.\(^{34}\) The Court in *Unilever Australia Limited v Goodman Fielder Consumer Foods Pty Ltd*\(^{35}\) also adopted the *Taco Bell* steps without referring to the case itself.

See also *Australian Competition and Consumer Commission v Australian Dreamtime Creations Pty Ltd*.\(^{36}\)

### A Consistent Approach to Principles – The Basic Evaluative Framework

The consistent approval of the *Taco Bell* steps enables a summary of the basic principles employed by the Courts in evaluating whether conduct is misleading or deceptive or likely to mislead or deceive.\(^{37}\)

The principles set out below have been extracted from a number of recent decisions of the Federal Court including *ACCC v Clarion Marketing Pty Ltd*,\(^{38}\) *Butcher v Lachlan Elder Realty Pty Limited*\(^{39}\) and *ACCC v Australian Dreamtime Creations Pty Ltd*.\(^{40}\)

There are many other cases in which these principles have been stated (in various ways) and elaborated upon, and they form a basic conceptual framework against which allegations of misleading or deceptive conduct may be evaluated. The following ten principles form that basic evaluative framework:

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\(^{37}\) Alex Bruce, *Introduction to Misleading or Deceptive Conduct*, Chapter 3 in *Consumer Protection Law in Australia*, (LexisNexis Butterworths, Australia, 2011) 51, 73.

\(^{38}\) *ACCC v Clarion Marketing Pty Ltd* [2009] FCA 1441, 8 – 9.


1. Whether a representation is likely to mislead or deceive is an objective question of fact, to be determined having regard to all the circumstances of the conduct and not just some isolated aspect of that conduct;

2. Conduct is misleading or deceptive if leads into error. It is likely to be misleading or deceptive if there is a real chance that the conduct or representations will mislead or deceive;

3. It is necessary to identify some conduct, whether in the form of a representation, an omission or some other form, that led the consumer(s) into error;

4. It is necessary to identify the class of consumers toward whom the allegedly misleading conduct was directed;

5. Having identified the relevant class of consumers, the test to be applied is objective, that is, whether a ordinary and reasonable person from the class is likely to have been misled or deceived;

6. The process involved in identifying the ‘ordinary and reasonable’ person from the class differs depending on whether the allegedly misleading or deceptive conduct was directed toward specific and identified individuals or to a large class;

7. Actual intention to mislead or deceive is not necessary to establish a breach of s 18 of the ACL, but if intention is present, a Court may be more likely to find that the conduct complained of was misleading;

8. Conduct may be misleading or deceptive if it induces into error, but it is not sufficient merely to show that it may have led to confusion or caused people to wonder;
9. Actual evidence that some people may have been misled is not essential but is admissible and may be persuasive if given;

10. A corporation does not avoid liability for breach of s 18 because a person who has been the subject of misleading or deceptive conduct could have discovered the misleading or deceptive conduct by proper inquiries;

**Application of Relevant Case Law – ‘Positive’ Labelling Representations.**

These principles form the basic legal framework against which both of the ACCC’s allegations against Hestia are to be evaluated in terms of ACL s 18. In relation to the first allegation, existing case law demonstrates how the ACL can be successfully employed against Hestia in relation to the first set of the ACCC’s allegations; that Hestia has engaged in misleading or deceptive conduct in falsely representing that its ‘Healthy Choice Range’ eggs are free-range.

Since 2010, the Australian Competition and Consumer Commission has instituted proceedings in the Federal Court of Australia against several Australian suppliers alleging misleading, deceptive or false claims made by those companies concerning food animal products.

At the time of writing this thesis, one of those causes of action remains on foot while fresh proceedings against yet another supplier, Rosie’s Free Range Eggs, were instituted by the ACCC on 8 March 2012.

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41 Part XI, s138(1) of the Competition and Consumer Act 2010 (Cth) confers jurisdiction on the Federal Court of Australia in relation ‘to any matter arising under this Part or the Australian Consumer Law’.

42 ACCC v Baiada Poultry Pty Ltd (ACN 002 925 948) & Ors (VID 974 of 2011).

The unreported decisions in *Australian Competition and Consumer Commission v C.I & Co Pty Ltd* and *Australian Competition and Consumer Commission v Turi Foods Pty Ltd* provide useful guidance about the relationship between product labelling and food animal welfare and how the misleading or deceptive conduct provisions of the ACL can be deployed to ensure food animal products accurately reflect antecedent animal husbandry practices.

In *Australian Competition and Consumer Commission v C.I & Co Pty Ltd*, a Western Australian based family owned company, C.I & Co Pty Ltd (‘Cl’) acquired eggs from egg farms and supplied them to a number of retailers, cafes and restaurants. Between June 2008 and April 2010, Cl acquired over a million dozen eggs produced by battery cage hens and 12 000 dozen free-range eggs. However, in that period, Cl supplied nearly 900 000 dozen eggs to customers that it had labelled ‘free range’, conduct described by the Court as involving ‘a high level of dishonesty’.46

In doing so, Cl and its directors earned a significant amount of revenue they would not otherwise have earned if the eggs had been truthfully labelled as ‘cage eggs’. For example, the Court noted that in a two-week representative period between 15 and 30 April 2010, Cl and its directors earned between $5744 and $9008 in revenue ‘which they would not have derived had the eggs been labelled clearly as ‘cage eggs’’.47

Following an ACCC investigation, Cl and its directors admitted the deception and that they had contravened Sections 52, 53(a) and 55 of the *Trade Practices Act 1974* (Cth).48

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44 *Australian Competition and Consumer Commission v C.I & Co Pty Ltd* [2010] FCA 1511
45 *Australian Competition and Consumer Commission v Turi Foods Pty Ltd* (No 2) [2012] FCA 19.
46 *Australian Competition and Consumer Commission v C.I & Co Pty Ltd* [2010] FCA 1511, [31].
47 Ibid [14].
48 These are now Sections 18, 29(1)(a) and 33 respectively, of the ACL.
Both CI and the directors consented to certain orders being made against them, including declarations, injunctive relief and corrective advertising.

Because CI and its directors had admitted the contraventions and consented to orders being made, the Court was not required to establish CI's liability through the Taco Bell and Campomar methodologies discussed above. It has become increasingly common for respondents to agree to consent orders and making joint submissions on penalties with the ACCC thereby avoiding a substantive trial on the issues.

Nevertheless, the Court cannot simply make orders and impose penalties just because parties consent to them. Before it does so, the Court must be satisfied that the facts before it actually do disclose a breach of the CCA or ACL. 49 In this case, the Court accepted that the relevant sections of the TPA (now ACL) had been breached 'following many years of unlawful conduct which must have yielded considerable undeserved profit'. 50

Significantly, the Court clearly explained the relationship between the misleading labelling and consumer interest in food animal welfare. According to the Court, the misleading labels 'amounted to a cruel deception on consumers who mostly seek out free range eggs as a matter of principle, hoping to advance the cause of animal welfare by so doing.' 51

This is a simple and direct statement of the intended use of the ACL anticipated by the Commonwealth Labelling Logic Report.

49 Australian Competition and Consumer Commission v SIP Australia Pty Ltd (1999) ATPR 41-702, 43,000.
50 Australian Competition and Consumer Commission v C.I & Co Pty Ltd [2010] FCA 1511, [21].
51 Ibid [31].
In an increasingly competitive market for food products, the *Labelling Logic Report* anticipates that consumer demand for ethically produced animal products, what it calls 'values issues', will signal producers to implement food animal welfare practices such as free-range farms. Unfortunately the case is also a clear example of the dishonest and unethical practices warned about by ACCC Commissioner Martin and discussed at the beginning of Chapter 5.

Growing consumer demand for welfare friendly animal products is reflected in the continued willingness of some suppliers to mislead consumers. For example, on 8 March 2012, the ACCC instituted proceedings against Ms Rosemary Bruhn, trading as Rosie's Free Range Eggs in South Australia. In instituting proceedings, the ACCC ‘alleges that from March 2007 to October 2010, Ms Bruhn represented that eggs she supplied to business customers including 117 customers in South Australia such as retail outlets, bakeries, cafes and restaurants, were free range eggs when a substantial proportion of the eggs were not free range but cage eggs’.53

At the time of writing, the matter is before the Federal Court.

Also still before the Court are proceedings commenced in September 2011 by the ACCC against Turi Foods Pty Ltd, Baiada Poultry Pty Ltd, Bartter Enterprises Pty Limited and the Australian Chicken Meat Federation Inc (’the ACMF’). Baiada Poultry and Bartter Enterprises supply chickens throughout Australia under the well-known ‘Steggles’ brand name while Turi Foods supplies ‘La Ionica’ brand chickens in New South Wales and Victoria.

The ACCC alleged that these corporations engaged in misleading or
deeceptive conduct in breach of both the TPA and the ACL in making certain
representations associated with the chicken meat products they supplied. 54
The ACCC alleged that ‘Baiada Poultry and Bartter Enterprises made false
or misleading claims in print advertising and product packaging, that
Steggles meat chickens are raised in barns with substantial space available
allowing them to roam freely’ when this was not the case at all’. 55

Similar allegations were made against Turi Foods where it was alleged that
‘Turi Foods made false or misleading representations through in-store
displays and advertising on delivery trucks. La Ionica brand meat chickens
were claimed to be able to roam freely in barns with substantial space and
in conditions equivalent to a free range system’. 56

While it is on-going, this litigation has been bitterly contested. In
December 2011, the Australian Chicken Meat Federation sought
interlocutory orders dismissing the ACCC’s proceedings either on the basis
that no reasonable cause of action was disclosed 57 or that the ACCC had no
reasonable prospect of successfully prosecuting its claims. 58

The actual evidence indicated that the average space available to each
chicken was about 500 square centimetres. 59 To provide some
perspective, an A4 sheet of paper has an area of 625 square centimetres.
A standard laying hen is at least 40-cm high when she stands erect and is
approximately 45-cm long and 18-cm wide, without her wings extended.

54 ACCC Takes Action over ‘Free to Roam’ Chicken Claims, ACCC Media Release 7
September 2011.
(Accessed 12 May 2012)
55 Ibid.
56 Ibid.
57 Rule 26.01(1)(c) Federal Court Rules 2011.
58 Rule 26.01(1)(a) Federal Court Rules 2011.
59 Australian Competition and Consumer Commission v Turi Foods Pty Ltd [2011] FCA
1382, [14] (Unreported decision of Tracey J dated 2 December 2011).
Her body space takes therefore takes up an area of about 810 square centimetres.

Despite the mathematical bleakness of the evidence, the ACMF claimed that there were simply no grounds for alleging that chickens were not 'free to roam' as they had represented.\textsuperscript{60} Perhaps not surprisingly, Tracey J refused to strike out the ACCC’s action, observing that ‘five hundred centimetres squared is a remarkably small space. In order for any one chicken to have a larger area of movement, others would have to be confined within an even smaller space.’\textsuperscript{61}

By January 2012, Turi Foods Pty Ltd had decided to conclude the proceedings against it by admitting the contraventions and submitting to consent orders.\textsuperscript{62} After reviewing the evidence, Tracey J concluded:

the stock densities, which La Ionica has admitted are to be found in the barns in which its chickens are raised, are maintained at such a level that the chickens have severe restrictions placed on their capacity to roam, if, indeed any such capacity exists.\textsuperscript{63}

These conclusions would later return to haunt Tracey J. The three other respondents continue to fight the ACCC’s allegations and\textsuperscript{64} at least two of the respondents have also decided to personally attack the Judge.

\textsuperscript{60} Ibid [10].
\textsuperscript{61} Ibid [13].
\textsuperscript{62} Australian Competition and Consumer Commission \textit{v} Turi Foods Pty Ltd (No 2) [2012] FCA 19 (unreported decision of Tracey J dated 23 January 2012)
\textsuperscript{63} Ibid [23].
\textsuperscript{64} It is usual for food animal suppliers to vigorously litigate against persons who threaten to expose their treatment of animals – see Takhar \& Anor \textit{v} South Australian Telecasters Ltd (BC 9702320, Unreported decision of Perry J of the Supreme Court of South Australia, 1997) involving an application for an injunction to restrain a current affairs program from airing footage of a battery hen egg farm operated by a supplier falsely selling eggs as ‘free range’; ABC \textit{v} Lenah Game Meats Pty Ltd (2001) 185 ALR 1 in which a supplier of possum meat sought an injunction to restrain display of footage taken of the plant’s processing practices.
In February 2012 Baiada Poultry Pty Ltd and Bartter Enterprises attempted to have Tracey J disqualify himself from hearing the case on the grounds of apprehended bias. 65 Both Baiada Poultry and Bartter Enterprises owned and operated chicken growing sheds in the same way as Turi Foods, including equivalent stocking densities.

Accordingly, they alleged that Tracey J's conclusion about stocking densities made in concluding the proceedings against Turi Foods 'travelled beyond the agreed facts...and constituted findings independently made by me.' 66 His Honour rejected the application and, at the date of writing this thesis, the litigation continues.

These decisions demonstrate that the misleading or deceptive conduct provisions in the ACL can be effectively deployed to prevent suppliers of food animal products from deceiving consumers about value issues such as animal welfare conditions. They also reflect an awareness by the Courts of the relationship between consumer concern for food animal welfare and the information provided by suppliers on labels and advertising material.

At least in relation to positive representation such as 'free-range' or 'free-to-roam', the policy behind the Labelling Logic Report is likely to be well served by the effective enforcement of the ACL.

By preventing suppliers from making misleading or false claims associated with food animal products, consumers will be provided with sufficient and accurate information enabling them to make informed choices about their purchases.

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65 Apprehended bias exists where 'a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide.' Michael Wilson & Partners v Nicholls (2011) 282 ALR 685, 692.

66 Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 2) [2012] FCA 19 (unreported decision of Tracey J dated 23 January 2012) [18].
This is especially important when, as North J in *Australian Competition and Consumer Commission v C.I & Co Pty Ltd* noted, consumers ‘seek out free range eggs as a matter of principle, hoping to advance the cause of animal welfare by so doing.’

**Chapter 6, Section IV – Silence, Can Nothing Become Something?**

The second of the ACCC’s allegations against Hestia are far more difficult for the case law to evaluate. It is alleged that Hestia sold meat products in circumstances that did not inform consumers that the meat products originated from animals that had been slaughtered according to religious rituals. The ACCC’s case depends on establishing that ACL s 18 is wide enough to encompass a failure to advise or to inform as misleading or deceptive conduct.

In beginning this evaluation, the first step is to identify the relevant class of consumers alleged to have been misled by Hestia’s conduct.

**Identifying the Relevant Class of Consumers**

In assessing whether consumers have been or might have been misled or deceived by conduct allegedly in breach of s 18 of the ACL, the Court must ‘test’ the conduct against the relevant class of consumers.

The *Taco Bell* methodology involves the Court first identifying the relevant section(s) of the public by reference to whom the question of whether conduct is or is likely to be misleading or deceptive falls to be tested; and once the relevant section of the public is established, considering the effect

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67 *Australian Competition and Consumer Commission v C.I & Co Pty Ltd* [2010] FCA 1511, [31].
of the conduct by reference to all who come within the identified class, including the astute or the gullible, the intelligent or not so intelligent, educated or not educated and men and women of various ages and vocations.

Accordingly, the very first step involves identifying the class of consumers who are alleged to have been or may have been misled by the conduct. But this begs the further question: ‘how is the relevant class identified?’

This question is particularly problematic in the circumstances of the ACCC’s case against Hestia. For example, is the relevant class of consumers everyone in Australia who buys groceries at retail stores? Or is the relevant class of consumers smaller, only those who buy groceries at Hestia stores? Or is the relevant class confined by excluding some sub-set or other of a larger group? Or is it necessary to file and serve affidavit evidence from actual consumers polled, for example, on Saturday mornings while they were shopping?

These difficulties were adverted to by Gibbs CJ in *Parkdale Custom Built Furniture Proprietary Limited v Puxu Proprietary Limited* where His Honour stated:

> Section [18] does not expressly state what persons or class of persons should be considered as the possible victims for the purpose of deciding whether conduct is misleading or deceptive or likely to mislead or deceive. It seems clear enough that consideration must be given to the class of consumer likely to be affected by the conduct. Although it is true, as has often been said, that ordinarily a class of consumers may include the inexperienced as well as the experienced and the gullible as well as the astute, the Section must in my opinion, be regarded as contemplating the effect of the conduct on reasonable members of the class.

> The heavy burdens which the Section creates cannot have been intended to be imposed for the benefit of consumers who fail to take reasonable care of their own interests. ⁶⁸

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This view; that the section must be 'regarded as contemplating the effect of the conduct on reasonable members of the class'\textsuperscript{69} would seem to further complicate the exercise of identifying the relevant class. Now the High Court is apparently suggesting that however the relevant class of consumers is to be defined for the purposes of testing the allegedly misleading or deceptive conduct, that class only includes 'reasonable members'.

But how does the Court go about identifying a reasonable member of a class that has, itself as yet eluded identification? Fortunately, the High Court in \textit{Campomar Sociedad v Nike International}\textsuperscript{70} provided some guidance in identifying the relevant class of consumers for the purposes of evaluating conduct against ACL s 18.

In \textit{Campomar}, the High Court commenced its discussion of identifying the relevant class of consumers by referring to a passage from the \textit{Taco Bell} decision where the Full Federal Court stated:

\begin{quote}
In some cases, such as an express untrue representation made only to identified individuals, the process of deciding that the question of fact may be direct and uncomplicated. In other cases, the process will be more complicated and call for the assistance of certain guidelines upon the path to decision.\textsuperscript{71}
\end{quote}

The High Court in \textit{Campomar} noted that this passage drew a distinction between conduct that is directed towards identified individuals on the one hand, and to the general public (or larger class) on the other.

When the alleged misleading conduct is directed toward identified individuals, such as the purchasers of a business, the relevant 'class' is confined to those specific, identified purchasers.

\textsuperscript{69} Ibid.
\textsuperscript{70} \textit{Campomar Sociedad v Nike International} (2000) 202 CLR 45.
\textsuperscript{71} Ibid 84.
However, in many cases, the relevant conduct is directed toward the public at large, especially when it is alleged that a company has breached ACL s 18 in its advertising through the mass media or through labelling (or the lack thereof) of food animal products in a supermarket.

The Campomar Methodology

In that situation, the High Court created a three-stage methodology for identifying the relevant class. First it noted:

Here (conduct directed to the public) the issue with respect to the sufficiency of the nexus between the conduct or the apprehended conduct and the misleading or deception or likely misleading or deception of prospective purchasers is to be approached at a level of abstraction not present where the case is on involving an express untrue representation allegedly made only to identified individuals.72

This extract recognises that different evaluative methodologies are required when assessing conduct directed toward an identified consumer on the one hand, and more generalised conduct directed toward the public at large on the other.

When allegedly misleading conduct is directed toward identified individuals the inquiry is focussed on the conduct and whether it misled those individuals. As the High Court in Backoffice Investments noted:

In the case of an individual, it is not necessary that he or she be reconstructed into a hypothetical 'ordinary' person. Characterisation may proceed by reference to the circumstances and context of the questioned conduct. The state of knowledge of the person to whom the conduct is directed may be relevant, at least in so far as it related to the content and circumstances of the conduct.73

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72 Ibid 84.
73 Ibid 620 – 621.
In other words, the evaluation is relatively straightforward; identify the conduct alleged to be misleading and deceptive, examine whether the misled state of mind of the actual consumer (purchaser) was caused by the conduct in question or by some other cause. This was the methodology outlined by the High Court in *Butcher v Lachlan Elder Realty Pty Ltd*, where the Court stated:

The plaintiff must establish a causal link between the impugned conduct and the loss that is claimed. That depends on analysing the conduct of the defendant in relation to that plaintiff alone. So here, it is necessary to consider the character of the particular conduct of the particular agent in relation to the particular purchasers, bearing in mind what matters of fact each knew about the other as a result of the nature of their dealings and the conversations between them, or which each may be taken to have known.\(^\text{74}\)

However, this methodology focusses attention on the impact of the conduct on an individual consumer, and would not necessarily work well when there is no individual consumer. But it is still necessary to establish a nexus between the alleged misleading conduct on the one hand, and a misled state of mind of a consumer on the other. How is this nexus to be proven if there is no actual consumer against whom to test the conduct? For this reason the *Campomar* methodology admits to the necessity of approaching the task with a certain level of abstraction. What does this mean?

The second step therefore is to note that this ‘level of abstraction’ involves the following inquiry:

Where the persons in question are not identified individuals to whom a particular misrepresentation has been made or from whom a relevant, face, circumstances or proposal was withheld, but are members of a class to which the conduct in question was directed in a general sense, it is necessary to isolate by some criterion a representative member of that class.\(^\text{75}\)

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\(^\text{74}\) *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, [37].

\(^\text{75}\) Ibid [85].
Once that representative member of the class has been identified, the third step requires an ‘inquiry to be made with respect to this hypothetical individual why the misconception complained has arisen or is likely to arise’. 76

This methodology was repeated by the High Court in its subsequent decision in *Campbell v Backoffice Investments Pty Ltd*:

> This Court has drawn a practical distinction between the approach to characterisation of conduct as misleading or deceptive when the public is involved, on the one hand, and where the conduct occurs in dealings between individuals on the other. In the former case, the sufficiency of the connection between the conduct and the misleading or deception of prospective purchasers 'is to be approached as a level of abstraction not present where the case is one involving an express untrue representation made only to identified individuals'. Where conduct is directed to members of a class in a general sense, then the characterisation enquiry is to be made with respect to a hypothetical individual 'isolated by some criterion' as a 'reasonable member of that class.' 77

In the context of the ACCC’s case against Hestia, the alleged misleading conduct; that is, the failure to advise consumers that meat products have originated from animals slaughtered according to religious ritual, falls within this second category, a national retailer selling food animal products to the general public.

The High Court in both its *Campomar* and *Backoffice Investments* decisions refers to the evaluation of allegedly misleading or deceptive conduct directed toward a large class of consumers or the public generally taking place at a certain ‘level of abstraction’.

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76 Ibid.

77 *Campbell v Backoffice Investments Pty Ltd* (2009) 257 ALR 610, 620.
According to the Court in *Campomar*, that ‘level of abstraction’ involves the following inquiry:

> Where the persons in question are not identified individuals to whom a particular misrepresentation has been made or from whom a relevant, face, circumstances or proposal was withheld, but are members of a class to which the conduct in question was directed in a general sense, it is necessary to isolate by some criterion a representative member of that class.  

However, the issue that then presents itself is exactly what criterion is to be used in ‘isolating’ a representative member of the class? In *Backoffice Investments*, the High Court referred to ‘reconstructing a hypothetical ‘ordinary’ person’ for this purpose. How is this ‘reconstruction’ to be undertaken?

**Reconstructing the ‘Ordinary Reasonable Member’ of the Class**

Given this theoretical framework, the challenge for the ACCC is to identify an ordinary, reasonable member of the class of consumers against whom Hestia’s failure to inform is evaluated. Once that hypothetical reasonable member has been identified, and consistent with the *Taco Bell* methodology, the Court can then investigate whether there is a nexus between Hestia’s conduct and the alleged misled state of mind of that hypothetical reasonable member.

As the High Court in *Campomar* noted, the task of identifying this hypothetical reasonable member of the class occurs in the abstract. The ACCC must confect this member by ‘isolating by some criterion’ the qualities this member possesses.

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79 *Campbell v Backoffice Investments Pty Ltd* (2009) 257 ALR 610, 620.
80 Above n 78.
Accordingly, the ACCC argues that the hypothetical representative of the class is an Australian consumer whose values include a concern for animal welfare issues and who seeks to exercise those values in the purchasing decisions they make. In support, the ACCC notes the observation made by North J in *Australian Competition and Consumer Commission v C.I & Co Pty Ltd* where His Honour noted, consumers 'seek out free range eggs as a matter of principle, hoping to advance the cause of animal welfare by so doing'.

Despite the relatively straight-forward guidance provided by the High Court in its *Campomar* and *Backoffice Investments* decisions to identifying the hypothetical representative member of the class when conduct is directed to the public at large, there are several issues of interpretation that have arisen and must be addressed if the ACCC’s case is to succeed.

**Necessity of Proving a Significant Proportion of Class Misled?**

Hestia’s first attack alleges that in order for the ACCC to successfully establish a contravention of ACL s 18, it is necessary for a certain proportion of the identified class to be misled. Hestia argues that the potential class of consumers of meat products throughout Australia is huge and that only a small number of that class would be misled by the conduct.

Hestia argues that in these circumstances, it is not sufficient if, within a large class, only a small number of that class is misled when the majority are not or would not be misled.

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81 *Australian Competition and Consumer Commission v C.I & Co Pty Ltd* [2010] FCA 1511, [31].
The first argument has its origins in the decision in *10th Cantanae Pty Ltd v Shoshana Pty Ltd*[^1] where Wilcox J stated that it was necessary to establish that a significant proportion of the public must be misled before a statement could be considered misleading or deceptive in breach of the Act.

However, subsequent case law has rejected this approach. For example, in *National Exchange Pty Ltd v Australian Securities and Investments Commission* the Full Court concluded:

> To speak of a reasonable member of a class necessarily implies that one is speaking of a significant proportion of that class. It is impossible to postulate a situation in which the reasonable member of a class is not representative of such a proportion.[^3]

The conclusion of the Court in *National Exchange* was affirmed by the Full Federal Court later that year in *Domain Names Australia Pty Ltd v .au Domain Administration Ltd*.[^4]

This is a common sense conclusion. The High Court’s *Campomar* approach in effect designates the hypothetical representative member of the class as ‘proxy’ for the balance of the class. It’s as if all of the members of the identified class were rolled into the single hypothetical representative who stands as proxy for the whole.

**Differential Knowledge?**

Hestia’s second attack concerns the level of knowledge to be imputed to the hypothetical representative member of the class.

[^1]: *10th Cantanae Pty Ltd v Shoshana Pty Ltd* (1988) ATPR 40-833, 49,001.
[^4]: *Domain Names Australia Pty Ltd v .au Domain Administration Ltd* [2004] FCAFC 247, [27]-[28].
Hestia argues that within the wide class of consumers purchasing meat products, some consumers are very informed about sales and marketing techniques and would not be misled by the absence of labels advising of the religious slaughter of animals. Hestia therefore argues that because some members of the class would not be misled, then the hypothetical representative cannot be misled.

This is a slightly more subtle argument. Both Hestia and the ACCC accept that it is necessary to identify a hypothetical consumer who stands in place of all the members of the relevant class of consumers to whom the impugned conduct is directed. However, in effect, Hestia is attempting to argue that because members of the identified class differ in their commercial and intellectual abilities, unless all members of the class would be misled by the relevant conduct, then none of them could be misled.

The Court in *National Exchange Pty Ltd v Australian Securities and Investments Commission* rejected such an argument, noting that:

> Whilst it is true that members of a class may differ in personal capacity and experience; that is usually the case whenever a test of reasonableness is applied. Such a test does not necessarily postulate only one reasonable response in the particular circumstances. Frequently, different persons acting reasonably, will respond in different ways to the same objective circumstances. The test of reasonableness involves the recognition of the boundaries within which reasonable responses will fall, not the identification of a finite number of acceptable reasonable responses.\(^{85}\)

It is true that within an identified class of consumers, there will be different levels of knowledge, intelligence and commercial experience. But when the High Court in *Campomar* talks about isolating ‘by some criterion a representative member of that class’, it does not mean an attempt is made to identify one or other particular member of that class.

Rather, the process involves confecting a *hypothetical reasonable member* of the class who stands as proxy for the entire identified class of consumers.

This point was raised in *ACCC v Ascot Four Pty Ltd*[^6] in the context of allegations that price representations in a jewellery catalogue were false or misleading. In that case, the ACCC had instituted proceedings against Ascot Four, trading under the name 'Zamels' alleging that price representations relating to jewellery in 'was' 'now' format and contained in a Christmas catalogue were false and misleading.

The Court recognised that there were consumers who possessed knowledge of the jewellery industry and others who did not.[^7] There were also consumers who did not even read the catalogue.

The ACCC had instituted criminal proceedings under Part VC of the TPA.

The Court approached the task of identifying the class of consumers in the following way:

> The appropriate question is whether ordinary or reasonable members of the classes of prospective purchasers of the 11 jewellery items would understand the relevant contents of the Christmas catalogue as conveying the representation which I have found to have been made... Of course, upon the whole of the evidence, clearly not all ordinary or reasonable prospective purchasers of the 11 jewellery items necessarily would have so understood that material... There are obviously ordinary and reasonable members of the public among the potential purchasers of the defendant's jewellery who did not read or understand the Christmas catalogue....

> There are also obviously ordinary and reasonable members of the public among the potential purchasers of the defendant's jewellery who are aware that, notwithstanding a ticketed price, they can negotiate a lower price... However, such considerations do not detract from my conclusion that there was a group of ordinary and reasonable members of prospective purchasers of the 11 jewellery items to whom the representations I have found were made about the 11 jewellery items.[^8]

[^7]: Ibid 49, 530.
[^8]: Ibid.
However, the fact that not *all* of the consumers within an identified class would have been misled did not mean that *none* of the consumers were misled. The Court concluded that:

The fact that most or many of the consumers understood the representation in the way I have identified, but that some may not have done so, does not mean that the representation was not made at all. The representation was still made...even if some customers might reasonably have understood what was represented by the relevant parts of the Christmas catalogue in all the circumstances, that would not mean that the representation which I have identified was not made.  

Note that although the Court recognised that within the class of consumers, there would be differing levels of awareness and understanding concerning the price representations, it did not attempt to impute these different levels of knowledge to the consumers in testing the representations.

The approach of the Court in *Ascot Four* was referred to with approval by the Full Federal Court in *ACCC v Prouds Jewellers Pty Ltd*. In *Apotex Pty Ltd v Les Laboratoires Servier (No 2)*, discussed above, the Court evaluated the representations directed toward three distinct classes of consumers; patients who used the drug ‘Coversyl’, the doctors who prescribed the drug and the pharmacists who dispensed the drug. The Court concluded:

The Sections of the public to whom the stamp representations are directed are medical practitioners (doctors), pharmacists and patients who take or who are prescribed new Coversyl....No reason has been advanced to sub-divide these groups into any sub-classes or areas of specialisation. The question is whether the advertisements would be likely to lead to a misconception arising in the minds of that Section of the public to whom the conduct, or silence, has been directed.

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Where, as here, the representations are made to various classes of
the public, the characteristics of the members of that class are
relevant in order to determine whether a misconception is likely to
arise from the conduct alleged (Campomar at [98]–[103];
Astrazeneca at [34]).... It is therefore necessary to assess the
reactions or likely reactions of the members of each class to whom
the conduct was addressed (Campomar at [105]). The
representations are to be tested by their effect on ordinary and
reasonable persons within those groups (Campomar at [102]). 92

This extract demonstrates the Court’s reluctance to sub-divide or fragment
members of a particular class according to individual characteristics. The
Court found that a reasonable member of each of these classes would be
misled to varying degrees by the representations.

In Hestia’s case, some consumers don’t know or don’t care about whether
the meat products they purchase comes from animals slaughtered
according to religious rituals.

However, the ACCC notes the observation of the Court in ACCC v Ascot
Four Pty Ltd93 where the Court concluded that the fact that not all of the
consumers within an identified class would have been misled did not mean
that none of the consumers were misled.

In the circumstances of the present case, the Court is likely to conclude
that the hypothetical representative member of the class is an Australian
consumer who buys food animal products, including meat and who is not
possessed of special industry knowledge about the slaughter of food
animals.

92 Ibid 49,209.
The next field of battle therefore involves the difficult issue of whether Hestia’s failure to advise the ordinary reasonable consumer that meat products they purchase may have originated from animals slaughtered according to religious ritual, constitutes misleading or deceptive conduct in breach of ACL s 18. This is Hestia’s strongest vector of attack.

Silence and the ACL – An Incoherent, Inconsistent and Lonely Concept

Whether and in what circumstances a failure to act, to disclose or to correct some information can constitute misleading or deceptive conduct in breach of ACL s 18 is one of the more vexed issues in Australian consumer law. Although the case law does recognise the possibility, the Full Federal Court has lamented that it is ‘not properly subject to any unifying principle.’

Accordingly, the issue lacks ‘an entirely coherent and consistent framework of principles which is necessary for maximising the prospect of correctly applying the law to the facts.’

Answering the question; ‘does a failure by suppliers to advise consumers that meat products have originated from animals slaughtered by religious ritual, constitute misleading or deceptive conduct in breach of ACL s 18?’ therefore involves the application of an inconsistent legal framework not only lacking coherency but also any form of unifying jurisprudential principles.

There are at least three reasons for the confused, inconsistent and often incoherent state of the law associated with this issue.

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94 Rafferty v Madgwicks (2012) FCAFC 37, [278].
95 Owston Nominees No 2 Pty Ltd v Clambake Pty Ltd (2011) WASCA 76, [43].
First, the prohibition in ACL s 18 is directed toward ‘conduct’. Sections 2(2)(a) and 2(2)(c)(i) of the ACL provide that conduct can take the form of a refusal to do an act as well as refraining (otherwise than inadvertently) from doing that act. Most contraventions of ACL s 18 are therefore positive in the sense that some extant written, visual or spoken representation has allegedly misled another party.

Now, it is accepted that a subjective or even objectively determined intention on the part of one party to mislead or deceive another is not required in order to breach ACL s 18. However, the presence of the words ‘otherwise than inadvertently’ in ACL s 2 significantly complicates matters because it apparently does require the presence of intention or advertence. Courts across all Australian jurisdictions are divided in their attempts to reconcile these apparently contradictory elements.

But even if ACL s 18 does require some degree of information disclosure, the second difficulty involves the extent of that disclosure. In the context of sensitive commercial negotiations, a balance needs to be struck between the competing imperatives of maintaining a strong tactical bargaining position on the one hand, with the necessity of disclosing sufficient information in a way that avoids breaching ACL s 18 on the other.

Third, how is an absence of a representation, statement or information to be evaluated under ACL s 18?

All of these difficulties are encountered in evaluating whether Hestia’s failure to advise consumers that the meat products they have, or are about to purchase have originated from animals that have not been stunned prior to slaughter but instead have had their throats cut without prior stunning pursuant to Jewish or Islamic religious requirements.

97 Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd (1978) 140 CLR 216, 234.
At this point, the temptation is to conclude that because the question is simply too difficult to answer, it is not likely to be the subject of legal proceedings requiring a Court to do so. This is especially so in Australia where the legal costs structure makes no exception for speculative or public interest litigation.98

For example, if it were not the ACCC taking legal action, but Animals Australia,99 a non-profit, charitable organisation reliant on public donations and dedicated to animal welfare, instituting what it called ‘public interest’ proceedings in the Federal Court of Australia against Hestia alleging misleading or deceptive conduct over meat labels that did not advise consumers that the meat was halal or kosher, they would face similar costs orders as private commercial litigants.100 Despite any public interest characterisation of its cause of action, the High Court has consistently decided that public interest litigants such as Animals Australia should not be granted a ‘free kick’ in relation to costs orders.101

Given the conceptual uncertainty associated with Animal Australia’s cause of action (silence as misleading conduct) if it were to lose a lengthy trial, an eventual adverse costs order may be crippling. And even before a substantive trial, a strategically timed application for security for costs by Hestia may have the effect of summarily terminating Animal Australia’s proceedings before a substantive resolution of the issues.102

100 Section 43 of the Federal Court of Australia Act 1976 (Cth) and Rules 40.01 and 40.02 of the Federal Court Rules 2011.
102 Sales-Cini v Wyong City Council [2009] NSWLEC 201, [47], [60].
As the discussion in Chapter 4 indicated, this issue is far from speculative. Consumers in the European Union, the United Kingdom, New Zealand, Australia and the United States care about whether food animals have been slaughtered according to religious practices. This concern is simply a reflection of the observation made by the Court in *Australian Competition and Consumer Commission v C.I & Co Pty Ltd* about consumers deploying their buying power to express concern for the welfare of food animals generally.\textsuperscript{103}

**An Absence can be a Presence**

The prohibition in ACL s 18 is directed toward engaging in ‘conduct’ that is misleading or deceptive or likely to mislead or deceive. The word ‘conduct’ is commonly associated with positive acts, such as representations made in an advertisement. However, is the term wide enough to encompass a failure to act; that is, negative conduct? The *Explanatory Memorandum* certainly states that it does:

Section 18 of the ACL refers only to ‘conduct’ which is misleading or deceptive or is likely to mislead or deceive. The High Court has found that the ambit of ‘conduct’ is not limited to a positive action or representation, and that silence can be considered misleading or deceptive in certain circumstances.\textsuperscript{104}

At the time the *Explanatory Memorandum* was written, this extract was actually incorrect. In support of its conclusion there is a footnoted reference to the decision in *Demagogue Pty Ltd v Ramensky*.\textsuperscript{105}

\textsuperscript{103} *Australian Competition and Consumer Commission v C.I & Co Pty Ltd* [2010] FCA 1511, [31].

\textsuperscript{104} *Explanatory Memorandum* to the Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (Cth), [3.16].

\textsuperscript{105} *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31.
However, *Demagogue* is not a decision of the High Court, but of the Full Federal Court and so is not authority for the proposition that the High Court has found that silence can be considered misleading or deceptive conduct.

Since then, the High Court in *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited*\(^{106}\) has accepted that silence; the failure to disclose certain information can constitute 'conduct' for the purposes of s 52 of the TPA (including ACL s 18). How did the High Court reach this conclusion?

To begin with, the High Court referred to the definition of 'conduct' as it then existed in s 4 of the TPA, which is in identical terms as ACL s 4. 'Conduct' is presently defined in s 2(2) of the ACL by reference to the expression 'engaging in conduct'. Section 2(2) of the ACL is quite extensive and provides:

2(2) In this Schedule:
   (a) a reference to engaging in conduct is a reference to doing or refusing to do any act, including:

   (i) the making of, or the giving effect to a provision of, a contract or arrangement; or

   (ii) the arriving at, or the giving effect to a provision of, an understanding; or

   (iii) the requiring of the giving of, or the giving of, a covenant; and

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(b) a reference to conduct, when that expression is used as a noun otherwise than as mentioned in paragraph (a), is a reference to the doing of or the refusing to do any act, including:

(i) the making of, or the giving effect to a provision of, a contract or arrangement; or
(ii) the arriving at, or the giving effect to a provision of, an understanding; or
(iii) the requiring of the giving of, or the giving of, a covenant; and

(c) a reference to refusing to do an act includes a reference to:

(i) refraining (otherwise than inadvertently) from doing that act; or
(ii) making it known that that act will not be done; and

(d) a reference to a person offering to do an act, or to do an act on a particular condition, includes a reference to the person making it known that the person will accept applications, offers or proposals for the person to do that act or to do that act on that condition, as the case may be.

For the High Court in Miller, the crucial parts of this definition are s 2(2)(a) and s 2(2)(c)(i). These sections provide that conduct can take the form of a refusal to do an act and refraining (otherwise than inadvertently) from doing that act. These subsections correspond to the former s 4(2)(a) and (b) of the TPA. The definition of ‘engaging in conduct’ in s 2(2) of the ACL is wide enough to bring a failure to do or say something within that definition.
However, this is just the first step because it is then necessary to explore the circumstances in which that conduct can be misleading or deceptive in breach of ACL s 18.

The starting point is the seminal decision of the Full Federal Court in Demagogue Pty Ltd v Ramensky, where Black CJ observed:

Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive.

To speak of ‘mere silence’ or of a duty of disclosure can divert attention from that primary question. Although ‘mere silence’ is a convenient way of describing some fact situations, there is in truth no such thing as ‘mere silence’ because the significance of silence always falls to be considered in the context in which it occurs. That context may or may not include facts giving rise to a reasonable expectation, in the circumstances of the case, that if particular matters exist they will be disclosed.\(^\text{107}\)

This approach to the evaluation of silence as misleading or deceptive conduct has been consistently applied by the Courts across all Australian jurisdictions and was approved of by the High Court in Miller.\(^\text{108}\)

There are several points to note about this extract from Demagogue:

1. The comment concerning ‘not imposing any general duty of disclosure’ is a reference to early case law that required a plaintiff to establish that the defendant owed a positive duty of disclosure before the failure to disclose could be considered misleading or deceptive in terms of the TPA; Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd;\(^\text{109}\)

\(^{107}\) Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31, 32.


\(^{109}\) Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd (1986) ATPR 46-010.
2. However, the Courts have comprehensively rejected the need to establish a ‘duty to disclose’ in favour of evaluating the conduct as a whole, within the entirety of the circumstances of the case – *Commonwealth Bank of Australia v Mehta*;\(^{110}\)

3. Therefore, the crucial question is whether the context of the facts gave rise to a ‘reasonable expectation of disclosure’ that if a particular matter existed, that matter would be disclosed; and

4. If the answer to that question is ‘yes’ then it may be that in the circumstances of the case, that failure to disclose the particular fact amounted to conduct that was misleading or deceptive or likely to mislead or deceive in breach of s 18 of the ACL.

The essential inquiry concerns whether, in the circumstances of the case, there existed a reasonable expectation that the relevant information would be disclosed.

**A Reasonable Expectation of Disclosure**

This phrase ‘reasonable expectation of disclosure’ is not found in either the ACL generally or s 18 specifically. Initially, French J (now Chief Justice of the High Court) in *Kimberley NZI Finance Limited v Torero Pty Ltd*:

> The cases in which silence may be so characterised are no doubt many and various and it would be dangerous to essay any principle by which they might be exhaustively defined. However, unless the circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed it is difficult to see how mere silence could support the inference that that fact does not exist.\(^ {111}\)


\(^{111}\) *Kimberley NZI Finance Limited v Torero Pty Ltd* (1989) ATPR (Digest) 46-054, 53,195.
This comment was then referred to with approval by Gummow J (now Justice of the High Court) in *Demagogue Pty Ltd v Ramensky*:

> unless the circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed, it is difficult to see how mere silence could support the inference that the fact does not exist.\(^{112}\)

Finally, the High Court in *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited* confirmed:

> The language of reasonable expectation is not statutory. It indicates an approach which can be taken to the characterisation, for the purposes of [s.18], of conduct consisting of, or including, non-disclosure of information.\(^{113}\)

Since the decision of the Full Court in *Demagogue*, and now more recently since *Miller* it has been accepted that a failure to disclose information can constitute misleading or deceptive conduct when the circumstances of the case in question indicate that if some fact existed, there was a reasonable expectation that the fact would be disclosed.

In these circumstances, the ACCC argues that Hestia is aware that meat offered for retail sale is derived at least in part from animals slaughtered according to religious ritual; that is, slaughtered without prior stunning. It argues that consumer sensitivity to animal welfare generally and the religious slaughter issue specifically, is information that the hypothetical representative consumer would expect to be disclosed at or before the time of purchase. The failure of Hestia to do so means that it has engaged in misleading or deceptive conduct in breach of ACL s 18.

Pressing its case, the ACCC argues that the question of whether there was a reasonable expectation of disclosure is answered from the perspective of the hypothetical representative member of the class.

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\(^{112}\) *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 41.

After all, the High Court in *Miller* emphasised the importance of the knowledge of the person to whom conduct is directed.\(^{114}\)

In its response, Hestia alleges that the ACCC has misconstrued the reasonable expectation test. The ACCC alleges that whether it was reasonable to expect certain information to have been disclosed is a question tested from the perspective of the hypothetical representative of the class of consumers.

However, Hestia argues that the question is not asked from the perspective of the hypothetical representative of the class but is asked in the abstract, after an examination of *all the circumstances* of the case at hand.\(^{115}\) The ACCC’s emphasis on the extract from *Miller* to the effect that the knowledge of the person to whom conduct is directed is important is impermissibly selective because that knowledge is only one circumstantial factor amongst many that informs the resolution of the issue.

In support, Hestia notes that the Full Federal Court in *Demagogue Pty Ltd v Ramensky* stated ‘the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or likely to mislead or deceive.’\(^{116}\) That the issue involves an examination of the wider circumstances of the case was affirmed by the High Court in *Miller*.\(^{117}\)

When this wider analysis is undertaken, Hestia argues that the ACCC’s allegation is one of ‘mere silence’ of the kind referred to in *Miller*\(^{118}\) and which the law has consistently recognised as conduct that without more, cannot be misleading or deceptive in breach of ACL s 18.

\(^{114}\) Ibid 369-370.


\(^{116}\) *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 32.

\(^{117}\) Above n 115, 369-370.

\(^{118}\) Ibid 364.
Hestia draws the Court’s attention to the decision of Justice Gummow in *Demagogue Pty Ltd v Ramensky* where His Honour confirmed:

Unless the circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists, it would be disclosed, it is difficult to see how mere silence could support the inference that the fact does not exist.\(^{119}\)

While Hestia acknowledges the observations of North J in *Australian Competition and Consumer Commission v C.I & Co Pty*\(^{120}\) about consumers seeking out free range eggs as a matter of principle, hoping to advance the cause of animal welfare, it alleges that the case is clearly distinguishable from the present circumstances. In that case, there were positive representations about the nature and quality of the eggs; that they were ‘free-range’.

The deliberate and direct marketing of consumer values associated with animal welfare squarely raised the expectation in the circumstances of that case that if the eggs in fact originated from battery farms, that fact would be disclosed.

In the present case, Hestia argues that it has not attempted to market the meat in circumstances that squarely raise consumer values issues. The mere fact of non-disclosure of this or that slaughtering technique of itself cannot amount to misleading or deceptive conduct in breach of ACL s 18.\(^{121}\)

In any case, Hestia argues, for ‘mere’ non-disclosure to amount to misleading or deceptive conduct, the case-law requires that it must have formed the subjective intention not to disclose the fact of the religious slaughter of animals to consumers. Hestia argues that at no time had it formed this intention.

\(^{119}\) *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 41.

\(^{120}\) *Australian Competition and Consumer Commission v C.I & Co Pty Ltd* [2010] FCA 1511, [31].

\(^{121}\) *Kimberly NZI Finance Ltd v Torero Pty Ltd* [1989] ATPR (Digest) 64-054.
Relevance of Intention?

A person or corporation does not have to intend to engage in misleading or deceptive conduct before its conduct breaches ACL s 18. Accordingly, the High Court has confirmed that subjective intention is not an element of the contravention.\(^{122}\)

However, the definition of ‘refusing to do an act’ set out in s 2(2)(c) of the ACL means ‘refraining (otherwise than inadvertently) from doing that act.’ The expression ‘otherwise than inadvertently’ raises the difficult question as to whether some form of intentional non-disclosure is required before there can be a breach of ACL s 18. The issue is important because a person may unintentionally fail to disclose certain information. Has that person engaged in conduct for the purposes of ACL s 18?

This would suggest that in order to be liable under ACL s 18, the person who failed to disclose information must have had actual knowledge of the facts that he or she failed to disclose. In other words, the person must have adverted to the facts but made a subjective intentional decision not to disclose them; otherwise, how can it be said the non-disclosure was ‘inadvertent’?

The case law on this point is very unsettled and confused. Some decisions suggest that the person does not have to be subjectively aware of the facts that he or she fails to disclose. Other decisions suggest that the person is required to be subjectively aware of the non-disclosed facts because such non-disclosure is required to be ‘otherwise than inadvertent.’

Unfortunately, the recent decision of the High Court in *Miller* did not resolve the issue.

In *Costa Vraca Pty Ltd v Berrigan Weed & Pest Control Pty Ltd* the Court stated:

It is clear that a failure to provide information can be conduct which is misleading or deceptive. For the purposes of [s.18](1) "engaging in conduct" is defined in s 4(2)(a) as a reference to doing or refusing to do any act and by s 4(2)(c) a reference to refusing to do an act includes a reference to refraining (otherwise than inadvertently) from doing that act. However, when the complaint is that [s.18](1) has been infringed by conduct that involves either refusing or refraining from doing an act before that conduct is actionable it must have been deliberately engaged in.\(^{123}\)

For the Court, the element of deliberation was necessary. The respondent or defendant must have the relevant information in mind and adverted to the non-disclosure.

This reasoning was followed by the NSW Court of Appeal in *Semrani v Mamoun*\(^{124}\) where the Court concluded that in order for silence to constitute a breach the defendant must have had actual knowledge of the facts that he or she intentionally failed to disclose. Similar reasoning was employed by the Court of Appeal in *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* where the Court concluded:

> the requirement ... that a refraining be otherwise than inadvertent requires that there be actual advertence to the question of whether something should be done or not and the formation of an intention that it not be done.\(^{125}\)

The *Abigroup* reasoning was subsequently adopted in *Alpine Hardwood (Aust) Pty Ltd v Hardys Pty Ltd*\(^{126}\) and *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq).*\(^{127}\)

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\(^{123}\) *Costa Vraca Pty Ltd v Berrigan Weed & Pest Control Pty Ltd* (1999) ATPR 41-694, 42,879.

\(^{124}\) *Semrani v Mamoun* [2001] NSWCA 337, [62].

\(^{125}\) *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [2002] NSWCA 211, [58].

\(^{126}\) *Alpine Hardwood (Aust) Pty Ltd v Hardys Pty Ltd* [2001] FCA 1876.

\(^{127}\) *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq.)* (2001) 188 ALR 566.
Earlier in 2012, the Western Australian Court of Appeal in *Owston Nominees No 2 Pty Ltd v Clambake Pty Ltd* concluded that in the absence of clarification by the High Court’s decision in *Miller*, in order for a defendant to breach the misleading or deceptive conduct provisions of the ACL through failure to disclose, that defendant must ‘advert to the question and form an intention not to disclose.’

At least in terms of an allegation of failure to disclose certain information, this line of reasoning seems both intuitively appealing and supported by the statutory context. After all, and in the words of the Court in *Spedley Securities Ltd (in liq) v Bank of New Zealand* a person ‘cannot fail to inform of a matter of which one was unaware...concepts of ‘refusal’ or ‘refraining’ involve some element of mental process or decision making.’

However, there is also a line of authority in which the exact opposite view has been expressed. In *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* the Court considered that as a general proposition, it was not necessary to show that the party who failed to disclose the information did so with the intent to mislead or deceive. These comments were approved and adopted in *Noor Al Houda Islamic College Pty Limited v Bankstown Airport Limited* and in *Crump v Equine Nutrition Systems Pty Ltd*.

Just to complicate matters slightly, the Victorian Court of Appeal in *CCP Australian Airships Ltd v Primus Telecommunications Pty Ltd* made a distinction between the non-disclosure of information on the one hand and a refusal to provide information on the other.

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128 *Owston Nominees No 2 Pty Ltd v Clambake Pty Ltd* [2011] WASCA 76, [59] per McLure P (Pullin JA agreeing), Murphy JA dissenting.
130 *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2001) ATPR 41-794, 42,548.
131 *Noor Al Houda Islamic College Pty Limited v Bankstown Airport Limited* (2005) ATPR (Digest) 46-263, 52,519.
132 *Crump v Equine Nutrition Systems Pty Ltd* [2006] NSWSC 512, [149].
133 *CCP Australian Airships Ltd v Primus Telecommunications Pty Ltd* (2005) ATPR 42-042.
The Court stated:

... the misleading and deceptive quality of remaining silent inheres in the non-disclosure of information; not in any refusal to provide it. Consequently, it does not follow from the fact that a failure to act must be intentional in order to be actionable, that silence must be intentional in order to be actionable. It is plain in principle and authority that it is not necessary that silence be intentional in order that it may constitute misleading and deceptive conduct for the purposes of [s.18].

On this view, the issue of whether the failure to disclose was ‘otherwise than inadvertent’ would never arise. This is because the fact of remaining silent is non-disclosure and not a refusal to disclose. A more recent 2009 decision of the NSW Court of Appeal in Dwyer v Craft Printing Pty Ltd referred to the Costa Vraca and Semrani decisions with approval but did not decide the issue.

At the date of writing this thesis, the most recent 2012 decisions of the Federal Court involving silence; Mecland Investments Group Pty Ltd v Duncalm Pty Ltd and of the Full Federal Court in Rafferty v Madgwicks have not addressed the issue.

The ACCC’s responds to Hestia’s argument concerning intention by admitting that while mere silence cannot without more may not amount to misleading or deceptive conduct, the extended meaning given to the term ‘conduct’ by ACL s 2 means that mere silence can constitute misleading conduct if the failure to inform was deliberate or adverted to.

134 Ibid 42,514.
135 Dwyer v Craft Printing Pty Ltd [2009] NSWCA 405, [55].
136 Mecland Investments Group Pty Ltd v Duncalm Pty Ltd [2012] FCA 183.
The ACCC alleges that Hestia knew the meat originated from animals slaughtered according to religious ritual but made the deliberate decision not to inform consumers of this fact. In those circumstances, the ACCC alleges the retailer’s conduct was misleading in breach of ACL s 18.138

Chapter 6, Section V - Returning to the Central Question

What is to be made of all this conflicting authority and does it matter anyway? One way through this maze is to return to the basic principles set out by the High Court in Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited.139 Chief Justice French and Justice Kiefel commenced their judgement by recognising:

Where silence or non-disclosure is relied upon, the pleading should identify whether it is alleged of itself to be, in the circumstances of the case, misleading or deceptive or whether it is an element of conduct, including other acts of omissions, said to be misleading or deceptive.140

This statement reflects the practice of the Court in dividing allegations of deception by silence into two broad conceptual categories; situations of ‘mere’ silence and cases ‘in which silence is part of a wider factual matrix.’141

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138 Johnson Tiles Pty Ltd & Ors v Esso Australia Ltd & Ors (1999) ATPR 41-696, 42,888.
140 Ibid [5].
Where it is alleged that misleading conduct has occurred in isolation from the surrounding factual matrix, then that failure to disclose will not constitute a breach of the ACL unless the relevant knowledge is deliberately withheld.142 Rather, silence or a failure to disclose information will be misleading or deceptive where circumstances, including the wider factual matrix of conduct indicate that there was a reasonable expectation that the information should have been disclosed and it was not.

This approach seems both to attract the weight of present authority143 and accord with the basic legal interpretation of ACL s 18 in that intention is not required in order to establish a breach.

In this way, the failure to disclose the information is assessed like any other form of alleged misleading or deceptive conduct.144 This is a recognition that any theoretical discussion cannot be quarantined from the actual circumstances of the case being decided and that in the context of a failure to warn are often determinative. For example, all of the decisions discussed above invariably involved commercial transactions between identified individuals or corporations.

In those circumstances, the Courts experienced little real difficulty in determining the threshold question whether, in the circumstances, there was a reasonable expectation that certain information that in fact existed and was known to one of the parties should have been disclosed.145

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142 Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd (1986) 12 FCR 477.
143 Noor Al Houda Islamic College Pty Limited v Bankstown Airport Limited (2005) ATPR (Digest) 46-263, 52,520.
In terms of practical indicia informing the existence of a reasonable expectation of disclosure, the High Court in *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited* emphasised the importance of:

The knowledge of the person to whom the conduct is directed...Also relevant...may be the existence of common assumptions and practices established between the parties or prevailing in the business profession, trade or industry in which they carry on business. The judgement which looks to a reasonable expectation of disclosure as an aid to characterising non-disclosure as misleading or deceptive is objective.\(^ {146}\)

These factors assist the Court in evaluating the reasonableness of an expectation of disclosure in the context of a confined commercial transaction involving identified parties in a particular industry. It is less clear how a Court would approach the evaluation of a reasonable expectation of disclosure in the context of a representation to the public at large. Different considerations inform the task of evaluating representations directed toward identified parties one the one hand and consumers at large on the other. The High Court confirmed:

That approach may differ in its application according to whether the conduct is said to be misleading or deceptive to members of the public, or whether it arises between entities in commercial negotiations.\(^ {147}\)

In fact, these principles have yet to be tested in the context of representations made to the public at large and evaluated under the *Campomar* framework. In these circumstances, the task is complicated because the Court is not faced with identified parties involved in a defined commercial transaction where it is alleged that there was a reasonable expectation that specific information known to one of the parties (such as the status of a security, the existence of debt or the status of a commercial contract) should have been disclosed to the other.


\(^ {147}\) Ibid.
Rather, the issue of disclosure of the religious slaughter of animals exists at a certain level of abstraction. The question to be answered is whether, in the circumstances of purchasing meat, there is a reasonable expectation that the fact of the religious ritual slaughter of food animals should be disclosed to the hypothetical representative member of the relevant class of consumers?\textsuperscript{148}

A Principled but Ultimately Negative Resolution

Based on the present state of the law explained above, the ACCC’s argument concerning non-disclosure is likely to fail. The \textit{mere} non-disclosure of the method of slaughter of animals, absent a wider context of advertising accentuating animal welfare issues, is not likely to be misleading or deceptive conduct in breach of ACL s 18.

While the High Court in \textit{Miller} did acknowledge that in evaluating conduct directed toward a wide class of consumers different considerations may be called upon in determining whether a reasonable expectation of disclosure exists, it did not explain what those considerations might be.\textsuperscript{149}

In resolving the dispute in \textit{Miller} the Court was not required to because the allegation related to a commercial exchange between two identified parties.

\textsuperscript{148} Alex Bruce, \textit{Introduction to Misleading or Deceptive Conduct}, Chapter 3 in \textit{Consumer Protection Law in Australia}, (LexisNexis Butterworths, Australia, 2011) 51, 77 – 78.

\textsuperscript{149} \textit{Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited} (2010) 241 CLR 357, 369.
However the decision of the Full Federal Court in *Fraser & Anor v NRMA Holdings Limited & Ors*\(^{150}\) and of the Federal Court in *Johnson Tiles Pty Ltd & Ors v Esso Australia Ltd & Ors*\(^{151}\) although pre-dating the High Court’s *Campomar* and *Miller* decisions, did involve allegations of misleading conduct by silence directed toward a wide class of consumers. In both cases the allegations failed.

In both cases it was held that ‘mere silence’ without additional circumstantial conduct necessary to render the context of the alleged omission misleading or deceptive, could not breach s 52 of the *Trade Practices Act 1974* (Cth).\(^{152}\)

These decisions are understandable because the weight of case law suggests two prerequisites are required before silence alone can support a cause of action in misleading or deceptive conduct in breach of ACL s 18. First, the respondent / defendant must be subjectively aware of the facts expected to be disclosed but decided not to do so (thus adverted to those facts).\(^{153}\) And second, the non-disclosure must operate within a wider factual context in a way that renders the totality of the conduct misleading or deceptive; that is, where there is a reasonable expectation of disclosure.\(^{154}\)

In this way, despite the ‘reasonable expectation test’ lacking a statutory basis in ACL s 18 it nevertheless ‘indicates an approach which can be taken to the characterisation, for the purposes of s 52, of conduct consisting of, or including, non-disclosure of information’.\(^{155}\)

\(^{150}\) *Fraser & Anor v NRMA Holdings Limited & Ors* (1995) ATPR 41-374.

\(^{151}\) *Johnson Tiles Pty Ltd & Ors v Esso Australia Ltd & Ors* (1999) ATPR 41-696.

\(^{152}\) Ibid 42,888.


That approach inevitably directs attention back to the principles explained at the start of Section IV and seminal decision in the oft-quoted *Demagogue Pty Ltd v Ramensky*, where the Court emphasised:

> Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive.\(^{156}\)

In the circumstances of the ACCC's hypothetical case, without additional contextual behaviour by the national retailer, simply offering meat products for sale without disclosing antecedent religious slaughter practices will not amount to misleading or deceptive conduct in breach of ACL s 18.

**Conclusion: What Must be Done?**

If the Commonwealth government intends to regulate consumer values issues, including animal welfare and religious slaughter practices associated with food product labelling, through existing consumer laws, then it will only partially succeed. While Australia's new consumer protection regime has been constructed to apply across all Australian jurisdictions, its legal reach will be relatively confined.

Food animal welfare is one of the less visible consumer values issues associated with labelling of food products purchased on a daily basis. Food safety, preventative health and new technologies are the principal focus of the Commonwealth government's *Labelling Logic* framework.\(^{157}\)

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\(^{156}\) *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 32.

Consumer values issues are at the bottom of the 'Food Labelling Hierarchy' and are intended to be regulated through market forces.158

However, while Australian consumers are clearly becoming aware of and concerned for the welfare of food animals, their influence will depend almost entirely on complex legal and economic market forces. If consumers are to signal preferences for welfare friendly products to suppliers, then the market must facilitate that signalling so that suppliers respond in non-deceptive ways. The recent decisions of the Federal Court concerning free-range eggs or free-to-roam chickens clearly suggest that this signalling mechanism can be exploited by suppliers.

To address potential market failures, the Commonwealth government’s intention to use the ACL is contingent on the legal framework in which misleading or deceptive conduct is evaluated by Australian Courts. That framework suggests that ‘positive’ representations associated with food animal products (such as free-range) are certainly within the scope of the ACL’s prohibitions against misleading, deceptive or false conduct.

Offering food animal products for retail sale to consumers will squarely fall within the conception of ‘in trade or commerce’ for the purposes of ACL s 18, consistent with the High Court’s Concrete Constructions decision.159

Courts will have little difficulty in then applying the High Court’s Campomar methodology in identifying the hypothetical reasonable representative member of the class of consumers toward whom the conduct is directed. Even constructed at a certain level of abstraction, Courts can and have identified such a representative as a consumer concerned with food animal welfare issues.160

158 Ibid.
159 Concrete Constructions (NSW) Pty Limited v Nelson (1990) 169 CLR 594, 640.
160 Australian Competition and Consumer Commission v C.I & Co Pty Ltd [2010] FCA 1511, [31].
Labels that make untrue marketing representations through word or image, concerning food animal welfare will lead that representative into error and will be characterised as misleading or deceptive or likely to mislead or deceive in breach of ACL s 18.\textsuperscript{161}

However, ‘negative’ representations concerning, for example, the antecedent slaughter of food animals according to religious practice are unlikely to be caught by the ACL. Where suppliers and retailers offer these forms of meat products to consumers in supermarkets without any form of identification or labelling information, it is unlikely that the conduct will be considered misleading or deceptive in breach of ACL s 18.

Although the case law does recognise the possibility, it lacks ‘an entirely coherent and consistent framework of principles which is necessary for maximising the prospect of correctly applying the law to the facts.’\textsuperscript{162} Nor is it ‘subject to any unifying principle.’\textsuperscript{163} Accordingly, the divisive case law on this point necessarily reverts to general principles by investigating whether, in the overall context of the facts of the case, the failure to disclose is misleading or deceptive.

And in these circumstances, it is unlikely that the bland cellophane packaging of meat products available for purchase at supermarkets will create a reasonable expectation that retailers should disclose the fact that some meat products have originated from animals slaughtered according to religious ritual.

These jurisprudential difficulties highlight the importance of the legislative initiatives that are anticipated by the European Union and United Kingdom and discussed in Chapter 4 of this thesis.

\textsuperscript{161} Ibid.
\textsuperscript{162} Owston Nominees No 2 Pty Ltd v Clambake Pty Ltd (2011) WASCA 76, [43].
\textsuperscript{163} Rafferty v Madgwick (2012) FCAFC 37, [278].
Although not without their own difficulties and controversies, if it is seriously intending to take note of consumer values issues associated with food animal welfare, the Commonwealth government would be wise to supplement the general provisions of the ACL with more specific initiatives enabling consumers to make accurate and informed purchasing decisions that will enable them to express their demonstrated concern for food animal welfare.

Legislative initiatives such as the United Kingdom *Food Labelling (Halal and Kosher Meat) Bill 2012* or the European Union proposed Amendment 205 operating concurrently with the ACL would go a long way to enlarging the law’s heart to include food animals.
PART 4 – Conclusion

Enlarging the Law’s Heart to Include Animals

Chapter 7: Reviewing the Research and its Wider Implications

This concluding Part reviews the principal research undertaken in this thesis as it explored whether and to what extent the prohibition against misleading or deceptive conduct in section 18 of the new *Australian Consumer Law* (‘the ACL’) could be employed to advance food animal welfare initiatives and to address practices associated with the religious slaughter of animals consistent with intention expressed in the *Labelling Logic Report*. It explains what has been shown, states the conclusions it has reached and offers certain recommendations.

Although this question was relatively narrow in its focus, the answers it anticipated, and that were explored throughout the thesis, have much wider significance for the universal task of improving the welfare of animals generally and food animals particularly.

What Has Been Shown? What are the Wider Implications?

In evaluating the potential for the ACL to be used in this way, the thesis proposed five principal questions that provided the framework for the philosophical analysis in Part 1, the regulatory analysis in Part 2 and finally the legal analysis in Part 3.
Part 1 – The Philosophical

The first question investigated how contemporary Western civilisation arrived at the doubly unfortunate characterisation of animals as mere property and as mere instruments to be exploited to satisfy the wants, needs and interests of humans.

Exploring the answers to this question and their wider implications was the focus of Part 1 of the thesis as it investigated ancient and contemporary philosophical schools of thought that formed the foundations of this characterisation.

Chapter 1 questioned the normative assumptions, both philosophical and religious, that for millennia have informed the Western characterisation of animals as exploitable property. It demonstrated how the answer to that question, and thus the cultural foundations for the industrial exploitation of food animals in the 21st century, could be traced to the dominance of Aristotle’s seminal philosophical influence on Western civilisation. Consistent with Aristotle’s ‘Great Chain of Being’, animals were relegated to a lowly status, creatures that could be used to satisfy human ends.

It demonstrated how, despite contrary views held by Pythagoras and Plato, it was Aristotle’s conception of animals that was subsequently imported into the fabric of Western Christian society by Thomas Aquinas who adopted and then modified Aristotle’s ‘Great Chain of Being’ giving theological authority to the lowly status of animals.
It argued that the Aristotelian / Thomistic characterisation of animals remained largely untroubled by post-Enlightenment philosophies, demonstrating how Descartes' mechanistic conception of animals reinforced an instrumentalist characterisation of animals while Kant's deontological philosophy (and variations proposed by animal friendly neo-Kantian philosophers) only imposed indirect duties on humans toward animals.

Chapter 2 explored the most promising contemporary philosophical challenges to this characterisation, discussed their limitations and identified theoretical gaps that might be exploited by future scholarship for the benefit of animals.

It explored Peter Singer's Preference Utilitarianism, Contractarianism (including Martha Nussbaum 'capacities approach' as an answer to the perceived shortcomings of Contractarian theories of animal welfare) and the views of contemporary deontologists Tom Regan and Gary Francione.

It concluded that despite the apparent advantages for animals promised by these three contemporary philosophical schools of thought, they ultimately failed to provide a workable basis for food animal welfare reforms. This was because each school of thought has its own internal faults that precludes the formation of a philosophical consensus about whether and to what extent animals have rights or interests that can be asserted against human claims and interests.

Although this is a legal thesis, Chapter 2 nevertheless proposed an eight-fold framework for a new 'ethic of bioinclusiveness'. Emphasising the qualities of sentience and interconnectedness, an ethic of bioinclusiveness builds upon Eastern philosophy in expanding the social contract to include animals.
The discussion of the ethic of bioinclusiveness explained; (i) its guiding principles of sentience and interconnectedness; (ii) how it potentially overcomes perceived limitations in existing philosophical systems by including animals and marginal humans within the social contract; (iii) how its guiding principles were consistent with current scientific understanding of animals and the environment; (iv) how it nevertheless accounts for the very differences between humans and animals while not excluding animals from the social contract; (v) how it was capable of incorporating the best elements of the ancient and contemporary schools of animal rights philosophy; (vi) the nature of the duties of stewardship it imposes upon people; (vii) how it was capable of constructively informing policy, regulatory and legal initiatives in ways that are consistent with the long-term sustainability of humans, animals and the closed ecosystem that is the Earth; and (viii) how its principles must be coherent with the qualities of wisdom and compassion in the world's religious traditions.

However, until such time as an ethic of bioinclusiveness or any of the other philosophical theories discussed in Chapters 1 and 2 command general acceptance, animals remain characterised as exploitable property.

Part 2 – The Regulatory

Part 2 commenced with the acknowledgement that despite all of the criticisms and limitations discussed in the previous Part, 'one emerges blinking from the shadows of philosophy to discover that there is a moral consensus in the Western world that animals should be treated better than they are'.

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However, Part 2 demonstrated that an inability to translate this intuitive moral consensus into pragmatic legal and regulatory initiatives intended to ensure food animals are ‘treated better than they are’ has generated significant legal and regulatory confusion and conflict manifesting in two distinct spheres of food animal production.

This was the second principal question explored by this thesis as Chapter 3 investigated how the characterisation of animals as property manifests as governmental policy conflict. Chapter 3 explored the way in which contemporary concentrated animal feedlot operations exemplify the neoclassical economic principles driving contemporary Western markets.

It identified and discussed the difficulties experienced by governments as they pursue inconsistent regulatory agendas that bring into conflict the efficient and profitable development of primary industries on the one hand and the welfare of food animals on the other. It examined the legal and regulatory regime associated with intensive or ‘factory farming’ practices in the chicken, pork and beef industries producing meat and eggs intended for general consumption.

It explained the conditions in which these food animals are processed and demonstrated how the inherent conflict identified above manifests in the actual legal and subordinate instruments, the Commonwealth MCOPs that regulate the processing of those food animals.

Chapter 4 then analysed the legal and regulatory difficulties associated with the highly controversial issue of the religious slaughter of animals. It explained that while food animals intended for general consumption are required to be stunned before slaughter, religious requirements associated with kosher and some halal slaughter prohibit prior stunning of the food animal.
It noted that specific exemptions for this purpose are embodied in all State and Territory Animal Welfare Acts and in Commonwealth Model Codes of Practice.

In addressing these issues, Chapter 4 explored how attempts in the European Union, the United Kingdom and New Zealand to regulate the religious slaughter of animals to enable consumers to make a choice about whether to purchase kosher or halal food animal products have generated a great deal of regulatory and legal conflict.

It discussed how these attempts have generated apparently intractable legal, regulatory, religious and ethical conflicts, exacerbated by the absence of a generally accepted philosophical framework of animal rights.

The Common government’s Labelling Logic Report anticipates that consumer values issues such as food animal welfare and food-oriented religious practices will be regulated through market forces, underpinned by the ACL. These circumstances underscored the importance of evaluating whether and to what extent the ACL might fulfil this regulatory role.

Part 2 concluded that food animals in most western countries including Australia suffer as a result of an inherent conflict between government attempts to facilitate industry exploitation of food animals as an economic resource while simultaneously encouraging the protection of animal welfare.

However, Part 2 also suggested if an underlying cause of food animal suffering lies in market dynamics informed by neo-classical principles of efficiency and profit-maximisation, then perhaps one indirect solution might also lie in those same principles.
In fact, the Commonwealth government is intending to do exactly that, characterising concerns about food animal welfare and religious slaughter issues as 'consumer values issues' in its *Labelling Logic Report*.

In an increasingly competitive food product market, the Commonwealth government’s *Labelling Logic Report* anticipates that demand for ethically produced food animal products will signal producers of consumer preferences for food animal welfare practices. In safeguarding this consumer demand, the Commonwealth government intends the ACL to play a key role in preventing suppliers from exploiting consumer demand for welfare-friendly food animal products by preventing misleading or deceptive marketing claims.

**Part 3 – The Legal**

Part 3 of the thesis recognised that in order for this regulatory intention to work effectively, it must be supported by both competition and consumer theory and practice. Accordingly, the fourth and fifth of the principal questions explored by this thesis investigated the wider capacity for competition and consumer law and policy to be used in this way.

The discussion in Part 3 therefore explored the theoretical and practical legal capacity for the ACL to navigate the regulatory conflict generated by government attempts to facilitate industry exploitation of food animals as an economic resource and to preserve freedom of religious practice on the one hand while simultaneously encouraging the protection of animal welfare on the other.

Chapter 5 explored the theoretical assumptions upon which any use of the ACL in this way necessarily rests. It commenced by locating the ACL within consumer protection theory, grounded in the notion of consumer sovereignty.
It demonstrated how market forces of supply and demand facilitated by
the ACL might empower consumers in a way that generates food animal
welfare reform. It noted that given the effectiveness of these forces,
consumers would in fact be willing to pay for 'ethically produced' food
derived from animals.

However Chapter 6 noted that it was necessary for this theoretical
potential for the ACL to address food animal welfare issues to be translated
into workable legal practice. Accordingly, Chapter 6 explored the statutory
and common law framework of the prohibition against misleading or
deceptive conduct in ACL s 18.

Through the analytical device of hypothetical litigation instituted by the
ACCC against fictitious retailer Hestia Pty Ltd, it explored whether the
prohibition against misleading and deceptive conduct in ACL s 18 could be
interpreted to address both misleading animal welfare claims on product
labels and the failure to inform consumers that meat products may have
originated from animals slaughtered according to religious ritual.

After analysing relevant case law, Chapter 6 concluded that the ACL can be
successfully deployed throughout all Australian jurisdictions to prevent
misleading or deceptive animal welfare claims made by suppliers on labels
promoting their products. However, it also concluded that legal difficulties
associated with conceptualising silence as misleading or deceptive conduct
will mean that a cause of action based upon a failure to advise consumers
that meat has been derived from animals slaughtered according to
religious ritual is unlikely to succeed.

These findings carry significant implications for the success or otherwise of
the Commonwealth government’s intention to use the misleading or
dehceptive conduct provisions of the ACL to address consumer values issues
associated with food animal welfare generally and animal welfare during
religious slaughter practices particularly.
The Commonwealth government’s preferred indirect method of regulating consumer values associated with food animal welfare and religious slaughter issues through market forces and the ACL, indicated in its Labelling Logic Report will only partially succeed.

Like the European Union and the United Kingdom, the thesis recommends that the Commonwealth government explore legislative initiatives for addressing welfare issues associated with the religious slaughter of animals.

Although introducing such legislative initiatives will be difficult and controversial, if it is seriously intending to take note of consumer values issues associated with food animal welfare, the Commonwealth government would be wise to supplement the general provisions of the ACL in this way thereby enabling consumers to make accurate and informed purchasing decisions that will enable them to express their demonstrated concern for food animal welfare.

**Recommendations: The Importance of Specific Legislative Initiatives, Knowledge, Awareness and Empathy**

This thesis therefore concludes that the Commonwealth government’s intention, expressed in its Labelling Logic Report, to use the ACL generally and the prohibition against misleading or deceptive conduct in ACL s 18 particularly, as a means of addressing consumer values issues associated with food animal products is likely to be only partially successful.

Without specific animal welfare initiatives, sole reliance on the ACL to overcome the inability to translate the intuitive moral consensus identified earlier, that food animals should be ‘treated better than they are’ into pragmatic welfare initiatives will not succeed.
The effective and strategic use of the ACL can support limited legislative, enforcement and consumer initiatives in favour of food animal welfare and in doing so, it has the potential to by-pass several difficult philosophical and regulatory problems associated with food animal welfare reform identified in earlier Chapters.

The Commonwealth government will find it comparatively easier to introduce legislative initiatives such as ‘truth in labelling’ requirements for food animal products than to initiate food animal welfare reform on the basis of one or other philosophies of ‘animal rights’.

However, if it did intend to introduce specific legislation such as the United Kingdom Food Labelling (Halal and Kosher Meat) Bill, the Commonwealth government will face significant opposition from religious representatives. Similar to the New Zealand experience, this opposition is likely to take the form of litigation on the basis that legislation of that kind infringes freedom of religious practice or discriminates against particular religious traditions.

For regulators like the Australian Competition and Consumer Commission, the ACL generally and labelling specific consumer legislation will provide a more coherent basis for strategic legal and enforcement initiatives than action based on alleged breaches of inchoate ‘animal rights’. And finally, accuracy in product labelling will provide consumers with sufficient information about animal-derived food products enabling them to make choices that reflect their personal values, particularly for those consumers who ‘seek out free range eggs as a matter of principle, hoping to advance the cause of animal welfare by so doing’. ²

Of course, recourse to the ACL or to labelling specific consumer legislation does not absolve western societies of the larger imperative to develop a coherent philosophy of animal welfare that commands general acceptance.

² Australian Competition and Consumer Commission v C.I & Co Pty Ltd [2010] FCA 1511, [31].
However, until such a philosophy has been created and accepted, the thesis concludes that consumer demand, protected by the ACL and underwritten by strategic enforcement through the ACCC, has the potential to permit partial advances in food animal welfare.

Throughout this thesis, the importance of knowledge, awareness and empathy has been consistently emphasised. Without knowledge of the suffering experienced by food animals, people cannot empathise with them. When they are made aware of the suffering of food animals, consumers initially experience some degree of cognitive dissonance before either continuing or changing their purchasing patterns.

Consumers become aware of animal exploitation and suffering only by gaining knowledge of the legal and regulatory framework that permit the cruel conditions in which animals are exploited for human desires. Hard knowledge generates thoughtful awareness. In turn, awareness of this suffering engenders empathy, a quality that is inconsistent with cruelty but consistent with kindness. This thesis has therefore traced a trajectory from knowledge to thoughtful awareness to empathy and then to kindness. In this sense, I agree with Albert Schweitzer who suggested:

> Very little of the great cruelty shown by men can really be attributed to cruel instinct. Most of it comes from thoughtlessness or inherited habit. The roots of cruelty, therefore, are not so much strong as widespread. But the time must come when inhumanity protected by custom and thoughtlessness will succumb before humanity championed by thought. Let us work that this time may come.³

My hope is that this thesis contributes to the triumph of this way of thinking that would enlarge the geography of human wisdom and compassion beyond narrow species interests to include non-human animals.

Appendix A – Author Published Sources

Because this is a thesis 'by publication', it's four Parts have been written by expanding upon and re-working my existing publications, principally book chapters and journal articles. These chapters and articles are set out below. Originals are available upon request:

**Book Chapters**

1. *Animal Law in History*; Chapter 1 in *Animal Law in Australia: An Integrated Approach*, 2012, LexisNexis Butterworths, Sydney, Australia;


10. *Introduction to Misleading or Deceptive Conduct*, Chapter 3 in *Consumer Protection Law in Australia*, 2011, LexisNexis Butterworths, Sydney, Australia;

11. *Factual Categories of Misleading or Deceptive Conduct*, Chapter 4 in *Consumer Protection Law in Australia*, 2011, LexisNexis Butterworths, Sydney, Australia;


Refereed Articles


3. 'Cognitive Dissonance in the Contribution of the Catholic Church to International Human Rights Law Discourse' (2009) *Adelaide Law Review* 147; and

## Appendix B
### Basic Philosophical Vocabulary

<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
<th>Use of the term</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rights:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. Hohfeld’s notion of</td>
<td>The existence of a legal relationship between party A and party B</td>
<td>However, animals do not owe nor can they exercise rights because they cannot act</td>
</tr>
<tr>
<td>advantage and duty at law</td>
<td>and party B imposing a duty upon one and a right upon another. The</td>
<td>freely in assuming those duties and rights. Therefore, they have no rights</td>
</tr>
<tr>
<td></td>
<td>possession of legal obligation against another creates rights</td>
<td></td>
</tr>
<tr>
<td>2. Rawls’ 'contractarian’</td>
<td>Humans exist as part of a 'social contract' and assume obligations</td>
<td>Animals lack the rational capacity to accept moral obligations toward others.</td>
</tr>
<tr>
<td>rights</td>
<td><em>qua</em> each other</td>
<td>Therefore animals cannot be considered part of the social contract, and have no</td>
</tr>
<tr>
<td></td>
<td></td>
<td>rights</td>
</tr>
<tr>
<td>3. Kantian autonomy</td>
<td>Humans exercise free will in pursuit of autonomy and thus deserve</td>
<td>Animals do not have the rational capacity to exercise free will in pursuit of</td>
</tr>
<tr>
<td></td>
<td>respect. Humans have the right not to be used as instruments for others'</td>
<td>rights.</td>
</tr>
<tr>
<td></td>
<td>ends</td>
<td>Animals are not owed direct duties but indirect duties. To harm an animal</td>
</tr>
<tr>
<td></td>
<td></td>
<td>predisposes a human to harm another human</td>
</tr>
<tr>
<td>4. Interest-based rights</td>
<td>All sentient beings with interests have rights, all animals have</td>
<td>Because animals have interests they have rights, especially rights to freedom</td>
</tr>
<tr>
<td></td>
<td>interests, therefore all animals have rights</td>
<td>from pain and to flourish</td>
</tr>
<tr>
<td>Moral agency</td>
<td>A person’s understanding and experience of themselves and others as</td>
<td>Because it is thought that animals do not experience themselves and their actions</td>
</tr>
<tr>
<td></td>
<td>agents whose morally relevant actions are based in goals and beliefs</td>
<td>as being based in goals and beliefs, it is thought that they are not 'moral agents'</td>
</tr>
<tr>
<td>Moral standing</td>
<td>Person A has moral standing in relation to person B if, in making</td>
<td>Animals do not have moral standing because in making decisions, humans do not</td>
</tr>
<tr>
<td></td>
<td>decisions, person B takes person A’s interests into account for person</td>
<td>take animals’ interests into account for their own sake, but rather only to the</td>
</tr>
<tr>
<td></td>
<td>A’s own sake rather than taking person A’s interests into account</td>
<td>extent that those interests will benefit animals’ owners</td>
</tr>
<tr>
<td></td>
<td>only because those interests benefit person B or another person</td>
<td></td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>Morally relevant distinctions</th>
<th>The existence of some characteristic that permits discrimination between classes of entities</th>
<th>Some argue that the lack of cognitive abilities in animals is a morally relevant distinction permitting abrogation of their interests in favour of the interests of humans</th>
</tr>
</thead>
<tbody>
<tr>
<td>Principle of equal consideration</td>
<td>We must treat like cases alike except where a morally relevant distinction supports different treatment</td>
<td>Rights theorists argue that there is no morally relevant distinction between humans and animals because both are sentient beings. Therefore, the principle of equal consideration requires the abolition of factory farming, for example, since we would not factory farm cognitively equivalent humans</td>
</tr>
<tr>
<td>Lifeboat scenario</td>
<td>A lifeboat can only hold four sentient beings but there are five sentient beings, including an animal, wanting to board. Which sentient being gets left behind and why?</td>
<td>A mechanism to test the parameters of a system of thought by positing an extreme situation that requires making moral choices</td>
</tr>
<tr>
<td>Indirect duties</td>
<td>Where person B benefits from the performance of a duty to person A by person C</td>
<td>Animals are not owed direct duties, but benefit from indirect duties (since such duties are usually not to harm) owed by humans to other humans</td>
</tr>
</tbody>
</table>
## Appendix C

### Key Philosophical Approaches to Animals

<table>
<thead>
<tr>
<th>Philosopher</th>
<th>View</th>
<th>Implications for animals</th>
</tr>
</thead>
<tbody>
<tr>
<td>John Stuart Mill</td>
<td>Human freedom is key — liberal democratic governments should provide ‘neutral’ framework of rights to facilitate individual pursuit of freedom</td>
<td>Anthropocentric view where the interests of animals subordinated to freedom of humans to pursue their own ends</td>
</tr>
<tr>
<td>John Locke</td>
<td>Emphasised the importance of <em>human rights</em> flowing on to members of human society</td>
<td>Anthropocentric view where animals were not autonomous members of human society</td>
</tr>
<tr>
<td>Jeremy Bentham</td>
<td>Utilitarian. As regards animals, emphasised the capacity to feel pain rather than capacity for higher cognitive abilities</td>
<td>Broke with explicitly anthropocentric orientation, thereby enabling animals’ interests to be factored into evaluation of conduct</td>
</tr>
<tr>
<td>Peter Singer</td>
<td>‘Preference utilitarian’. Disciple of Bentham. Not just animal suffering that should be factored in, but also preferences of animals</td>
<td>Animals preferences to be accounted for. Those preferences outweigh human preferences in certain circumstances</td>
</tr>
<tr>
<td>Tom Regan</td>
<td>‘Rights theorist’. Animals might not be moral agents, but are ‘moral patients’</td>
<td>Animals are ‘subjects-of-a-life’ and are owed rights and duties</td>
</tr>
<tr>
<td>Gary Francione</td>
<td>‘Rights theorist’, more radical than Regan</td>
<td>All sentient beings are owed inalienable rights</td>
</tr>
<tr>
<td>Richard Posner</td>
<td>‘Soft utilitarian’. Animals do not possess rights, but should be subjects of empathy</td>
<td>Method of ensuring animals welfare is through enforcement of anti-cruelty laws</td>
</tr>
<tr>
<td>Carl Cohen</td>
<td>Both welfarist and rights theorists are committing a ‘category confusion’ error in assigning rights to animals</td>
<td>Animals are of a different order of species than humans; different category of species. They have no rights</td>
</tr>
<tr>
<td>Welfarist approach</td>
<td>Rights approach</td>
<td></td>
</tr>
<tr>
<td>--------------------</td>
<td>----------------</td>
<td></td>
</tr>
<tr>
<td><strong>Principal philosophical Influence</strong></td>
<td>Classical and preference utilitarian</td>
<td>Animals are 'subjects-of-a-life' and 'moral patients' to whom moral duties are owed</td>
</tr>
<tr>
<td><strong>Principal arguments</strong></td>
<td>If animals can suffer then their interests should be taken into account</td>
<td>• Animals have inherent worth • Animals are ‘moral patients’ to whom moral duties are owed</td>
</tr>
<tr>
<td><strong>Principal advocates</strong></td>
<td>Jeremy Bentham, Peter Singer</td>
<td>Tom Regan, Gary Francione</td>
</tr>
<tr>
<td><strong>Preferred method of application</strong></td>
<td>Work within industry to improve condition of animals to extent of minimising unnecessary pain and suffering</td>
<td>Complete abolition of industry exploitation of animals</td>
</tr>
<tr>
<td><strong>Arguments against</strong></td>
<td>• Aggregation principle does not exclude animal suffering • How do you measure pleasure and pain?</td>
<td>• Still anthropocentric because principle of equal inherent worth of animals is abandoned when it conflicts with welfare of humans • Fails ‘lifeboat scenario’</td>
</tr>
<tr>
<td><strong>Principal opponents</strong></td>
<td>Tom Regan, Gary Francione</td>
<td>Carl Cohen, Peter Singer</td>
</tr>
</tbody>
</table>


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