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Labelling Illogic? Food Animal Welfare & the Australian Consumer Law [1]

By Ven. Alex Bruce*

Introduction

This article is intended as the first of two exploring whether, and to what extent an existing regulatory regime in the form of the new *Australian Consumer Law* ('the ACL')⁵ 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. By 'food animals' I mean the millions of chickens, cows and pigs processed and slaughtered in Australia each day for human consumption.

At first glance, the ACL appears to have little to do with animal welfare generally and food animal welfare specifically. Located within the *Competition and Consumer Act 2010* (Cth) ('the CCA'), the ACL is not intended to benefit animals, but to facilitate the larger objective of the CCA in enhancing the welfare of Australians through the promotion of competition, fair trading and consumer protection.⁶

Recently, however, 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.⁷

*Associate Professor, Buddhist Monk, ANU College of Law.

⁵ 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.

⁶ *Competition and Consumer Act 2010* (Cth) s 2.

⁷ Food Labelling Law and Policy Review Panel, *Labelling Logic: Review of Food Labelling Law and Policy*, 27 January 2011, Commonwealth of Australia.

Importantly, the *Labelling Logic Report* recommended what it called 'consumer values issues': consumer concerns associated with food animal welfare and religious practices associated with food animal products, to be regulated through the mechanisms in the CCA generally but particularly the new ACL.⁸ In its December 2011 *Response*, the Commonwealth government agreed.⁹

So, 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.¹⁰ 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.¹¹

But how realistic is this intention? This first article explores the *theoretical* economic and consumer protection policy foundations for using the ACL in this way. It does so in the following seven parts.

Part I explains why the imperative to regulate for food animal welfare and the religious slaughter of animals has recently become an important issue for Australian governments. Part II places that imperative in the context of the *Labelling Logic Report* as it explains why the ACL has now assumed an important role in the regulation of food animal welfare. Part III explains the regulatory inconsistencies and conflicts inherent in government attempts to facilitate profitable primary industries and freedom of religious practice on the one hand, while simultaneously

<http://www.foodlabellingreview.gov.au/internet/foodlabelling/publishing.nsf/content/labelling-logic> (Accessed 26 June 2012).

⁸ Ibid 47, [3.20].

⁹ Response to the Recommendations of Labelling Logic. Review of Food Labelling Law and Policy (2011), Commonwealth Government, December 2012, 40.

¹⁰ Above n 3.

¹¹ 67 [6.3].

attempting to improve animal welfare on the other. Part IV shows how consumers are responding to this regulatory conflict in their purchasing patterns. Part V explains the economic assumptions that underpin the *Labelling Logic Report* and that empower consumers to show their sensitivity to food animal welfare issues. Those economic assumptions are intended to facilitate market conditions whereby the consumer is sovereign, a concept discussed in Part VI. But even if consumer sovereignty *theoretically* empowers consumers to indirectly benefit food animal welfare, does the evidence indicate they are *in fact* willing to pay a price-premium for welfare-friendly food animal products? Part VII analyses Australian and European literature which suggests that they are willing.

This article concludes that the Commonwealth government's intention, expressed in its *Labelling Logic Report*, to use the ACL to regulate consumer values issues associated with food animal welfare and religious slaughter of animals, is theoretically capable of being achieved. However, as this article also notes, translating economic and consumer theory into practice in the legal application of the ACL is a quite different matter.

The second article, to be published in (2012) 8 AAPLJ, will explore whether and, if so, to what extent the case law permits an interpretation of the ACL to prohibit misleading or deceptive animal welfare claims, and to consider whether failure to advise consumers that animals have been slaughtered according to religious practice can amount to misleading or deceptive conduct.

Part I: The Imperative for Australian Governments

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.¹² There were images of cattle being abused while being slaughtered, supposedly according to Islamic religious ritual.

¹² A Bloody Business, ABC Four Corners Program, 30 May 2011

<<http://www.abc.net.au/4corners/content/2011/5/3228880.htm>> (Accessed 20.5.12).

The disturbing footage and the national condemnation it generated, convulsed the Commonwealth government into suspending the 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.¹³

Although live cattle exports were resumed, systematic breaches of the new scheme, by Australian export companies North Australian Cattle Company and International Livestock Export, were revealed by yet another review into the export industry, released in May 2012, by the Commonwealth Department of Agriculture, Forest and Fisheries ('DAFF').¹⁴

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.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 (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 debate concerning animal 'rights' is all the more confusing because, despite 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 should be legally protected and enforced over and above human rights claims, interests, preferences or freedom of religious practice.¹⁷

¹³ <<http://www.daff.gov.au/animal-plant-health/welfare/export-trade/gov-response-to-cattle-mistreatment-in-indonesia>> (Accessed 20 May 2012).

¹⁴ <<http://www.daff.gov.au/aqis/export/live-animals/livestock/investigation-report/combined>> (Accessed 20 May 2012).

¹⁵ <<http://www.abc.net.au/am/content/2011/s3379638.htm>> (Accessed 20 May 2012).

¹⁶ Alex Bruce, 'Do Sacred Cows Make the Best Hamburgers? The Legal Regulation of the Religious Slaughter of Animals' (2011) 34(1) University of New South Wales Law Journal 351.

¹⁷ 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), 6-7.

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.¹⁸ The ways society exploits animals for entertainment, pleasure and consumption raise 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'.¹⁹

It is very difficult for Western states generally and Australian governments, in particular, 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.²⁰ This is particularly so of the millions of animals processed and slaughtered daily to feed humans.²¹

This difficulty is an inevitable result of an apparent inherent regulatory conflict between the Commonwealth government facilitating primary industry exploitation of food animals as an economic resource and preserving religious slaughter practices on the one hand, while encouraging the protection of animal welfare on the other.²²

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.

The Australian government apparently does not intend to directly regulate for food animal welfare or mandate certain slaughter practices for the religious slaughter of animals. The lack of an express power in the *Constitution* means animal regulation is not principally the responsibility of the Commonwealth government.²³ Instead, regulatory responsibility for animals throughout Australia is shared across

¹⁸ *Attorney General (SA) v Bray* (1964) 111 CLR 402.

¹⁹ Bolliger, Gieri, *Constitutional and Legislative Aspects of Animal Welfare in Europe*, Conference, February 2007, 1.

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.

²² Steven White, 'Regulation of Animal Welfare in Australia and the Emergent Commonwealth: Entrenching the Traditional Approach of the States and Territories or Laying the Ground for Reform?' (2007) 35(3) *Federal Law Review* 347, 359.

²³ Andrew Bartlett, *Animal Welfare in a Commonwealth System: A Commonwealth Politician's Approach*, in *Animal Law in Australasia: A New Dialogue*, Peter Sankoff and Steven White (eds), (The Federation Press, Sydney 2009) 387.

Commonwealth, state, territory and local governments through a complex, often confusing, co-operative regime.²⁴

However, the Commonwealth Government *indirectly* influences food animal regulation by assuming lead policy responsibility through the former *Primary Industries Ministerial Council* ('PIMC'), replaced in September 2011 by the *Standing Council on Primary Industries*. ('SCoPI').²⁵ Under the PIMC/SCoPI framework, the Commonwealth Government issued various *Model Codes of Practice* ('MCOPs') and *Australian Standards*, relating to the welfare of animals, that are implemented to varying degrees of effectiveness 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 throughout these two articles.

Part II: Why the ACL Has Assumed a Greater Profile

The Commonwealth Government is proposing to facilitate consumer preferences 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 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 (iv) consumer values issues.²⁶ Animal welfare claims made by suppliers of food animal products fall into the category of 'consumer values issues'.²⁷

²⁴ Steven White, 'Regulation of Animal Welfare in Australia and the Emergent Commonwealth: Entrenching the Traditional Approach of the States and Territories or Laying the Ground for Reform?' (2007) 35(3) *Federal Law Rev.* 347.
²⁵ < http://www.mincos.gov.au/about_scpi > (Accessed 26 June 2012).

²⁶ Food Labelling Law and Policy Review Panel, *Labelling Logic: Review of Food Labelling Law and Policy*, 27 January 2011, *Commonwealth of Australia*, 40-41, [3.3].

²⁷ *Ibid.* 97, [6.1].

Consistent with this hierarchical regulatory approach, in addressing concerns associated with 'consumer values issues', the Commonwealth government view is that 'food labelling for such generalised issues is best left to market responses'.²⁸ In its December 2011 *Response to the Labelling Logic Report*, the Commonwealth affirmed that consumer values 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).²⁹

The decision to use 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.³⁰

It is also consistent with State government initiatives such as the NSW *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 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.³¹

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

²⁸ *Ibid.* 97, [6.3].

²⁹ *Response to the Recommendations of Labelling Logic: Review of Food Labelling Law and Policy* (2011), Commonwealth Government, December 2012, 40.

³⁰ *Food Standards Australia New Zealand Act 1991* (Cth), s 3(c).

³¹ Food Labelling Law and Policy Review Panel, *Labelling Logic: Review of Food Labelling Law and Policy*, 27 January 2011, Commonwealth of Australia, paragraph 3.20 at p 47.

differentiation based on food animal welfare claims requires careful substantiation.³²

It might have been thought prior to 2011 that 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 1.1.11, as part of the *Competition and Consumer Act 2010* (Cth), changed the regulatory landscape.³³

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.³⁴

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.³⁵

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.

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

32 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 products.' ACCC *Food Labelling Guide*, 2009, Canberra, Australia, 3.

33 Alex Bruce, *Australia's National Consumer Protection Regime*, Chapter 1 in *Consumer Protection Law in Australia*, (LexisNexis Butterworths, Australia, 2011) 4.

34 Response to the Recommendations of *Labelling Logic: Review of Food Labelling Law and Policy* (2011), Commonwealth Government, December 2012, 13.

35 Alex Bruce, *Application of the Competition and Consumer Act 2010*, Chapter 2 in *Consumer Protection Law in Australia*, (LexisNexis Butterworths, Australia, 2011).

willing to pay something to reduce the suffering of animals used as food'.³⁶ 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, this article explores two key aspects of consumer protection theory. First, it explores the way in which consumer protection law and policy is intended to benefit consumers by empowering them to make informed purchasing decisions. It therefore discusses the concept of 'consumer sovereignty'.

This discussion takes place in the context of the policy approach expressed by the Commonwealth government in its *Labelling Logic Report*³⁷ that assumes, at least in theory, that 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 *Labelling Logic Report*.³⁸

This article then explores whether consumers, once informed by suppliers about animal welfare issues associated with the food products they are buying, are *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.

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 s18 in ways that would prevent

36 Jeff Leslie and Cass Sunstein, 'Animal Rights Without Controversy' (2007) 70 *Law and Contemporary Problems* 117.

37 Food Labelling Law and Policy Review Panel, *Labelling Logic: Review of Food Labelling Law and Policy*, 27 January 2011, Commonwealth of Australia, 47, [3.20].

38 *Ibid* 41-42, [3.7].

producers making misleading statements about the conditions in which meat and egg products were produced? Does the case law permit an interpretation of ACL s18 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 this second set of questions are explored in the subsequent article (to be published in (2012) 9 AAPLJ - Ed.) 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.

Part III: Regulatory Inconsistency and Conflict

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'.³⁹ Indeed, sociologist Pierre Bourdieu asserts that meat-eating is part of Western society's 'habitus', an unquestioned principle of everyday life.⁴⁰

Human preferences for meat products have grown dramatically since World War 2 and will continue to grow at a dramatic rate as the world's population soars. By 2050, the United Nations Population Division predicts the world's population will reach from eight to 11 billion.⁴¹ 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.⁴² This is particularly so in China and India where demand for meat products is growing rapidly.⁴³

39 Nick Fiddes, *Meat: A Natural Symbol*, (Routledge Press, United States, 1991) 5.

40 Pierre Bourdieu, *Outline of a Theory of Practice*, (Cambridge University Press, United Kingdom, 1977).

41 United Nations Department of Economic and Social Affairs; *World Population Prospects - The 2010 Revision* <<http://www.un.org/popin/>> (accessed 29 March 2012).

42 Philip Thornton, 'Livestock Production: Recent Trends, Future Prospects' (2010) *Philosophical Transactions of the Royal Society* 2854 - 2855.

43 Jean-Francois Hocquette and Vincent Chatellier, 'Prospects for the European Beef Sector Over the Next 30 Years' (2011) *Animal Frontiers* 20.

In satisfying these growing preferences for meat products, animal farming enterprises have gone from small family-owned operations to large-scale concentrated animal farming operations ('CAFOs'). Large scale CAFOs, managed by vertically integrated corporations, aim to maximise the efficient production of animal products to satisfy domestic and foreign demand for food animal products.⁴⁴

The step from characterising animals as property to the efficient *exploitation* of animals as property is effortlessly facilitated through contemporary market dynamics. 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.⁴⁵

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.⁴⁶

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.⁴⁷

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'.⁴⁸

44 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/>>

45 Justice John Spigelman; 'Economic Rationalism and the Law' (2001) 24(1) *University of NSW Law Journal* 200.

46 Darian Ibrahim, 'A Return to Descartes: Property, Profit and the Corporate Ownership of Animals' (2007) 70 *Law and Contemporary Problems* 86.

47 Geoffrey Evans, 'To What Extent Does Wealth Maximisation Benefit Farmed Animals?' (2006) 13 *Animal Law* 167.

48 Wendy Adams, 'Human Subjects and Animal Objects: Animals as "Other" in Law' (2009) 3 *Journal of Animal Law and Ethics* 29.

The reality 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.*⁴⁹

Producing animal meat or harvesting eggs using these intensive production line methods is perfectly legal in Australia. 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'.⁵⁰

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.⁵¹

While food animals generally experience conditions that cause suffering, the experience of animals that are slaughtered according to religious ritual is potentially even worse.

In Australia animals whose meat is intended for general consumption are required by Commonwealth *Codes and Standards* to be stunned before they are slaughtered.⁵²

49 From Nest to Nugget: An Expose of Australia's Chicken Factories, Voiceless, November 2008, 9.

50 http://www.mincos.gov.au/about_pimc.

51 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.

52 CSIRO's Australian Standard for the Hygienic Production & Transportation of Meat and Meat Products for Human Consumption (AS 4696:2007); National Animal Welfare Standards for Livestock Processing Establishments Preparing

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 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 thus exists between the requirements for the slaughter of animals generally, mandated by Commonwealth *Codes and Standards*, and the specific requirements of the Jewish and Islamic religious traditions for their religious slaughter.⁵³

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. 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.⁵⁴

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

Meat for Human Consumption 2009-2010 (2nd Ed); Standing Committee on Agriculture and Resource Management ('SCARM') 2002 Model Code of Practice for the Welfare of Animals: Livestock at Slaughtering Establishments.

53 Alex Bruce, 'Do Sacred Cows Make the Best Hamburgers? The Legal Regulation of the Religious Slaughter of Animals' (2011) 34(1) University of New South Wales Law Journal 351; Joel Silver, 'Understanding Freedom of Religion in a Religious Industry: Kosher Slaughter (Shechita) and Animal Welfare' (2011) 42 Victoria University of Wellington Law Review 671.

54 Alex Bruce, 'Do Sacred Cows Make the Best Hamburgers? The Legal Regulation of the Religious Slaughter of Animals' (2011) 34(1) University of New South Wales Law Journal 351.

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', whatever that might mean!⁵⁵

Part IV: Consumer Sensitivity

Confined in concentrated animal feedlot operations, packed tightly into layer upon layer of cages to produce eggs and sometimes slaughtered without prior stunning, the welfare of chickens, cattle and pigs is subordinated to the economic profit of the few dominant corporations in Australia supplying food animal products to consumers.⁵⁶

These corporations are assisted by the former Primary Industries Ministerial Council ('PIMC') now *Standing Council on Primary Industries*, whose stated goal is 'to develop and promote sustainable, innovative and profitable industries in these commodities.'⁵⁷ Issued under the auspices of SCoPI/PIMC, 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 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.⁵⁸

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

⁵⁵ Primary Industries Ministerial Council, Communiqué, PIMC 21, 28 October 2011.

⁵⁶ http://www.mincos.gov.au/_data/assets/pdf_file/0017/2034431/pimo-21.pdf (Accessed 1 April 2012)

⁵⁷ Alex Bruce, *Animals as Food*, Chapter 9 in *Animal Law in Australia: An Integrated Approach*, (LexisNexis Butterworths, Australia, 2012) 221.

⁵⁸ *Animal Health Australia; Animal Health in Australia 2008*, (2009) Canberra, Australia, 6.

⁵⁹ Alex Bruce, *Animals and Cruelty*, Chapter 8 in *Animal Law in Australia: An Integrated Approach*, (LexisNexis Butterworths, Australia, 2012) 197.

religious practice recognised by domestic *Constitutions* or International Human Rights Instruments.⁵⁹

However, despite this regulatory regime, there is also evidence that consumers are becoming increasingly sensitive to the ways in which food animals are treated. This sensitivity is expressed morally and practically. From a moral perspective, 'one emerges blinking from the shadows... to discover that there is a moral consensus in the Western world that animals should be treated better than they are'.⁶⁰ From a practical perspective, this sensitivity is reflected in a willingness by some consumers to pay a price-premium for food animal products from suppliers who have implemented welfare-friendly animal husbandry practices.⁶¹

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'.⁶²

It is in these circumstances that instead of directly legislating to prohibit certain animal husbandry practices and slaughter without prior stunning, 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. And at the centre of this regulatory agenda is the power exercised by the consumer in the market.

⁵⁹ For a more detailed discussion of the International Law implications associated with the religious slaughter of animals, see Joel Silver, 'Understanding Freedom of Religion in a Religious Industry: Kosher Slaughter (Shechita) and Animal Welfare' (2011) 42 *Victoria University of Wellington Law Review* 671.

⁶⁰ Ellen Goodman, Book Review, 'Animal Ethics and the Law: A Review of *Animal Rights: Current Debates and New Directions*' (2006) 79 *Temple Law Review* 1291.

⁶¹ Luiza Tomá et al, 'Consumer and Animal Welfare: A Comparison between European Union Countries' (2012) 58 *Appetite* 597; Laura Andersen, 'Animal Welfare and Eggs - Cheap Talk or Money on the Counter?' (2011) 62(3) *Journal of Agricultural Economics* 565; Brian Naald and Trudy Cameron, 'Willingness to Pay for Other Species' Well-Being' (2011) 70 *Ecological Economics* 1325; Morven McEarchen and Monika Schroder, 'The Role of Livestock Production Ethics in Consumer Values Towards Meat' (2002) 15 *Journal of Agricultural and Environmental Ethics* 221.

⁶² *Australian Competition and Consumer Commission v C.J. & Co Pty Ltd* [2010] FCA 1511, [31].

The Role of the Consumer

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*.⁶³ The *Guidelines* are intended to assist food and beverage providers in understanding the implications of the law relating to misleading or deceptive conduct.

During his presentation, Commissioner Martin made two important points that are relevant to the discussion in Part 3 of this article. First, that 'consumers are becoming increasingly sophisticated and discerning. They are demanding products that offer health benefits, are fresher or are Australian produced'.⁶⁴

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'.⁶⁵

In the last five years, Australian consumers *have* become more discerning about the way in which food animals are treated. This concern is reflected in both informal and industry-sponsored consumer surveys,⁶⁶ 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 it would alter its purchasing decisions to buy eggs pursuant to the *Choose Wisely Campaign*.⁶⁷

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*.⁶⁸

And in its 2012–13 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.⁶⁹ In introducing these food animal welfare initiatives, the Tasmanian Treasurer specifically noted that 'changes in market and consumer demand' motivated the Budget initiatives'.⁷⁰

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.

Unfortunately, the decisions of the Federal Court in *Australian Competition and Consumer Commission v C.I. & Co Pty Ltd*,⁷¹ and *Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 2)*⁷² 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?

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

⁶³ John Martin, *Misleading Claims and the Trade Practices Act*, Presentation to the 8th Annual Food Regulation and Labelling Standards Conference, 23 November 2006, Sydney, Australia.

⁶⁴ *Ibid* 3.

⁶⁵ *Ibid*.

⁶⁶ These informal and industry-sponsored surveys are discussed below.

⁶⁷ *Action Against Battery Eggs* <http://www.chiefminister.act.gov.au/media.php?v=7457>

⁶⁸ *Ibid*.

⁶⁹ Treasurer Lara Giddings MP, 2012–2013 Budget Speech 'Strong Decisions. Better Future', 17 May 2012, delivered on the Second Reading of the Consolidated Fund Appropriation Bill (No 1) 2012

<<http://www.treasury.tas.gov.au/domino/dtfdtfnstfv-budget-budget-papers/0>> (Accessed 21 May 2012).

⁷⁰ *Ibid* 12.

⁷¹ *Australian Competition and Consumer Commission v C.I. & Co Pty Ltd* [2010] FCA 1511 (23 December 2010).

⁷² *Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 2)* [2012] FCA 19 (2 December 2011).

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.

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 patterns?

Part V: Efficient Markets & Consumer Demand

Accordingly, 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 supplying 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.⁷³ 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?

⁷³ 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. [http://www.aec.com.au/attachments/347/original/Annual_Report_2010.pdf?1289462015>](#) (Accessed 7 May 2012)

The principal goal of Australian competition policy is not the protection of individual traders or individual consumers. The High Court in *Boral Besser Masonry Ltd (now Boral Masonry Ltd) v ACCC* stressed that 'the purpose of the Act is to promote competition, not to protect the private interests of particular persons or corporations'.⁷⁴

I have written elsewhere about how the CCA is even less concerned with the welfare of animals generally or food animals particularly.⁷⁵ In protecting and facilitating economic efficiency, consumers are said to benefit from the efficient allocation of society's resources.⁷⁶

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'.⁷⁷

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.⁷⁸ 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

⁷⁴ *Boral Besser Masonry Ltd (now Boral Masonry Ltd) v ACCC* (2003) ATPR 41-915, [87].

⁷⁵ Alex Bruce, 'Animals and the Trade Practices Act 1974' (Cth) (2009) 2 *Australian Animal Protection Law Journal* 49, 52.

⁷⁶ Stephen Corones, *Competition Policy and Economic Theory*, Chapter 1 in *Competition Law in Australia*, (5th ed), (Thompson Reuters, Australia, 2010) 43.

⁷⁷ Food Labelling Law and Policy Review Panel, *Labelling Logic: Review of Food Labelling Law and Policy*, 27 January 2011, Commonwealth of Australia, 97, [6.3].

⁷⁸ *Ibid* 98, [6.5].

to adopt such a claim and for consumers to respond.⁷⁹ Perhaps it is hoped that Adam Smith's 'invisible hand' may gently push suppliers into creating food animal welfare initiatives?⁸⁰

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 *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 *for the benefit of* Australian consumers.⁸¹

How does this work? To begin with, it must be acknowledged that there is no overarching theory of consumer protection that explains these dynamics. 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...*⁸²

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'.⁸³

Complicating the search for clarity in conceptualising consumer protection policy is the sometimes bewildering vocabulary and terminology employed by commentators in discussing consumer

79 Ibid.

80 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, *Market Definition*, Chapter 3 in *Restrictive Trade Practices Law*, (LexisNexis Butterworths, Sydney, Australia 2010) 19, 21.

81 *Competition and Consumer Act 2010* (Cth), s 2.

82 Norbert Reich, 'Diverse Approaches to Consumer Protection Philosophy' (1992) 14 *Journal of Consumer Policy* 257.

83 Lynden Griggs, 'Intervention or Empowerment - Choosing the Consumer Law Weapon!' (2007) 15 *Competition and Consumer Law Journal* 111.

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.⁸⁴

It is beyond the scope of this article 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 subtlety of consumer issues lamented above surely requires an interdisciplinary hermeneutic [method of interpretation - Ed.].

For present purposes, 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.⁸⁵ Understanding this relationship clarifies the process by which consumers' preferences for welfare friendly food animal products are signalled to the suppliers.

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 s2 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. The other side of this is the view that anti-competitive markets, or markets in which consumers are not protected

84 Alex Bruce, *Australia's National Consumer Protection Regime*, Chapter 1 in *Consumer Protection Law in Australia*, (LexisNexis Butterworths, Australia, 2011) 1, 6.

85 Louise Sylvan, 'Activating Competition: The Consumer - Competition Interface' (2004) 12 *Competition and Consumer Law Journal* 191, 192.

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 s2 of the then *Trade Practices Act* (now CCA) then Justice French of the Federal Court (now Chief Justice of the High Court) explained:⁸⁶

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 said that 'consumer protection laws are important complements to competition policy.'⁸⁷ 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.⁸⁸

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:

⁸⁶ Justice Robert French, *Competition Law – Covering a Multitude of Sins*, 2004 Paper delivered to the Competition Law Conference, 15 May 2004, Sydney, 6.

⁸⁷ William Kovacic, 'Competition Policy, Consumer Protection and Economic Disadvantage' (2007) 25 *Journal of Law & Policy* 101, 114.

⁸⁸ Office of Fair Trading, *Joining Up Competition and Consumer Policy – The OFT's Approach to Building an Integrated* ... December 2009, United Kingdom.

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.⁸⁹

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?

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.⁹⁰

The idea of evaluating the effectiveness of markets through the lens of efficiency is very much a product of the neo-classical school of

⁸⁹ *Re Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012.

⁹⁰ Economic Planning Advisory Council, *Promoting Competition in Australia*, Council Paper No38, Australian Government Publishing Service, Canberra, 1989.

economic theory; the prevailing hermeneutical lens through which competition policy generally, and the CCA specifically, is viewed.⁹¹

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. This school '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.'⁹² In constructing the framework of such a market, free of failures, economists generally commence with a number of assumptions.

Those assumptions are: first, that there are many buyers and sellers in the market, second, that sellers produce a homogeneous product, third, that buyers and sellers are equally informed about price, fourth, that there are no barriers to entry, meaning that firms can enter and exit the market, and finally, that 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.⁹³

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.'⁹⁴

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. 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

⁹¹ Hon Justice John Spigelman, 'Economic Rationalism and the Law' (2001) 24(1) University of New South Wales Law Journal 200.

⁹² Craig Johnston, 'Consumer Welfare and Competition Policy' (1996) 3 Competition and Consumer Law Journal 1, 3.

⁹³ Michael Swann and William McEachern, *Microeconomics: A Contemporary Introduction*, 2nd ed, (Thomson/Nelson, Melbourne, 2003) 219-20.

⁹⁴ Unni Kjaernes, 'Ethics and Action: A Relational Perspective on Consumer Choice in the European Politics of Food' *Journal of Agricultural Environmental Ethics* 1, 3.

*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.'*⁹⁵

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.⁹⁶

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.

Firms want to make goods or services at as low a cost as possible to themselves, and 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.

⁹⁵ Above n 56, 219.

⁹⁶ Food Labelling Law and Policy Review Panel, *Labelling Logic: Review of Food Labelling Law and Policy*, 27 January 2011, Commonwealth of Australia, 133, [8.11].

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.⁹⁷

In this sense, consumers are said to activate competition. 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. Thus 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.⁹⁸

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.⁹⁹

However, markets are not ends in themselves, but economic processes that facilitate the efficient production and delivery of resources in such a way that consumers benefit. Because competitive markets are considered to enhance consumer welfare and because consumers are said to 'activate' competition, the consumer is said to be 'sovereign'.

Given the regulatory¹⁰⁰ and academic¹⁰¹ validation of consumer sovereignty as an effective hermeneutic with which to understand the

⁹⁷ Philip Williams, 'Why Regulate for Competition?' in M James (ed), *Regulating for Competition: Trade Practices Policy in a Changing Economy*, (Centre for Independent Studies, Sydney, 1989) 13.

⁹⁸ Trade Practices Commission, *Annual Report 1983 - 1984*, AGPS, Canberra, 184.

⁹⁹ Louise Sylvan, 'Activating Competition: The Consumer - Competition Interface' (2004) 12 *Competition and Consumer Law Journal* 191.

¹⁰⁰ William Kovacic, 'Competition Policy, Consumer Protection and Economic Disadvantage' (2007) 25 *Journal of Law & Policy* 101, 114; Office of Fair Trading, *Joining Up Competition and Consumer Policy - The OFT's Approach to Integrated Agency*, December 2009, United Kingdom.

relationship between competition policy and consumer protection policy, it is important to explore its implications for food animal welfare and *Labelling Logic's* assumptions.

Part VI: The Consumer is Sovereign

It is not surprising that consumer protection theory is frequently said to involve the notion of 'consumer sovereignty'.¹⁰² 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.'¹⁰³

This Section 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.

The primacy of the consumer can be traced 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.'¹⁰⁴

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*.¹⁰⁵ Hutt thought 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.¹⁰⁶ Hutt's emphasis on the primacy of consumers' freedom

¹⁰¹ Mark Armstrong, 'Interactions Between Competition and Consumer Policy' (2008) 4(1) *Competition Policy International* 97; Max Huffman, 'Bridging the Divide? Theories for Integrating Competition Law and Consumer Protection' (2010) 6(1) *European Competition Journal* 7; Stefan Schwarzkopf, 'The Political Theology of Consumer Sovereignty: Towards an Ontology of Consumer Society' (2011) 28(3) *Theory, Culture & Society* 106.

¹⁰² 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.

¹⁰³ Vijaya Nagarajan, 'Reconceiving Regulation: Finding a Place for the Consumer' (2007) 15 *Competition and Consumer Law Journal* 93.

¹⁰⁴ Adam Smith, *The Wealth of Nations*, 1776, (New York Modern Library, 1937) 625.

¹⁰⁵ William Hutt, *Economics and The Public: A Study of Competition and Opinion*, (Honathan Cape Publishers, United Kingdom, 1936).

¹⁰⁶ Joseph Persky, 'Retrospectives: Consumer Sovereignty' (1993) 7(1) *Journal of Economic Perspectives* 183, 186.

to pursue their own happiness or ends is reflective of John Stuart Mill's notion of the relationship of the individual to the state.

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 main United States scholars responsible for establishing the theoretical relationship between consumer sovereignty and competition policy.¹⁰⁷ Averitt and Lande 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.¹⁰⁸

Averitt and Lande explain the mechanics of consumer sovereignty in this 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.*¹⁰⁹

There are several elements to this extract that explain the nature of consumer sovereignty and how competitive and efficient markets facilitate that sovereignty.

First, it is said that the economy acts 'primarily in response to the aggregate signals of consumer demand.'¹¹⁰ This is a reference to the signalling process described above. Through their purchasing patterns,

¹⁰⁷ Neil Averitt and Robert Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law' (1997) 65 *Antitrust Law Journal* 713; Neil Averitt and Robert Lande, 'Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law' (1998) 10 *Loyola Consumer Law Review* 44, Robert Lande, 'Consumer Choice as the Ultimate Goal of Antitrust' (2000–2001) 62 *University of Pittsburgh Law Review* 503.

¹⁰⁸ Neil Averitt and Robert Lande, 'Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law' (1998) 10 *Loyola Consumer Law Review* 44, 47.

¹⁰⁹ Neil Averitt and Robert Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law' (1997) 65 (3) *Antitrust Law Journal* 713, 714.

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 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.

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.*¹¹¹

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'.¹¹² 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.'¹¹³

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.

Because neither markets nor consumers are rational or optimal, it is unsurprising to find that contemporary governments have 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.

¹¹¹ *Colgate Palmolive Pty Ltd v Rexona Pty Ltd* (1981) ATPR 40-242 at 43,195 - 43,196.

¹¹² William Kovacic, 'Competition Policy, Consumer Protection and Economic Disadvantage' (2007) 25 *Journal of Law & Policy* 101.

¹¹³ Vijaya Nagarajan, 'Reconceiving Regulation: Finding a Place for the Consumer' (2007) 15 *Competition and*

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.¹¹⁴ 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 judgments. Information about animal suffering may have significant effects on the political domain.*¹¹⁵

Where consumer choices reflect preferences for food animal products from suppliers who take account of food animal welfare, this is the market expressing demand for increased food animal welfare initiatives.

¹¹⁴ Alex Bruce, *Factual Categories of Misleading or Deceptive Conduct*, Chapter 4 in *Consumer Protection Law in Australia*, (LexisNexis, Australia, 2011) 87.

¹¹⁵ Jeff Leslie and Cass Sunstein, 'Animal Rights Without Controversy' (2007) 70 *Law & Contemporary Problems* 117, 123-124.

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. In this way consumers signal a demand for welfare friendly food animal products.¹¹⁶

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?¹¹⁷ 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.¹¹⁸

Part VII: Consumers' Willingness to Pay

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

¹¹⁶ 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].

¹¹⁷ Brian Naald and Trudy Cameron, 'Willingness to Pay for Other Species' Well-Being' (2011) 70 *Ecological Economics* 1325.

*think it important to express these 'ethical' and political preferences in the market itself and not solely on the political forum.*¹¹⁹

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 more than 6,000 public submissions, the Review Panel issued its *Issues Consultation Paper* on 5.3.10 ('the *Consultation Paper*') and invited further submissions.¹²⁰

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?'¹²¹

The *Labelling Logic Report* recommended that in relation to consumer values issues relating to specific food production methods, including religious slaughter methods, specific values-based definitions in the *Food Standards Code* should be adopted in order to achieve consistency of definitions.¹²²

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.¹²³

Accordingly, Australian governments are leaving evaluation of the kind 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

¹¹⁹ Michael Korthals, 'Taking Consumers Seriously: Two Concepts of Consumer Sovereignty' (2001) 14 *Journal of Agricultural and Environmental Ethics* 201, 203.

¹²⁰ Issues Consultation Paper: Food Labelling Law and Policy Review, 5 March 2010, Food Labelling Law Secretariat, Canberra, Australia.

¹²¹ *Ibid* 6.

¹²² Food Labelling Law and Policy Review Panel, *Labelling Logic: Review of Food Labelling Law and Policy*, 27 January 2011, Commonwealth of Australia, Recommendation 36, 12.

¹²³ Response to the Recommendations of Labelling Logic: Review of Food Labelling Law and Policy (2011), Commonwealth Government, December 2011, 40.

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 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 would be 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. 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.*¹²⁴

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

¹²⁴ Humane Society International, 'Method of Production' Labelling of Animal-Derived Food Products: A National Approach 2008 <http://hsi.org.au/editor/assets/admin/Labelling_policy_Aug08.pdf> (Accessed 6 May 2012)

*survey in Queensland in 2001 showed that many consumers rank the humane treatment of animals ahead of price.*¹²⁵

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'.¹²⁶

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.¹²⁷ 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 article 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.¹²⁸ 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 article.

¹²⁵ Ibid.

¹²⁶ Professor Grahame Coleman, Public Perceptions of Animal Pain and Animal Welfare, May 2007, Monash University, Australia <http://www.daff.gov.au/_data/assets/pdf_file/0006/299103/grahame-coleman.pdf> (Accessed 7 May 2012)

¹²⁷ Iris Bergmann, Tania von der Heidt and Cecily Maller, Cognitive Dissonance and Individual's Response Strategies as a Basis for Audience Segmentation to Reduce Factory Farmed Meat Consumption, in R Russell-Bennett and S Rundle-Thiele (eds), 2010 International Nonprofit and Social Marketing Conference, Brisbane, Australia.

¹²⁸ Alex Bruce, 'Cognitive Dissonance in the Contribution of the Catholic Church to International Human Rights Law Discourse' (2009) 30(1) Adelaide Law Review 149.

First, there is an important body of literature that examines the relationship between cognitive dissonance theory and consumer choices to eat food animal products.¹²⁹ 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.¹³⁰ 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

129 Emma Lea and Anthony Worsley, 'The Cognitive Context of Beliefs about the Healthiness of Meat' (2002) 5(1) *Public Health Nutrition* 37; Boyka Bratanova, Steve Loughnan and Brock Bastian, 'The Effect of Categorisation as Food on the Perceived Moral Standing of Animals' (2011) 57 *Appetite* 193; Monika Schroder and Morven McEarchen, 'Consumer Value Conflicts Surrounding Ethical Food Purchase Decisions: A Focus on Animal Welfare' (2004) 28(2) *International Journal of Consumer Studies* 168; Monika Schroder and Morven McEarchen, 'The Role of Livestock Production Ethics in Consumer Values Towards Meat' (2002) 15 *Journal of Agricultural and Environmental Ethics* 221; Steve Loughnan, Nick Haslam and Brock Bastian, 'The Role of Meat Consumption in the Denial of Moral Status and Mind to Meat Animals' (2010) 55 *Appetite* 156.

130 Andrew Elliot and Patricia Devine: 'On the Motivational Nature of Cognitive Dissonance: Dissonance as Psychological Discomfort' (1991) 67(3) *Journal of Personality and Social Psychology* 382; Draycott & Dabbs: 'Cognitive Dissonance: An Overview of the Literature and its Integration into Theory and Practice in Clinical Psychology' (1998) 37 *British Journal of Clinical Psychology* 37; Harmon-Jones & Mills (eds): 'Cognitive Dissonance: Progress on a Pivotal Theory in Social Psychology' 1999, American Psychological Association, The Eurospan Group, United States; Shultz & Lepper: 'Cognitive Dissonance Reduction as Constraint Satisfaction' (1996) 103 *Psychological Review* 219; Aronson, E: 'Dissonance Theory Makes a Comeback' (1992) 3 *Psychological Inquiry* 303.

fit with what they know, or having opinions that do not fit with the other options they hold'.¹³¹

Cognitive dissonance theory therefore concerns relationships amongst cognitions and amongst cognitions and consumer behaviour. Most cognitions are described as 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 is: '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.

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 daily lives.¹³²

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

131 Leon Festinger, 'A Theory of Cognitive Dissonance' (Stanford University Press, United States, 1957).

132 Andrew Elliot and Patricia Devine: 'On the Motivational Nature of Cognitive Dissonance: Dissonance as Psychological Discomfort' (1991) 67(3) *Journal of Personality and Social Psychology* 382.

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.¹³³

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'.¹³⁴

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 decisions.

European Union Citizens' Willingness to Pay

Research on the issue of consumers' willingness to pay for increases in food animal welfare is in its infancy in Australia, but it has been extensively studied in Europe for at least 10 years.

Numerous 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.¹³⁵

133 Steve Loughnan, Nick Haslam and Brock Bastian, 'The Role of Meat Consumption in the Denial of Moral Status and Mind to Meat Animals' (2010) 55 *Appetite* 156, 158.

134 *Ibid* 3.

135 Harper and Henson, *Consumer Concerns About Animal Welfare and the Impact on Food Choice: Final Report 2001*, United Kingdom Department of Agriculture and Food Economics; Monika Schroder and Morven McEarchen, 'Consumer Value Conflicts Surrounding Ethical Food Purchase Decision: A Focus on Animal Welfare' (2004) 28 *International Journal of Consumer Studies* 168; Chilton, Burgess and Hutchinson, 'The Relative Value of Farm Animal Welfare' (2006) 59 *Ecological Economics* 353; Fredrik Carlsson and Peter Frykblom, 'Consumer Willingness to Pay for Farm Animal Welfare' (2007) 34(3) *European Review of Agricultural Economics* 321; 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) *International Journal of Sociology of Food and Agriculture* 59; Morgan and McVittie, 'Estimation of the Value the Public Places on Regulations to

Animal Welfare' (2009) 17 *Animal Welfare* 43; Giuseppe Nocella, Lionel Hubbard and Riccardo Scarpa, 'Farm

For example, a 2005 study indicated 74% of European citizens believed they could exert a positive influence on farm animal welfare through purchases of animal-friendly products and more than 60% confirmed they were willing to pay a price premium to ensure farm animal welfare.¹³⁶

These studies consistently indicate that both access to food animal welfare information and the perception of welfare labelling significantly influence decisions consumers make in purchasing food animal products.¹³⁷

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 main reported obstacle involved the lack of information concerning welfare issues available to consumers at the time of purchase.¹³⁸ Without sufficient information concerning farm animal welfare, consumers were unwilling or unable to exercise purchasing decisions that reflected their animal welfare concerns.

A 2010 U.K. 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.¹³⁹ Tawse found 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

Animal Welfare, Consumer Willingness to Pay and Trust - Results of a Cross-National Survey' (2010) 32(2) *Applied Economic Perspectives and Policy* 275; Napolitano, Girolami and Braghieri, 'Consumer Liking and Willingness to Pay for High Welfare Animal-Based Products' (2010) 21 *Trends in Food Science & Technology* 537; Lagervist and Hess, 'A Meta-Analysis of Consumer Willingness to Pay for Farm Animal Welfare' (2011) 38(1) *European Review of Agricultural Economics* 55; Toma, Scott, Revoredo-Giha and Kupiec-Teahan, 'Consumers and Animal Welfare: A Comparison Between European Countries' (2012) 58 *Appetite* 597.

136 Laura Andersen, 'Animal Welfare and Eggs - Cheap Talk of Money on the Counter?' (2011) 62(3) *Journal of Agricultural Economics* 565.

137 Toma, Scott, Revoredo-Giha and Kupiec-Teahan, 'Consumers and Animal Welfare: A Comparison Between European Countries' (2012) 58 *Appetite* 597, 606.

138 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) *International Journal of Sociology of Food and Agriculture* 59.

139 Jacqueline Tawse, 'Consumer Attitudes Towards Farm Animals and their Welfare: A Pig Production Case Study' (2010) 3(2) *Bioscience Horizons* 156, 157.

considerable proportion of consumers, but also to present information, which will affect those consumers powerfully enough to alter their buying habits.¹⁴⁰ These results are consistent with recent U.S. studies.¹⁴¹

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.

The signal importance of accurate and sufficient animal welfare labelling information has also been recognised at the regulatory level. In 2009 the European Commission investigated the issue of farm animal welfare labelling information¹⁴² resulting in its inclusion in the current *European Union Strategy for the Protection and Welfare of Animals 2012-2015*.¹⁴³ Like the Australian Government, the EU Strategy intends to regulate animal welfare labelling claims through 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.*¹⁴⁴

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 this research underscores the important role intended for the ACL.

¹⁴⁰ *Ibid.*

¹⁴¹ R. Pickett, F. Norwood and J. Lusk, 'Consumer Preferences for Farm Animal Welfare: Results from a Telephone Survey of US Households' (2010) 19 *Animal Welfare* 333.

¹⁴² European Commission, *Feasibility Study on Animal Welfare Labelling and Establishing a Community Reference Centre for Animal Protection and Welfare* (2009) EU Directorate General for Health and Consumer Protection.

¹⁴³ *European Union Strategy for the Protection and Welfare of Animals 2012-2015*, 10 - 11, Part 3.4.

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. 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).¹⁴⁵

However, consideration of the question whether the use of the ACL in preventing misleading or deceptive conduct in relation to food animal product labelling 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 to exert backwards pressure on animal farmers to implement food animal welfare reforms. This pressure will be mediated through consumer demand.

¹⁴⁵ Response to the Recommendations of *Labelling Logic: Review of Food Labelling Law and Policy* (2011), Commonwealth Government, December 2012, 40.

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.¹⁴⁶

Studies in the European Union suggest 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.

It therefore seems that, at least in theory, it may be possible to realise the Commonwealth Government's intention, expressed in its *Labelling Logic Report*, to use the ACL to regulate consumer values issues associated with food animal welfare and the religious slaughter of animals.

However, translating economic and consumer theory into practice in the legal application of the ACL is another matter altogether. Given that competition and consumer policy as well as consumer literature supports the role of the consumer as sovereign in generating food animal welfare, it remains to explore the *legal* implications of that relationship.

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 will be explored in the second article.

¹⁴⁶ Food Labelling Law and Policy Review Panel, *Labelling Logic: Review of Food Labelling Law and Policy*, 27 (2012) 7 AAPLJ.