To the article *Australia's Need for An Independent Office of Animal Welfare* by Aimee Mundt following footnote is inserted to the sentence "Drawing on regulatory literature to critique the current situation in Australia's farm animal welfare system, it will be argued that regulatory capture exists due to the conflicts of interest present in the responsible regulatory departments." on page two:

> Footnote 4: This discussion is partly based on the themes presented by Jed Goodfellow, 'Regulatory Capture and the Welfare of Farm Animals in Australia' at the Voiceless Animal Law Lecture Series, University of Sydney, 23 April 2013.

Note that the current footnotes 4-121 in the article should now be referred to as 5-122.

The Editorial Board of GJAL
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Australia's Need for An Independent Office of Animal Welfare

By Aimee Mundt[1]

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1. Introduction

Each year, Australia raises and slaughters approximately half a billion farm animals, making it one of the world's largest producers of farm animals.[2] The Australian Government and the agricultural sector claim that Australia is an international leader in animal welfare.[3] Australia has a wide-ranging system of Commonwealth, State and Territory legislation, as well as regulations and industry codes, which regulate farm

[1] The author is an admitted solicitor who works at Animals Australia, one of Australia's leading animal protection organisations, as a Legal Officer. Aimee is also the Co-Founder of The Animal Law Institute, a community legal centre that is dedicated to protecting animals and advocating for their interests through the Australian legal system.

[2] Australian Bureau of Statistics (2012) 'Livestock Slaughterings and Products' Australian Farming in Brief, Cat No 7106.0, Commonwealth of Australia, Canberra.

[3] Department of Agriculture (2011) 'Australian Animal Welfare Strategy and National Implementation Place 2010-2014', 23 November 2011.

animal welfare. This paper argues that the existing framework fails to effectively protect farm animals from cruelty, and that an effective way to improve farm animal welfare would be to establish a federal Independent Office of Animal Welfare (IOAW).

Part One of this paper will examine the current framework in Australia for the protection of farm animals, including the current laws, regulations and codes. However, this paper will not focus on farm animals used in live export from Australia, as this is a distinct area of regulation which falls outside the parameters of this paper.

Part Two of this paper will examine how the current framework is failing to protect farm animals. The concept of regulatory capture will be described and analysed. Drawing on regulatory literature to critique the current situation in Australia's farm animal welfare system, it will be argued that regulatory capture exists due to the conflicts of interest present in the responsible regulatory departments.

Having established the key reason for regulatory capture in Australia's farm animal welfare framework in Part Two, Part Three will discuss common flow-on effects that are usually present in industries experiencing regulatory capture. Drawing on evidence from regulatory studies, a comparative analysis will be undertaken, demonstrating that a number of these key effects are present in Australia's farm animal welfare framework, including:

i) evidence of strong industry influence on the regulator;
ii) a serious lack of enforcement by the regulator; and
iii) evidence of the regulator advocating for industry.

Part Four will discuss how the current regulatory framework could be reformed to address the issues analysed in the previous three parts. It will be posited that an effective reform would be to create a federal IOAW, which would allow for the separation of the existing conflicting responsibilities of the regulator. An analysis of the functions, powers and operations of the IOAW will be undertaken, demonstrating that the IOAW could significantly reduce the existing regulatory failures and provide enhanced protection for farm animals. Part Four will conclude with an examination of how the IOAW could be created, including a brief analysis of the constitutional issues that may arise.

As a final introductory point, this paper focuses on the existing regulatory framework and will argue for change to improve that framework. This reflects a pragmatic choice, given that alternative solutions, in particular the complete abolition of the production of animals for food, are not likely to occur in the foreseeable future.[4]

[4] See for example: Gary Francione, 'The Abolition of Animal Exploitation' in Gary Francione and Robert Garner, *The Animal Rights Debate – Abolition or Regulation?* (Columbia University Press, 2010) 1.

2. Part One – The current farm animal welfare framework

2.1 Laws, regulations and codes

Australia currently has a complex system of animal cruelty legislation, regulation and codes governing the protection of farm animal welfare within the agriculture industry. Farm animal welfare is regulated by a myriad of enforceable and voluntary standards.

All Australian States and Territories have laws and regulations that aim to prevent animal cruelty.[5] However, most of these laws and regulations provide exemptions for farm animals, such as cattle, sheep, goats, pigs and chickens, by defining them separately as 'stock'. [6] This allows for these animals to be exempt from certain legislative protections that are provided to other animals, such as companion animals. For example, the *Prevention of Cruelty to Animals Act 1979* (NSW) provides for stock to be specifically exempt from the requirement that animals receive adequate exercise, making it lawful for this category of animals to be confined for their whole life.[7]

Additionally, compliance with non-legislative instruments may provide the basis for an exemption from cruelty offences. Non-legislative instruments include Commonwealth policies, standards and model codes of practice for the welfare of animals (MCOPs). These MCOPs are produced by the Council of Australian Governments and endorsed by the Primary Industries Ministerial Council (PIMC). Although these MCOPs have no legal standing and are not enforceable, they do play an important role in farm animal welfare in Australia. The MCOPs are commonly adopted under State and Territory legislation, either in total[8] or in a modified form.[9] Most animal cruelty legislation states that compliance with these codes of practice is a defence to acts of cruelty. For example, in Queensland, acts that would normally be considered cruelty if performed on a companion animal, such as castration, dehorning, and debeaking of animals without anaesthetic, do not attract animal cruelty charges in farming situations, as they are procedures considered acceptable in the MCOPs.[10] This essentially means that what is provided for in the

[5] *Prevention of Cruelty to Animals Act 1979* (NSW); *Animal Welfare Act 1985* (SA); *Animal Welfare Act 1993* (Tas); *Prevention of Cruelty to Animals Act 1986* (Vic); *Animal Welfare Act 2002* (WA); *Animal Care and Protection Act 2001* (Qld); *Animal Welfare Act 1992* (ACT); *Animal Welfare Act 1999* (NT).
[6] See for example, *Animal Welfare Act 2002 (WA)* s 26; *Animal Care and Protection Act 2001* (Qld) s 13(2)(e).
[7] See, *Prevention of Cruelty to Animals Act 1979* (NSW) s 9(1)(a) and *Animal Welfare Act 1999* (NT) s 11(3).
[8] For example, in Queensland, the Australian 'Model code of practice for the welfare of animals - domestic poultry (4th edition)' is an adopted code under the *Animal Care and Protection Act 2001* (Qld).
[9] For example, the Victorian Government incorporates the MCOPs into its own codes Victorian Codes of Practice for Animal Welfare.
[10] See *Animal Care and Protection Act 2001* (Qld), s 40.

MCOPs forms part of the legally acceptable standards for the treatment of farm animals in Australia.

Further, some of these MCOPs have recently been converted into legally enforceable Australian Animal Welfare Standards and Guidelines,[11] through State and Territory governments implementing these standards as law. For example, in 2014, Queensland implemented the *Australian Animal Welfare Standards and Guidelines – Land Transport of Livestock* as a compulsory requirement under the *Animal Care and Protection Regulation 2012* (Qld).[12] These standards are enforceable, and as with the MCOPs, compliance with them will provide an exemption to cruelty offences.[13] It was the intention to transform all MCOPs into nationally consistent animal welfare standards and guidelines. However, it is uncertain if this will be achieved given recent changes to the Australian Animal Welfare Strategy (AAWS), discussed below.[14]

2.2 Responsible regulators

The Department of Agriculture, Fisheries and Forestry (DAFF) is the regulatory department at the Commonwealth level responsible for farm animal welfare.[15] Until recently, DAFF was responsible for developing the AAWS, which created a national framework to identify priorities, coordinate stakeholder action and improve consistency across all animal use sectors.[16] However, in 2013, the Federal Government cut all funding from the AAWS, effectively ending its role as a national coordinator of farm animal welfare reform. The Federal Government also abolished the Australian Animal Welfare Advisory Committee (AAWAC).[17] The AAWAC advised the Federal Minister and assisted in the development of guidelines for animal welfare, which were reported to the State and Territory Ministers responsible for farm animal welfare.[18]

At a State and Territory level, the responsible regulatory departments are the Department of Primary Industries (or its equivalent). These departments generally have the responsibility to enact and administer animal welfare laws and regulations. As mentioned

[11] See for example, *Australian Animal Welfare Standards and Guidelines – Land Transport of Livestock*.
[12] Schedule 3, *Animal Care and Protection Regulation 2012* (Qld).
[13] For example, the *Australian Animal Welfare Standards and Guidelines – Land Transport of Livestock* was incorporated into Schedule 3 of the *Animal Care and Protection Regulation 2012* (Qld).
[14] See Department of Agriculture, *Australian Animal Welfare Standards and Guidelines (Model Codes of Practice)* (16 September 2014) <http://www.agriculture.gov.au/animal-plant-health/welfare/standards-guidelines>.
[15] See generally, Department of Agriculture's website: <http://www.daff.gov.au>.
[16] See generally, Department of Agriculture, *Animal Welfare, Australian Animal Welfare Strategy*, (15 July 2014) <http://www.daff.gov.au/animal-plant-health/welfare/aaws>.
[17] See for example Voiceless, *Animal law in the spotlight: 2014 Federal Budget*, (6 June 2014) Voiceless – The Animal Protection Institute <https://www.voiceless.org.au/content/animal-law-spotlight-2014-federal-budget>.
[18] Alex Bruce, *Animal Law in Australia* (LexisNexis Butterworths, 1st ed, 2012), 78.

above, States and Territories generally attempt to incorporate the Commonwealth policies, standards and MCOPs into such laws and regulations. However, this process is often inconsistent, as States and Territories can decide to accept the codes in full, partly, or not at all.[19] This has resulted in piecemeal farm animal welfare protection across the States and Territories.[20]

3. Part Two – The failure of Australia's farm animal welfare framework

3.1 Introduction to regulatory capture

Having outlined the existing framework for farm animal welfare in Australia in Part One, Part Two will examine how this framework fails to protect farm animals. Drawing on regulatory theories to analyse the current framework, it will be argued that regulatory capture is present due to conflicts of interest in the responsible regulatory departments.

Regulatory capture is a theory of regulation which describes the situation where an industry, subject to a regulatory regime, acquires influence disproportionate to the balance of interests that the regulation was designed to serve.[21] Regulatory capture exists where the subject regulation, in law or application, is consistently directed away from the public interest towards the interests of the regulated industry.[22] Regulatory capture can be detected where regulators serve the interests of the industry being regulated rather than the public interest.[23]

3.2 Regulatory capture in Australia's farm animal welfare framework

The existing regulatory framework for the protection of farm animal welfare creates an environment where regulatory capture would very likely exist. The relevant industry is the animal agricultural industries, including the cattle, pork, egg and chicken meat industries. The relevant public interest is the protection and advancement of animal welfare in Australia. The justification for animal welfare laws being in the public interest has been long established,[24] with it being recognised that Australians value animals and

[19] Geoff Neumann & Associates Pty Ltd *Review of the Australian Model Codes of Practice For The Welfare of Animals* (2005), 9.
[20] Bruce, above n 17, 81.
[21] Lawrence Baxter, 'Capture in Financial Regulation: Can We Channel it Toward the Common Good?' (2011) *Cornell Journal of Law and Public Policy* 27, 176.
[22] Daniel Carpenter and David A. Moss, 'Introduction' in Daniel Carpenter and David A. Ross (eds), *Preventing Regulatory Capture – Special interest influence and how to limit* it (Cambridge University Press 2014) 1, 13.
[23] Peter Grabosky and John Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (Oxford University Press, 1st ed, 1986) 198.
[24] Steven White, 'Legislating for animal welfare – making the interests of animals count', (2003) 28(6) *Alternative Law Journal* 277, 278.

their welfare,[25] and that harming animals indirectly harms the interests of humans.[26] Primary industry departments at both the Commonwealth and State/Territory levels are the relevant regulators and have responsibility for both the relevant farm animal industry and the public interest of animal welfare in Australia.

The primary cause of regulatory capture in Australia's farm animal welfare system is the design of the existing regulatory framework. Poor regulatory design can lead to situations of regulatory capture where the regulator and industry have such a close alignment of primary goals that it is inevitable that the regulator will serve the interest of the regulated industry and not the public interest. This alignment allows industry to strongly influence the regulator in a manner disproportionate to those attempting to advance animal welfare goals.[27]

The poor regulatory design in farm animal welfare directly causes the regulatory agencies to have conflicting responsibilities. The primary goal of these departments is the promotion of profitable and competitive farm businesses and industries.[28] For example, DAFF's website states that its role is to 'develop and implement policies and programs that ensure Australia's agricultural, fisheries, food and forestry industries remain competitive, profitable and sustainable.'[29] However, these departments also carry the responsibility for regulating farm animal welfare. For example, Biosecurity Queensland, a unit of the Queensland Department of Agriculture, Fisheries and Forestry, is the 'Government's lead agency for animal welfare activities in Queensland', responsible for developing, monitoring and enforcing animal welfare policy, legislation and standards.[30]

At face value, these two responsibilities – supporting profitable industries and protecting animal welfare – seem to be complementary. This is commonly the position argued by industry. Australian Pork, for example, states that 'producers understand…that providing excellent care results in a contented animal that provides a high quality product—pig producers' livelihoods depend on it.'[31] Further, a number of members of parliament have echoed this opinion. Mr Jai Rowell, Member for Wollondilly in the New South Wales Parliament, stated, 'Animals that are mistreated are not as productive as those that are

[25] See Australian Animal Welfare Strategy Vision: <http://www.agriculture.gov.au/animal-plant-health/welfare/aaws>.
[26] White, above n 23, 278.
[27] Adams, G Hayes, S Weierter, S & Boyd, J 'Regulatory Capture: Managing the Risk' (2007) Australian Public Sector Anti-Corruption Conference, Sydney, 6.
[28] Arnja Dale, 'Animal Welfare Codes and Regulations - The Devil in Disguise?' in Celeste Black, Peter Sankoff and Steven White (eds), *Animal Law in Australasia (*Federation Press, 2nd ed, 2013) 174, 185.
[29] Department of Agriculture, *About Us*, (1 August 2014) <http://www.daff.gov.au/about>.
[30] Queensland Department of Agriculture, Fisheries and Forestry, *Animal welfare and ethics*, (1 August 2014) <http://www.daff.qld.gov.au/animal-industries/welfare-and-ethics>.
[31] Australian Pork Limited, *Animal Welfare*, (3 August 2014) <http://australianpork.com.au/industry-focus/animal-welfare/>.

not...in simple terms, unhealthy and unhappy animals produce poor-quality meat and dairy products.'[32]

However, on closer examination, these two responsibilities conflict and have a negative relationship. [33] Extensive economic studies into this relationship reveal that while welfare and productivity can be complementary at low levels of output, high levels of productivity and profitability will ultimately come at the expense of welfare.[34] As Matheny and Leahy found, when animal welfare competes with economics, economics usually wins.[35]

Further, welfare considerations usually only include animals' physical welfare and not their psychological welfare. It is not unusual for an animal's behavioural or psychological wellbeing to be affected by poor farming conditions, while their physical health remains satisfactory.[36] Animals can maintain their physical health by triggering coping mechanisms such as 'non-injurious pathological behaviours', which are commonly assisted by the use of antibiotics.[37] A key example of this conflict is the battery cage system, where up to 20 hens are placed in one cage and allocated space that is equivalent to an A4 sheet of paper to spend their life.[38] Whilst this system allows for high productivity in the smallest amount of space, it has detrimental effects on hens' psychological health, as it denies them the ability to carry out their natural behaviours.[39] Although hens commonly survive in this environment and continue to produce eggs, it causes acute suffering.[40] As Rollin stated 'it is more economically efficient to put a greater number of birds into each cage, accepting lower productivity per bird but greater productivity per cage…chickens are cheap, cages are expensive.'[41]

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[32] Mr Jai Rowell, *Prevention of Cruelty to Animals Amendment Bill*, NSW Legislative Council, 12 September 2012.
[33] Jed Goodfellow, 'Animal Welfare Law Enforcement: To Punish or Persuade?' in Peter Sankoff, Steven White (eds), *Animal Law in Australasia* (Federation Press, ed 2, 2013) 183, 200.
[34] Ibid.
[35] Gaverick Matheny and Cheryl Leahy, 'Farm-Animal Welfare, Legislation, and Trade' (2007) 70(1) *Law and Contemporary Problems* 325, 328.
[36] Donald Broom, 'Animal welfare: future knowledge, attitudes and solutions', paper presented at the Australian Animal Welfare Strategy International Animal Welfare Conference, Gold Coast, 31 August 2008.
[37] Ibid.
[38] In Queensland, a 7(2)(a) *Animal Care and Protection Regulation 2012* (Qld) states that if three or more domestic laying fowls are kept in a cage, the minimum floor area for cages post 2001 is 550cm^2. This equates to less than one A4 piece of paper per chicken based on an A4 page, with sides of 21.0 cm x 29.7 cm, which would have an area of 623.7 cm^2.
[39] These natural behaviours include dust bathing, laying eggs in private, scratching and perching. See H. El-Lethey, V. Aerni, T.W. Jungi and B Wechsler, 'Stress and feather pecking in laying hens in relation to housing conditions' (2000) 41 *British Poultry Science* 22.
[40] Ibid.
[41] Matheny and Leahy, above n 34, 329.

As profitable industries are the foremost goal of the regulator, the goal of maintaining the public interest of animal welfare is subordinated. As Biber commented, it is common for agencies with conflicting goals to systematically underperform on their secondary goals in order to achieve their primary goals, especially where the secondary goals interfere with achieving the primary goal and are not easily monitored or measured.[42] This directly reflects the farm animal welfare regulatory environment in Australia. Further, as the regulated industry has the same primary goal as the regulator, their influence over the regulator is significantly greater than those advocating for the secondary goal of animal welfare.

Both these points demonstrate that it is highly likely that regulatory capture exists in Australia's farm animal welfare framework. This causes regulators to be consistently influenced by industry to serve their interests, resulting in the failure of the regulatory departments to effectively address animal protection, with the public interest of farm animal welfare subordinated.

4. Part Three – Effects of regulatory capture in the farm animal welfare framework

4.1 Effects of regulatory capture

As argued in Part Two, it is highly likely that regulatory capture exists in Australia's farm animal welfare framework. Part Three will examine the generally recognised effects of regulatory capture, demonstrating that a number of these effects currently exist in Australia's farm animal welfare framework. This analysis serves two purposes in advancing the overall thesis: it supports the contention that regulatory capture exists, and shows the dire state of farm animal protection, suggesting a need for extensive reform.

There are a number of generally recognised effects of regulatory capture:

- Disproportionate influence by industry;[43]
- Lack of enforcement by the regulator; [44] and
- The regulator adopting an advocacy role for the regulated industry.[45]

Each of these will be considered in turn in a farm animal context.

[42] Eric Biber, 'Too many things to do: How to deal with the dysfunctions of multiple-goal agencies' (2009) *Harvard Environmental Law Review* 1, 4.
[43] Baxter, above n 20.
[44] Ibid.
[45] Gary Adams, Sharon Hayes, Stuart Weierter & John Boyd, *Regulatory Capture: Managing the Risk* (2007) Australian Public Sector Anti-Corruption Conference, Sydney, 5.

4.2 Disproportionate industry influence

A key effect of regulatory capture is that industry disproportionately influences the regulator,[46] which commonly eventuates as a result of industry providing technical support to the regulator in areas relating to the subject regulation.[47] Industry representatives playing a key role in drafting legislation, regulations or standards is a common way in which regulation becomes captured.[48]

This disproportionate influence is evident in Australia's farm animal welfare framework, with industry wielding significant influence over the regulators in relation to animal welfare regulations. As mentioned in Part One, the MCOPs are relied upon for setting the minimum standard of animal welfare and are commonly adopted by the States and Territories. Industry provides technical support to the regulator and their guidance heavily influences the minimum welfare standards. A range of participants from industry are heavily involved in the drafting of the MCOPs.[49] The Animal Welfare Working Group, which is made up of a number of representatives including Animal Health Australia (AHA),[50] has the responsibility of developing MCOPs.[51] AHA is a non-profit public company made up of government and industry representatives, including Australia Pork Limited and the Cattle Council of Australia.[52] This allows industry to assist in the drafting of MCOPs, with their input undoubtedly exerting disproportionate influence on the standards set in the MCOPs, when compared with that of animal welfare representatives. This is worsened by the fact that public consultation does not routinely occur throughout the process of developing MCOPs,[53] further evidencing industry's disproportionate dominance in the non-government representation.[54] Further, although wider public consultation was evident in the drafting stages of the national standards and guidelines mentioned above, industry was still heavily influential and essentially controlled the content of those standards.[55]

[46] Baxter, above n 20.
[47] Adams, Hayes, Weierter & Boyd, above n 44, 5.
[48] Amitai Etzioni, 'The capture theory of regulations – revisited' (2009) 46 *Symposium: Public Dilemmas Revisited* 319, 320.
[49] Elizabeth Ellis, 'Making Sausages and Law: The Failure of Animal Welfare Laws To Protect Both Animals and Fundamental Tenets of Australia's Legal System' (2010) 4 *Australian Animal Protection Law Journal* 6, 14.
[50] Ibid 15.
[51] Ellis, above 48, 15.
[52] Ellis, above 48, 15.
[53] Geoff Neumann & Associates Pty Ltd *Review of the Australian Model Codes of Practice For The Welfare of Animals* (2005), 7.
[54] Dale, above n 27, 185.
[55] See: Department of Agriculture, *Review of the Animal Welfare Standards and Guidelines Development Process*, (16 September 2014) < http://www.agriculture.gov.au/animal-plant-health/welfare/standards-guidelines/review-animal-welfare-standards-and-guidelines-development-process>.

It is not unreasonable or unexpected for a regulator to approach key stakeholders, such as industry, in an attempt to gain a working understanding of the practicalities when drafting regulations. However, the farm animal industry's influence on its regulator is disproportionate, with industry being able to strongly influence the regulator. The Neumann Report found that involvement of industry in the code development process resulted in codes merely documenting existing management practices.[56]

The fact that industry influences the codes to reflect their own desired standards is further evidenced by reports finding that contemporary science is not commonly considered throughout the code drafting process,[57] nor are international welfare standards taken into account.[58] A clear example of this is Australia's failure to recognise welfare developments internationally, including the bans on certain intensive farming systems such as battery cages and sow stalls in the European Union and New Zealand.[59] Further, industry has significant influence and control over animal welfare science in Australia, meaning that even where 'scientific research' is relied upon, it is likely that the research is biased towards industry's desired outcomes.[60]

Industry's influence is disproportionate in Australia's farm animal framework, with industry influencing the minimum standards for welfare. [61] This further evidences the existence of regulatory capture and demonstrates the need for reform.

4.3 Lack of enforcement

Lack of adequate enforcement by the regulator is another common effect of regulatory capture.[62] Captured regulators commonly perpetrate cultures of non-enforcement, fail to monitor compliance and do not support inspectors to follow through with serious investigations or prosecutions.[63] Weakened enforcement is a well-known way for regulation to become non-applicable or only selectively applicable, without the need to

[56] Geoff Neumann & Associates Pty Ltd *Review of the Australian Model Codes of Practice For The Welfare of Animals* (2005), 10.
[57] Ibid ii.
[58] Peter Sankoff, 'Five years of the "new" animal welfare regime: lessons learned from New Zealand's decision to modernize its animal welfare legislation', (2005) 11(7) *Animal Law* 7, 23.
[59] Arnja Dale, above n 27, 189.
[60] Glenys Oogjes, 'Australian Land Transport Standards and Guidelines: Is the new review process providing protection for transported farm animals?' (2011) 6 *Australian Animal Protection Law Journal* 8, 16-18.
[61] Geoff Neumann & Associates Pty Ltd *Review of the Australian Model Codes of Practice For The Welfare of Animals* (2005), 10.
[62] Baxter, above n 20.
[63] David Turton, 'Wading in: environmental governance and Queensland's Clean Waters Act 1971' (2010) 17 *James Cook University Law Review* 46, 64.

expressly alter regulation 'on the books'.[64] This situation is evident in Australia's farm animal framework, with enforcement of animal welfare laws and regulations seriously lacking and prosecutions rarely being brought against the industry.

The first issue is that, in order for enforcement to occur, breaches must be detected and reported, which is difficult within the current framework. Farm animal welfare inspectorate and enforcement responsibilities rest either with the relevant State or Territory departments or are delegated to the Royal Society for the Prevention of Cruelty to Animals (RSPCA). Where the responsible department does retain control over inspections and enforcement, routine inspections for animal welfare compliance are rarely carried out, with investigations usually being instigated by tip-offs from third parties.[65] For example, in both Queensland and Victoria, the responsible departments[66] retain responsibility for the inspection and enforcement of farm animal welfare, however neither conducts routine inspections of intensive piggeries.[67] Instead, investigations only occur if allegations of cruelty are made.[68] Further, where inspections do occur, the legislation usually requires notice be provided to the owner in advance, reducing the possibility of detecting breaches.[69]

This reluctance to investigate and prosecute was evident in *Department of Local Government and Regional Development v Emanuel Exports Pty Ltd & Ors*.[70] The Director-General of the Department of Local Government and Regional Development in Western Australia[71] only investigated complaints of animal cruelty made by Animals Australia approximately two years after the complaints were made, following an order nisi for a writ of mandamus by the Western Australian Supreme Court, which led to the charges involved in the case.[72]

Further, regulators fail to provide appropriate resources for inspection and enforcement, which worsens enforcement issues. In some States and Territories, the responsible department delegates its inspection and enforcement responsibilities to the RSPCA,

[64] Amitai Etzioni, 'The capture theory of regulations – revisited' (2009) 46 *Symposium: Public Dilemmas Revisited* 319, 320.
[65] Deborah Cao, *Animal Law in Australia and New Zealand* (Thomson Reuters, 2010), 216.
[66] Department of Agriculture, Fisheries and Forestry in Queensland; and the Department of Primary Industries in Victoria.
[67] Animals Australia, 'How agriculture industry audits are failing Australian animals', 14 August 2014 < http://www.animalsaustralia.org/features/industry-audits-failing-animals.php>.
[68] Ibid.
[69] See for example *Animal Welfare Act 1985* (SA), s 31 and *Animal Care and Protection Act 2001* (Qld), ss 122-124.
[70] *Department of Local Government and Regional Development v Emanuel Exports Pty Ltd & Ors* (Perth Magistrates Court, Crawford M; judgment given 8 February 2008).
[71] The person responsible for instigating proceedings under the *Animal Welfare Act 2002* (WA).
[72] Graeme McEwen, *Animal Law: Principles and Frontiers*, (15 August 2014) Barristers Animal Welfare Panel, 246 < http://bawp.org.au/wp-content/uploads/2013/07/eBook-FINAL.pdf>.

which is a charity organisation. Not only is it extremely rare for a public interest statute to be enforced by a charity, the RSPCA has reported that it only receives approximately 2% of its annual income from government funding, noting that its resources are routinely stretched, thus making enforcement difficult. [73] Whilst this paper is not alleging that the RSPCA is in a state of regulatory capture, it is argued that it has a limited ability to routinely inspect and investigate farm animal facilities, and when it does detect breaches of the already low regulatory standards, prosecutions are rare and only occur in the most serious cases.[74]

This is possibly a result of the responsible regulator not providing the RSPCA with appropriate resources to carry out the delegated duties, and demonstrates a lack of concern for enforcement by the regulator. As Neumann reported, the most important factors leading to the lack of enforcement in animal welfare are resourcing issues, and notably, a lack of will on behalf of the regulator to enforce the regulations.[75] This passive attitude towards breaches of welfare regulations and reluctance to prosecute has previously been detected in industries proven to be experiencing regulatory capture.[76]

This situation is worsened due to the inconsistencies between animal welfare laws and regulations across Australia. Neumann commented that uniform enforcement is fundamental to the achievement of good welfare outcomes and an improvement in the international community's views on Australia's animal welfare framework.[77] This lack of enforcement is consistent with the argument that regulatory capture exists in Australia's farm animal framework and that reform is required.

4.4 Regulator acting as advocate for industry

Another key effect of regulatory capture in an industry is that the regulator commonly adopts an advocacy role for the regulated industry.[78] Where regulatory capture exists, it is not uncommon for the regulator to advocate for the industry they are meant to be regulating, causing the public interest purpose of the regulation to become subordinated.

An example of this is seen in the current discussions relating to the enactment of laws, known as 'ag-gag laws', which seek to make it illegal for any person to obtain footage of

[73] Ellis, above 48, 21.
[74] Ellis, above 48, 6.
[75] Geoff Neumann & Associates Pty Ltd *Review of the Australian Model Codes of Practice For The Welfare of Animals* (2005), 9.
[76] David Turton, 'Wading in: environmental governance and Queensland's Clean Waters Act 1971' (2010) 17 *James Cook University Law Review* 46, 65.
[77] Geoff Neumann & Associates Pty Ltd *Review of the Australian Model Codes of Practice For The Welfare of Animals* (2005), 47.
[78] Adams, G Hayes, S Weierter, S & Boyd, J 'Regulatory Capture: Managing the Risk' (2007) *Australian Public Sector Anti-Corruption Conference*, Sydney.

animal cruelty on farm facilities, and for media organisations to broadcast such footage.[79] Similar laws have already been enacted in parts of the United States of America,[80] which has seen a woman arrested and charged for filming animal cruelty from a public road.[81]

In Australia, a number of ministers who are responsible for the regulating departments have supported these laws, including New South Wales Minister for Primary Industries, Katrina Hodgkinson. Ms Hodgkinson stated that she would do everything in her power to end the activities of "animal activists", referring to members of the public who record animal cruelty.[82] Further, Federal Agriculture Minister, Barnaby Joyce, has given his support to a similar Private Senator's Bill introduced by Western Australian Senator, Chris Back.[83]

As stated above, it is these third party tip-offs of cruelty that usually spark investigations into farm cruelty. A recent example of this is the evidence provided by Animals Australia[84] of animal cruelty at an egg farm in New South Wales.[85] The footage showed unhealthy layer hens in overcrowded cages and chickens that were trapped beneath their cages living in faeces.[86] This footage was reported to the responsible regulator, resulting in an investigation where inspectors noted a number of problems and issued fines.[87] The key point here is that a third party, not the regulator, uncovered the animal abuse.

If the regulator, at the behest of a government minister or otherwise, supported the enactment of ag-gag laws, this would represent an attempt to make it unlawful for third parties like Animals Australia to obtain and provide evidence of animal cruelty to the regulator, RSPCA or police. This would not only make it more difficult for regulations to be effectively enforced in favour of the public interest, but would also demonstrate direct

[79] See for example, Voiceless, *Ag Gag*, (1 September 2014) Voiceless – The Animal Protection Institute <https://www.voiceless.org.au/the-issues/ag-gag>.
[80] See for example, Arkansas State Legislature, Bill Information SB13, state legislative website, accessed April 19, 2013.
[81] Will Potter, First "Ag-Gag" Prosecution: Utah Woman Filmed a Slaughterhouse from the Public Street, *Green is the New Red*, 2013.
[82] 'Animal rights activists 'akin to terrorists', says NSW minister Katrina Hodgkinson', ABC News (18 July 2013) accessed on 1 September 2014 at < http://www.abc.net.au/news/2013-07-18/animal-rights-activists-27terrorists272c-says-nsw-minister/4828556>.
[83] Lucy Barbour, 'Barnaby Joyce supports Liberal Senator Chris Back's push to legislate against activists on farms, ABC News (16 July 2014) accessed on 1 September 2014 at <http://www.abc.net.au/news/2014-07-15/chris-back-animal-welfare-bill/5598938>; *Criminal Code Amendment (Animal Protection) Bill* 2015.
[84] Animals Australia is a national animal protection organisation that represents some 40 member societies and individual supporters: Animals Australia, About Us, 14 August 2014 < http://www.animalsaustralia.org/about/>.
[85] Debra Killalea, 'Pace Farm denies cruelty to chickens', *News.com.au* (online), 20 August 2014 <http://www.news.com.au/finance/business/pace-farm-denies-cruelty-to-chickens/story-fnda1bsz-1227030624922>.
[86] Ibid.
[87] Ibid.

advocacy by the regulator in favour of industry. Such laws would reduce the possibility of detecting animal cruelty and would make it easier for regulations to be breached. Advocacy for such laws by the regulator would be supporting the wishes of industry in relation to animal welfare; that is, less regulation and enforcement.[88] It is argued that this is not unlikely given that the responsible ministers for some regulatory departments have already shown support for these laws.

Although this paper is not examining live export in detail, another example consistent with the argument that the regulator advocates for industry is the reporting systems of the live export industry. DAFF and its delegate, the Australian Quarantine and Inspection Service (AQIS), claim their website provides full high mortality investigation reports in relation to live export voyages.[89] However, documents obtained through freedom of information applications revealed that AQIS failed to publish full reports, and in fact, had amended the reports to delete evidence of breaches to live export licences by their "clients", namely industry licence holders.[90] This concealment by the regulator is a clear example of regulator advocacy for industry.

As has been argued in Part Two and Part Three, it is likely that regulatory capture exists in Australia's farm animal welfare regime due to the conflicting responsibilities of the responsible regulator, which has serious consequences for the protection of farm animal welfare. This includes disproportionate industry influence, lack of enforcement and regulator advocacy for industry, which collectively undermine animal welfare. Part Four will now assess the options for reform, demonstrating that the IOAW would be a reasonable and effective solution.

5. Part Four – Reform and the need for the IOAW

5.1 Options for reform

The final part of this paper will critically examine how the IOAW could be created to effectively address regulatory capture, resulting in improved farm animal welfare outcomes. In addition to being an effective option, the IOAW is a realistic solution in Australia as there is political support for its creation. The Australian Greens introduced

[88] Geoff Neumann & Associates Pty Ltd *Review of the Australian Model Codes of Practice For The Welfare of Animals* (2005), 10.
Also, in relation to industry support for such laws, see: Peter McCutcheon, 'Interview with Andrew Spencer' *ABC Landline*, 25 May 2014 at 12:30:09pm <http://www.abc.net.au/landline/content/2014/s4011433.htm>.
[89] McEwen, above n 70, 71.
[90] Ibid.

the *Voice for Animals (Independent Office of Animal Welfare) Bill 2013* to the Federal Parliament and the Australian Labor Party has previously supported an IOAW.[91]

Although potentially being an effective solution, this part will also explore the possible shortfalls of the IOAW. In particular, its success will be dependent on resourcing, staffing, powers and the cooperation of State and Territory governments.

Previous attempts have been made to address identified shortcomings in the regulation of farm animal welfare. Most of the issues caused by regulatory capture were raised in the Neumann Report.[92] The Federal Government tried to respond to these issues by establishing the AAWS to, amongst other things, harmonise the regulatory standards and increase public consultation and scientific evidence throughout the drafting stages.[93] However, it is argued that this was not an effective solution as regulatory capture continued, and industry still retained significant influence and control over the drafting stages and scientific research. Further, with the recent removal of the AAWS, it is likely that any positive steps taken by the AAWS will no longer exist. Together, this demonstrates a present need for reform.

There are a number of common reform options available when regulatory capture exists, including increasing transparency,[94] increasing public participation,[95] reviewing and amending regulations and reducing the discretionary powers of the regulator.[96] However, where the capture is a result of poor regulatory design, an effective reform is to separate the conflicting responsibilities of the regulator into separate departments.[97] Separating responsibilities has previously been suggested as an appropriate option for agencies that are captured as a result of poor regulatory design.[98]

Similarly, as the farm animal welfare framework is captured due to poor regulatory design, an appropriate reform would be to separate these responsibilities into different departments. This could be achieved by creating a federal IOAW, which would be

[91] RSPCA Victoria, 'Australian Labor Party', 14 August 2014 < http://www.rspcavic.org/issues-take-action/australian-labor-party>.
[92] Geoff Neumann & Associates Pty Ltd *Review of the Australian Model Codes of Practice For The Welfare of Animals* (2005).
[93] See Australian Animal Welfare Scheme Business Plan: <http://www.animalhealthaustralia.com.au/wp-content/uploads/2011/03/Animal-Welfare-Standards-and-Guidelines-Development-Business-Plan.pdf>.
[94] Baxter, above n 20, 194.
[95] Michael Livermore and Richard Revesz, 'Regulatory review, capture, and agency inaction' (2013) 101 *Regulatory Review* 1337, 1358.
[96] Michael Livermore and Richard Revesz, 'Regulatory review, capture, and agency inaction' (2013) 101 *Regulatory Review* 1337, 1358; Lawrence Baxter, 'Capture in Financial Regulation: Can We Channel it Toward the Common Good?' (2011) *Cornell Journal of Law and Public Policy* 27.
[97] Baxter, above n 20, 193.
[98] For example, the United States of America's financial regulatory system, which had conflicting responsibilities of chartering and regulating agencies: Baxter, above n 20, 193.

responsible for farm animal welfare. This would allow farm animal welfare to be regulated by an independent regulator that does not have conflicts similar to the current departments, thereby assisting to remove the capture and its effects.

5.2 Functions, powers and operations of the IOAW

The IOAW would be a Commonwealth statutory authority responsible for animal welfare in relation to the use of animals in Commonwealth regulated activities. In order to be separated from DAFF, it would be appropriate for the IOAW to report to the Attorney-General's Department or the Department of the Environment.

The IOAW would also be supported by a committee that consists of representatives from a range of stakeholders, including industry, animal welfare organisations, consumer groups and scientists.[99] The Australian Greens suggests that such a committee would assist the IOAW perform its duties to a high standard.[100]

The IOAW would assume the responsibilities in relation to animal welfare that DAFF previously performed through the AAWS, in addition to new responsibilities, which will be discussed below.

5.3 Achievements of the IOAW

The first significant feature of the IOAW is that it would be an independent body, separate from DAFF, responsible for farm animal welfare in Australia. This in itself would be an important improvement to the current framework. As examined in Part Two and Part Three, regulatory capture currently exists due to poor regulatory design. The IOAW would remove animal welfare responsibilities from DAFF, completely separating animal welfare from the conflicting responsibilities of productive and profitable primary industries. As a result, it is highly likely that farm animal welfare would be better regulated, as the IOAW would not have conflicting responsibilities and its foremost goals would not align with industry. Importantly, this would reduce industry's disproportionate influence over the regulator. Although it is appropriate that industry is still considered a key stakeholder, those representing the public interest of animal welfare would likely be equally significant.

Further, this separation would allow the IOAW to provide independent oversight of the regulatory framework at a national level, with the ability to publicly examine and critique

[99] Emmanuel Giuffre, *Animal law in the spotlight: office of animal welfare*, (1 July 2013) Voiceless – The Animal Protection Institute < https://www.voiceless.org.au/content/animal-law-spotlight-office-animal-welfare>.
[100] Explanatory Memorandum, *Voice for Animals (Independent Office of Animal Welfare) Bill 2013*.

activities of DAFF. This would range from animal welfare issues in farm animal industries and live export, to the effectiveness of DAFF's implementation of animal welfare laws and regulations.[101]

This independence could also improve the drafting stages of the MCOPs and standards and guidelines. The IOAW would have independence from disproportionate industry influence over the contents of the codes and would be better placed to provide regulatory oversight in this area. This would ensure that the development of codes is effective in achieving appropriate minimum standards for welfare that reflect community expectations.

Second, the IOAW could also have a positive impact on the harmonisation of laws and regulations across Australia. While it is recognised that State and Territory departments would still be exposed to regulatory capture if they too did not create an independent office due to their similar conflicting responsibilities, a federal IOAW could significantly improve this situation. The IOAW could review standards and make recommendations on how national harmonisation could be accomplished. The benefits of having a national body coordinate animal welfare throughout Australia were seen with the AAWS prior to its abolition. States and Territories implemented the AAWS Standards and Guidelines,[102] demonstrating that national coordination of animal welfare can achieve nationally consistent and enforceable welfare standards, despite being led by a federal body that is not directly responsible for enforcement.

This harmonisation is necessary to improve the current failings of farm animal welfare as a result of the regulatory capture. The Neumann Report identified that the lack of harmonisation of animal welfare standards has numerous negative consequences, including confusion within industry, increased chances of regulations being ignored, poor support to regulators, and failure to uphold community expectations of high animal welfare.[103] The creation of the IOAW to implement harmonisation is timely, considering the recent abolition of the AAWAC.[104] This AAWAC previously advised the Minister for Agriculture on nationally significant animal welfare issues and drove the implementation of the AAWS. The IOAW could assume similar responsibilities and work towards ensuring that animal welfare laws and standards are consistent, streamline the process for

[101] Giuffre, above n 97.
[102] See for example the *Australian Animal Welfare Standards and Guidelines for the Land Transport of Livestock*.
[103] Geoff Neumann & Associates Pty Ltd *Review of the Australian Model Codes of Practice For The Welfare of Animals* (2005), 9-10.
[104] See for example, RSPCA, Australian Animal Welfare Advisory Committee Scrapped, 8 November 2013 < http://www.rspca.org.au/media-centre/press-releases/2013/australian-animal-welfare-advisory-committee-scrapped>.

adopting future reforms, and promote consistency in enforcement and prosecution processes nationally.[105]

Third, the IOAW would be able to call inquiries, commission independent scientific research, prepare reports on their findings, and make recommendations in relation to animal welfare matters.[106] Not only would this reduce the abovementioned influence industry has on research, it would additionally introduce accountability into the current regulatory framework. Further, the IOAW could provide these reports and recommendations to the Minister, who would be required to table them in Parliament and provide a response on record. This would ensure animal welfare had independent representation in Parliament; something that currently does not exist in Australia. [107]

It would be beneficial for the IOAW to create a central database to collate information from these inquiries and reports in addition to third party information. This could include matters such as compliance monitoring, charges and prosecutions, numbers of animals being produced and used, and provide an information repository of animal welfare research from all Australian jurisdictions and internationally. There is no present database of consistent, reliable and publicly accessible information in relation to animal welfare.[108] Not only would this be useful for public education, it would also be valuable in ensuring that independent information is provided to DAFF, enforcement agencies and the judiciary.[109]

It is acknowledged that the success of the IOAW, similar to any government body, would be dependent on funding, the number of staff, and the powers given to it. It would also be dependent on the States and Territories adopting its recommendations, however this cooperation was seen with the AAWS.

Ultimately, the IOAW could effectively remove the situation of regulatory capture that currently exists at a federal level, which would likely have positive flow on effects in the States and Territories.

5.4 Constitutional issues

A key issue that must be addressed when considering the creation of the IOAW is whether the Commonwealth has power to create such an office. The *Australian*

[105] Giuffre, above n 97.
[106] Explanatory Memorandum, *Voice for Animals (Independent Office of Animal Welfare) Bill 2013*; White, above n 23, 281.
[107] Explanatory Memorandum, *Voice for Animals (Independent Office of Animal Welfare) Bill 2013*.
[108] White, above n 23, 281.
[109] Giuffre, above n 97; and White, above n 23, 281.

Constitution[110] does not address power to directly regulate animal welfare.[111] However, the *Constitution* does provide the Commonwealth Government with indirect powers to make laws relating to animals, including the quarantine, fisheries, trade and commerce and external affairs powers. [112] These powers have been previously relied upon by the Commonwealth to enact laws relating to the international trade of animals and animal products, quarantine and biosecurity issues surrounding animal production, management of endangered, feral or invasive animals, and to sign treaties relating to animals.[113] In fact, the Commonwealth Government had become increasingly involved in the regulation of farm animal welfare through the AAWS prior to its abolition, especially in relation to policy coordination.[114] It is evident that these heads of powers could be relied upon again by the Commonwealth to create the IOAW.

Further, national animal welfare schemes are not new to parliamentary discussions in Australia. In addition to the recent *Voice for Animals (Independent Office of Animal Welfare) Bill 2013*, Senator Bartlett introduced the *National Animal Welfare Bill 2005* (Cth). This Bill also relied on a range of heads of powers for Commonwealth intervention including the external affairs power, trade and commerce power and corporations powers.[115] It also allowed for States and Territories to retain their animal welfare laws where it was capable of operating concurrently with the Bill.[116] Although this Bill was not passed, the IOAW could rely on similar heads of powers.

Alternatively, the trade and commerce power (s51(i)) or the corporations power (s51(xx)) could also be an appropriate head of power for the creation of the IOAW, as a large percentage of farm animal products are supplied and controlled by a handful of corporations.[117] For example, 80 percent of chicken meat is produced by two corporations[118] and approximately 50 percent of beef is produced by four large corporations.[119]

Finally, an alternative way to form the IOAW would be through an intergovernmental agreement between the States and Territories and the Commonwealth Government. This is not an uncommon option, especially where resources are needed to effectively regulate

[110] *Commonwealth of Australia Constitution Act*.
[111] Bruce, above n 17, 75.
[112] 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, 365.
[113] Bruce, above n 17, 75-76.
[114] White, above n 110, 348.
[115] McEwen, above n 70, 246.
[116] Ibid.
[117] Bruce, above n 17, 321.
[118] Baiada and Inghams Enterprises.
[119] Swift Australia, Cargill Australia, Teys Brothers and Nippon Meats: Bruce, above n 17, 321.

an area. As discussed earlier, there is a current lack of resources in farm animal welfare. McEwen argues that the Commonwealth Government has the necessary resources to effectively manage a national animal welfare statutory authority, [120] such as the IOAW. Should the States and Territories agree that federal resources are needed, an intergovernmental agreement could be entered into in relation to animal welfare. This option was used to create the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) through the execution of the *Intergovernmental Agreement on the Environment*, after it was agreed that the Commonwealth Government's resources were needed to manage certain environmental issues.[121]

Overall, there are a number of options available to the Commonwealth Government to create the IOAW in a manner that complies with the *Constitution*. A number of these options have already been explored in previously proposed national animal welfare schemes and also in other areas, such as the environment.

6. Conclusion

The current framework regulating farm animal welfare in Australia reflects a state of regulatory capture, due to the regulatory departments having conflicting responsibilities of profitable primary industries and animal welfare. This creates a series of regulatory shortcomings including lack of enforcement by the regulator, disproportionate influence by industry and the regulator adopting an advocacy role for industry. This leads to a situation where the public interest of good animal welfare is not met, despite claims Australia is an international leader in animal welfare.

As demonstrated throughout this paper, an effective and efficient solution would be the establishment of the IOAW. The Commonwealth Government has a range of powers available to it to lawfully create the IOAW. The IOAW could assist in resolving the situation of regulatory capture by bringing about an independent federal body that is responsible for farm animal welfare. Whilst, the success of the IOAW is dependent on factors such as funding, powers and staffing, ultimately, it would significantly improve the current situation and assist in ensuring the public interest of good animal welfare is upheld.

[120] McEwen, above n 70, 223.
[121] McEwen, above n 70, 223.

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