LIMITATIONS OF THE MARKET-BASED APPROACH TO THE REGULATION OF FARM ANIMAL WELFARE

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I INTRODUCTION

> [T]hey were nothing like the plump hens that wandered through the outbuildings of his grandmother's acreage. These were different creatures. They were small and scrawny, their movements abrupt and charged. Their necks were red and blistered, stripped raw of feathers, and their mangled feet clawed at the mesh floor of the cages.[1]

Like the story's protagonist, Justin, many consumers would be shocked by the conditions that millions of animals endure in Australian farms.[2] Although the opening quotation is from a work of fiction, the account closely resembles actual footage obtained from inside Australian producers of caged eggs.[3] For this reason, animal protection organisations work hard to illuminate the hidden realities of food production, in the hope that consumers will '"vote" with their wallets' and purchase more humane products; or, alternatively, reduce their

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1 Wayne Strudwick, 'Caged' in J M Coetzee et al (eds), *The 2013 Voiceless Anthology* (Allen & Unwin, 2012) 197, 198.

2 Australian Egg Corporation Limited, *Annual Report* (2013) 3 <http://www.aecl.org/assets/About-us/AECL-Annual-Report-2013-final.pdf>, states that the number of layer hens in Australia was 16.859 million (layers) as at 31 December 2012, with 51 per cent in caged egg production systems. According to Australian Pork Limited, *Annual Report* (2012–13) 1, 3 <http://australianpork.com.au/wp-content/uploads/2013/10/Annual-Report-2012-2013.pdf>, there were approximately 4.75 million pigs at the end of June 2013, with less than 50 per cent of sows spending time in a gestation stall. See also Voiceless Limited, Submission to Senate Standing Committee on Rural and Regional Affairs and Transport, Parliament of Australia, *Inquiry into Climate Change and the Australian Agricultural Sector*, March 2008.

3 See Aussie Farms, *Egg Farms across Australia: A Snapshot of the Industry*, Australian Egg Farming: The Inside Story <http://www.aussieeggs.com/egg-farms>, which contains footage obtained from three Australian battery egg factories.

consumption entirely.[4] Animals Australia's campaign, 'That ain't no way to treat a lady', is a recent example that uses well-known comedians to encourage consumers not to purchase caged (also known as battery) eggs.[5]

There is some evidence to suggest that this approach works. For instance, the consumption of veal dramatically declined over 30 years in the United States after consumers learned about the husbandry practices used to achieve the tender, pink meat.[6] A similar shift in consumer demand is evident in the United Kingdom, where 52 per cent of eggs purchased from retail outlets in 2014 came from accredited free-range suppliers, and for over 10 years McDonald's United Kingdom has only used free-range eggs to satisfy the increasing demand for humanely produced products.[7] In Australia, the fast food giant recently succumbed to public pressure when it announced that McDonald's Australia would be switching to free-range eggs in its products from 2017.[8]

Looking at these results, it is easy to understand why 75 per cent of respondents surveyed in the European Union, and 52 per cent in the United States, believed they could influence animal welfare conditions by purchasing animal welfare friendly products.[9] The scholar Eadie also supports this proposition, stating 'consumer preferences based on animal welfare issues can have an impact on both supermarket operations and the choice of supplies used by fast food outlets'.[10] If consumers wield such power, then why are millions of

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4 Christine Parker, Carly Brunswick and Jane Kotey, 'The Happy Hen on Your Supermarket Shelf: What Choice Does Industrial Strength Free-Range Represent for Consumers?' (2013) 10 *Journal of Bioethical Inquiry* 165, 169; Edward N Eadie, *Animal Suffering and the Law: National, Regional, and International* (Seaview Press, 2009) 238. See, eg, RSPCA, *The Story*, Hens Deserve Better <http://www.hensdeserve better.org.au/the-story.html>; Animals Australia, *The Facts: Making Sense of Egg Labels*, Make It Possible <http://www.makeitpossible.com/guides/egg-labels.php>. See also Christine Parker, 'Voting with Your Fork? Industrial Free-Range Eggs and the Regulatory Construction of Consumer Choice' (2013) 649 *ANNALS of the American Academy of Political and Social Science* 52, 53; Robin Jane Roff, 'Shopping for Change? Neoliberalizing Activism and the Limits to Eating Non-GMO' (2007) 24 *Agriculture and Human Values* 511, 511–12, 514.

5 Animals Australia, *Battery Cages: 'That Ain't No Way to Treat a Lady'* <http://www.animals australia.org/no-way-to-treat-a-lady>.

6 Eadie, above n 4, 238.

7 Ibid 238–9; Egginfo, *Archive Industry Statistics 2004–2014* <http://www.egginfo.co.uk/sites/default/files/Archive%20industry%20stats%202004%20-%202014%20%281%29.docx>; McDonald's UK, *Are All the Eggs You Use Free Range?* (June 2013) What Makes McDonald's? <http://www.mcdonalds.co.uk/ukhome/whatmakesmcdonalds/questions/food/animal-welfare/are-all-the-eggs-you-use-free-range.html>.

8 Debra Killalea, 'McDonald's Australia Announces Move towards Using Cage-Free Eggs by 2017', *News.com.au* (online), 13 September 2014 <http://www.news.com.au/finance/business/mcdonalds-australia-announces-move-towards-using-cagefree-eggs-by-2017/story-fnda1bsz-1227057403657>.

9 Eurobarometer, 'Attitudes of Consumers towards the Welfare of Farmed Animals' (Special Eurobarometer Report No 229, European Commission, June 2005) 45–6 <http://ec.europa.eu/food/animal/welfare/euro_barometer25_en.pdf>; F Bailey Norwood and Jayson L Lusk, *Compassion, by the Pound: The Economics of Farm Animal Welfare* (Oxford University Press, 2011) 343. See also David S Favre, *Animal Law: Welfare, Interests, and Rights* (Aspen Publishers, 2008) 20.

10 Eadie, above n 4, 238–9.

farm animals in Australia confined to cages, crates or stalls too small for them to express normal animal behaviours, or undergoing surgical procedures without anaesthesia? There are two possible answers. The first is that the majority of consumers are not concerned about the care and treatment of farm animals, or they turn a blind eye to the animals' plight. Or, second, the premise that an individual can reflect his or her concerns and values about the treatment of animals through his or her purchasing behaviour is deficient. This premise is referred to as the market-based approach to regulating values-based issues which, in this case, is animal welfare.[11] This article critically examines the market-based approach, as it relates to the welfare of farm animals.

The market-based approach to regulation is pervasive and has been referred to as 'the dominant strain of regulatory thought' in both the United States and the United Kingdom.[12] The same may be true in Australia, with the federal and the state and territory governments supporting the market-based approach to animal welfare regulation on numerous occasions. In January 2011, the Federal Government accepted 'the industry argument that if significant bodies of consumers desire certain value approaches to food production, the competitive forces will typically compel producers, or at least some producers, to cater for these needs'.[13] More recently, the Western Australian Government deferred to the market-based approach when considering the stocking density of hens in the free-range egg industry, with Robyn McSweeney, Minister for Agriculture and Food, stating: 'Market-driven approaches to consumer values in food labelling issues are likely to be more responsive to consumer needs than regulatory approaches'.[14] Similarly, in August 2013, the market-based approach was endorsed by the New South Wales Government during the debate on the Truth in Labelling (Free-range Eggs) Bill 2011 (NSW), which was subsequently defeated in the Legislative Assembly.[15]

This article suggests that Australian consumers who are concerned about the care and treatment of farm animals are not able to reflect these values through

11 Neal Blewett et al, 'Labelling Logic' (Final Report, Commonwealth Review of Food Labelling Law and Policy, 27 January 2011) 97.

12 Mike Feintuck, 'Regulatory Rationales beyond the Economic: In Search of the Public Interest' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, 2010) 39, 39.

13 Blewett et al, above n 11, 47; Legislative and Governance Forum on Food Regulation Convening as the Australia and New Zealand Food Regulation Ministrial Council, *Response to the Recommendations of Labelling Logic: Review of Food Labelling Law and Policy* (2011) 40–3. See also Alex Bruce, 'Labelling Illogic? Food Animal Welfare and the *Australian Consumer Law*' (Pt 1) (2012) 7 *Australian Animal Protection Law Journal* 5, 6; Parker, above n 4, 58.

14 Western Australia, *Parliamentary Debates*, Legislative Council, 23 May 2012, 3020b (Robyn McSweeney).

15 New South Wales, *Parliamentary Debates*, Legislative Assembly, 22 August 2013, 22 634 (Katrina Hodgkinson, Minister for Primary Industries). For defeat of the Bill, see New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 August 2013, 23 030.

their purchasing behaviour due to market, political and social considerations. Collectively these considerations disrupt or interfere with the transmission of animal welfare values into purchasing behaviour. For this reason, the regulation of farm animal welfare cannot be left to the market-based approach. Instead, government regulatory intervention is required in accordance with public interest theories of regulation.

Although the focus of this article is on Australia, the discussion that follows is relevant to other high-income countries where the market-based approach to animal welfare regulation is also employed. This article also focuses exclusively on the animal welfare values of consumers, being the dominant ethical paradigm in human–animal relations.[16] As such, the purchasing behaviour of vegans and vegetarians, to the extent that it represents an abolitionist or animal rights perspective, is excluded from this analysis. Before addressing the market, political and social considerations in turn, it is first necessary to clarify the meaning and scope of animal welfare regulation and the market-based approach.

II ANIMAL WELFARE REGULATION

There are almost as many definitions of regulation as there are applications of the term.[17] This is attributable to the broad legal and non-legal contexts to which the term regulation is applied.[18] However, regulatory theorists have noted that the numerous definitions of regulation can generally be divided into three categories.[19] According to Baldwin, Cave and Lodge, the first category considers regulation as 'a binding set of rules to be applied by a body devoted to this purpose'.[20] In the second group of definitions, regulation is considered to be any deliberate state influence in business or social affairs.[21] The final (and broadest) category considers regulation to be any form of social or economic influence,

16 Mike Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (Oxford University Press, 2001) 118. See also Geoff Bloom, 'Regulating Animal Welfare to Promote and Protect Improved Animal Welfare Outcomes under the Australian Animal Welfare Strategy' (Paper presented at Australian Animal Welfare Strategy International Animal Welfare Conference, Gold Coast, 1 September 2008) 24.

17 See Christine Parker et al, 'Introduction' in Christine Parker et al (eds), *Regulating Law* (Oxford University Press, 2004) 1, 1; Anthony I Ogus, *Regulation: Legal Form and Economic Theory* (Hart Publishing, 2004) 1. For an in-depth review of the semantic issues, see Julia Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1.

18 Ogus, above n 17, 1.

19 Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford University Press, 2nd ed, 2012) 3; Black, 'Critical Reflections on Regulation', above n 17, 11.

20 Baldwin, Cave and Lodge, above n 19, 3.

21 Ibid. See also, Philip Selznick, 'Focusing Organizational Research on Regulation' in Roger G Noll (ed), *Regulatory Policy and the Social Sciences* (University of California Press, 1985) 363, 363, who describes the 'central meaning' of regulation as the 'sustained and focused control exercised by a public agency over activities that are valued by a community'. See also Ogus, above n 17, 1.

whether from government or non-government sources, such as the market.[22] Black, a regulatory scholar, provides a similar taxonomy, with some variation to the second and third categories. Specifically, state intervention in the second group of definitions is limited to the economy, while the third category is reserved for forms of social control or influence.[23]

The market-based approach to regulation falls into the third category of definitions. It does so for two reasons. First, the market-based approach presumes that consumers are able to control suppliers by using their purchasing power (through increased demand for more humanely produced products) to influence the production systems of suppliers of farm animal products.[24] Secondly, the market-based approach to the regulation of farm animal welfare does not have a binding set of rules or a government agency from which regulation originates, thus precluding the other two categories. While the market-based approach to regulation requires a level of regulatory intervention from government to define and enforce market rules, this intervention is limited to fostering competition and providing a basic level of consumer protection. The market-based approach to the regulation of farm animal welfare sees the government play a limited 'structural' role in defining and enforcing the 'rules of the game', with the creation of regulation occurring mostly 'on the field'.

There is another definitional issue that must be addressed, concerning the intentionality of the market acting as a regulatory mechanism.[25] Some scholars argue that regulation must be an 'intentional activity of attempting to control, order, or influence the behaviour of others'.[26] Applying such a definition, the disinterested market lacks the intention necessary to be considered a form of regulation. However, the requirement of intention must not be applied slavishly. Few would dispute that policymakers, both in the private and public spheres, use the unintentional and disinterested market mechanism to achieve control, order or influence.[27] There are numerous instances where addressing issues of efficiency and pollution control, for example, are achieved by shifting 'from hierarchy to

22 Baldwin, Cave and Lodge, above n 19, 3.

23 Black, 'Critical Reflections on Regulation', above n 17, 11. See also Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-regulation in a "Post-regulatory" World' (2001) 54 *Current Legal Problems* 103, 129.

24 The term 'suppliers' is used throughout this article, in preference to other terms like 'producers', to capture all stages in the production of animal-based food products, including primary producers, abattoirs and retailers.

25 See Black, 'Decentring Regulation', above n 23, 136. See also Christine Parker and John Braithwaite, 'Regulation' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003) 119, 136.

26 Black, 'Decentring Regulation', above n 23, 142. See, eg, Parker et al, above n 17, 1; Nicola Lacey, 'Criminalization as Regulation: The Role of Criminal Law' in Christine Parker et al (eds), *Regulating Law* (Oxford University Press, 2004) 144, 144.

27 Parker and Braithwaite, above n 25, 136.

market'.[28] The third category of definitions is utilised in this article, as it avoids this controversy by incorporating all forms of social or economic influence. Specifically, in respect of the third category, 'there is no requirement that the regulatory effects of a mechanism are *deliberate or designed*, rather than merely incidental to other objectives'.[29] Thus, consumer demand and the market mechanism are both forms of regulation as they influence the behaviour of suppliers. What is necessary for the market-based approach to regulating values-based issues is the ability for demand to accurately reflect consumers' values. Whether this occurs in reality is the subject of critical examination in this article.

Within the regulation of animal welfare, there are two types of protection that may be afforded to animals – negative and positive.[30] Negative forms of protection restrict certain types of behaviour deemed to be socially unacceptable.[31] For example, under the *Prevention of Cruelty to Animals Act 1979* (NSW) ('*NSW Act*') it is an offence to commit or authorise an act of cruelty against an animal.[32] Positive protective regulations, on the other hand, impose a positive duty or obligation on an individual.[33] Thus, under the same Act a person in charge of an animal is guilty of an offence if he or she fails to provide proper and sufficient food, drink or shelter that is reasonable in the circumstances.[34]

The market-based approach to regulating farm animal welfare normatively covers positive and negative protective regulations. Although no-one is advocating that protections against cruelty should be regulated by the market-based approach,[35] this reflects the current regulatory environment for farm animal welfare in Australia. This is due to the operation of codes of practice (or standards in Tasmania)[36] and their effect on the protections contained in the animal welfare legislation. Codes of practice, inter alia, set out the conditions in which painful practices or procedures may be performed on farm animals.[37] As one may expect, industry representatives play a significant role in drafting the codes of practice, given their expertise in animal husbandry.[38] As compliance with a code of practice is a defence from prosecution in every state and territory

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28 Ibid.
29 Baldwin, Cave and Lodge, above n 19, 3 (emphasis added).
30 Bloom, above n 16, 26.
31 For examples of negative protection, see ibid.
32 *Prevention of Cruelty to Animals Act 1979* (NSW) ss 5(1)–(2).
33 Bloom, above n 16, 26.
34 *Prevention of Cruelty to Animals Act 1979* (NSW) s 8(1). See also Bloom, above n 16, 26.
35 See David Harvey and Carmen Hubbard, 'Reconsidering the Political Economy of Farm Animal Welfare: An Anatomy of Market Failure' (2013) 38 *Food Policy* 105, 108.
36 *Animal Welfare Act 1993* (Tas) s 44A.
37 Deborah Cao, Katrina Sharman and Steven William White, *Animal Law in Australia and New Zealand* (Thomson Reuters, 2010) 135.
38 Arnja Dale and Steven White, 'Codifying Animal Welfare Standards: Foundations for Better Animal Protection or Merely a Façade?' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia: Continuing the Dialogue* (Federation Press, 2nd ed, 2013) 151, 164, 166. See Eadie, above n 4, 48.

in Australia (with the exception of New South Wales and Tasmania),[39] any concern that the practice or procedure may otherwise violate the relevant animal welfare legislation is dispelled.[40] For instance, section 5(3)(b) of the *NSW Act* prohibits the infliction of pain on an animal without reasonable steps taken to alleviate the pain. Relying on this provision, an argument could be made that the beak trimming of layer hens without anaesthetic constitutes 'cruelty to animals'.[41] However, section 13.2 of the *Model Code of Practice for the Welfare of Animals: Domestic Poultry* ('*Model Code*'), which has been prescribed under regulation 33(1)(a) of the *Prevention of Cruelty to Animals Regulation 2012* (NSW),[42] does not require the use of anaesthesia when de-beaking birds.[43] While compliance with a code of practice is not a defence to prosecution under the *NSW Act*, it is

39 *Animal Welfare Act 1992* (ACT) s 20; *Animal Welfare Act 1999* (NT) s 79, applies to adopted codes of practice; *Animal Care and Protection Act 2001* (Qld) s 40; *Animal Welfare Act 1985* (SA) s 43; *Prevention of Cruelty to Animals Act 1986* (Vic) s 6(1)(c), which states that the Act does not apply to 'any act or practice with respect to the farming, transport, sale or killing of any farm animal which is carried out in accordance with a Code of Practice'; *Animal Welfare Act 2002* (WA) s 25; but see *Prevention of Cruelty to Animals Act 1979* (NSW) s 24, which provides a statutory defence for procedures or practices commonly provided for in a code of practice, such as ear-marking or branding a stock animal, castration of pigs or stock animals, dehorning goats or stock animals, and tailing and mulesing of sheep. See also Dale and White, above n 38, 155–6; Arnja Dale, 'Animal Welfare Codes and Regulations – The Devil in Disguise' in Peter Sankoff and Steven White (eds), *Animal Law in Australasia: A New Dialogue* (Federation Press, 2009) 174, 198–9; Eadie, above n 4, 48–9. In Tasmania, non-compliance with the regulations that prescribe standards for the care and management of animals may result in a penalty: *Animal Welfare Act 1993* (Tas) s 50(7); see, eg, *Animal Welfare (Pigs) Regulations 2013* (Tas) reg 13, which states that an 'elective husbandry procedure' (eg, teeth clipping and tail docking) must be performed by a veterinary surgeon, or an experienced, competent stockperson, or under the supervision of a veterinary surgeon, or an experienced, competent stockperson. A breach of this regulation will result in a fine not exceeding 100 penalty units for a body corporate, or 50 penalty units for a natural person. For continuing offences an additional fine is imposed 'for each day during which the offence continues'.

40 See Katrina Sharman, 'Farm Animals and Welfare Law: An Unhappy Union' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia: Continuing the Dialogue* (Federation Press, 2nd ed, 2013) 61, 78.

41 Beak trimming, or de-beaking, is widely understood to cause pain and physiological stress in birds. See especially American Veterinary Medical Association, *Literature Review on the Welfare Implications of Beak Trimming: Literature Review* (7 February 2010) <https://www.avma.org/KB/Resources/Literature Reviews/Pages/beak-trimming-bgnd.aspx>. See also Katrina Sharman, 'Putting the Chicken before the Egg: Layer Hen Housing Laws in Australia' (2008) 1 *Animal Protection Law Journal* 46, 51; but see Farm Animal Welfare Council, *Opinion on Beak Trimming of Laying Hens* (November 2007) 5, 8, 9 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/325161/FAWC_opinion_on_beak_trimming_of_laying_hens.pdf>, which states, among other things, that the risk of long-term chronic pain can be minimised by performing the procedure in younger birds (under seven days old).

42 The *Prevention of Cruelty to Animals Regulation 2012* (NSW) is enabled by the *Prevention of Cruelty to Animals Act 1979* (NSW) s 34A(1).

43 Primary Industries Standing Committee, *Model Code of Practice for the Welfare of Animals: Domestic Poultry 4th Edition* (at 2002) s 13.2 requires that every effort is made to avoid beak trimming and that the procedure is performed by an accredited operator (or under the supervision of an accredited operator), and in accordance with agreed accreditation standards.

admissible evidence in proceedings brought under the Act or its regulations.[44] As admissible evidence, it is very likely that compliance with the *Model Code* will mean that beak trimming without anaesthesia is not 'cruel' for the purposes of the *NSW Act*. Thus, the operation of codes of practice and the susceptibility of industry (as the 'experts' who inform the development of the codes of practice) to market forces means that the market-based approach regulates both positive and negative forms of protection for farm animals.

III WHAT IS THE MARKET-BASED APPROACH?

The market-based approach to regulating farm animal welfare is epitomised by the belief that if individuals are so concerned about animals then 'why can this not be adequately expressed in the voluntary decisions of consumers? Surely, if [consumers] feel strongly enough about the matter, they will act on their own initiative'.[45] Therefore, under the market-based approach, regulation is, in theory at least, *driven* and *steered* by consumers.[46] It is consumers, through their purchasing decisions, that signal to suppliers that they want more humanely produced products. By purchasing more of one product than another, consumers signal to the market that greater resources should be allocated to the production of the former product.[47] Bruce, when discussing the welfare implications of the Independent Panel for the Review of Food Labelling Law and Policy Report, noted that:

> instead of simply legislating to prohibit certain animal farming practices, or to regulate the religious slaughter of animals, the Commonwealth Government is intending market forces, in the form of consumer demand exerting upstream market pressure on primary industry producers, to implement food animal welfare initiatives.[48]

In burdening the consumer with this responsibility for standard setting, Roff argues that governments and manufacturers are attempting to absolve themselves of any imputation should any problems arise.[49] However, Roff concludes that individual consumers 'cannot (and should not) shoulder all the responsibility for what products exist on supermarket shelves'.[50]

The market-based approach to regulating farm animal welfare therefore relies on the ability for suppliers to distinguish their products from less

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44 *Prevention of Cruelty to Animals Act 1979* (NSW) s 34A(3).

45 See Radford, above n 16, 108.

46 See Roff, above n 4, 515–16; Parker, above n 4, 66.

47 Philip Williams, 'Why Regulate for Competition?' in Michael James (ed), *Regulating for Competition? Trade Practices Policy in a Changing Economy* (Centre for Independent Studies, 1989) 11, 13–14. See also Bruce, above n 13, 29–30.

48 Bruce, above n 13, 6.

49 Roff, above n 4, 515–16.

50 Ibid 516.

humane alternatives. As mentioned previously, this requires some level of regulatory intervention from government to create a level playing field.[51] Without restrictions and protections in the market, farm animal suppliers may be tempted to mislead or deceive customers by describing their products as free-range or organic when this is not the case.[52] These protections were evident in December 2012, when Egg Corporation Limited sought approval of a certification logo for free-range eggs produced with an outdoor stocking density of 20 000 hens per hectare and was rejected by the Australian Competition and Consumer Commission ('ACCC').[53] According to Parker, Brunswick and Kotey, '[t]he [ACCC] rejected the new certification scheme on the basis that its definition of "free-range" was out of step with consumer expectations of what "free-range" means and therefore potentially misleading and deceptive to consumers'.[54] Without consumer protection regulations, conduct by suppliers could undermine the fundamental market principles of competition and consumer choice.[55] Proponents of the market-based approach would argue that legislation, such as the *Australian Consumer Law*,[56] and institutions, such as the ACCC, sufficiently protect consumers' ability to 'shop for change',[57] as evidenced in the ACCC's rejection of the Australian Egg Corporation Limited's certification logo. However, these protections only facilitate the efficient operation of the market. The assumption that consumer values are accurately represented through the demand mechanism remains unconsidered.

This article sets out three considerations that may disrupt consumer demand for more humanely produced products. This interference creates a fracture between consumers' purchasing decisions and their values regarding the care and treatment of farm animals. Such a disjuncture between consumer demand and values undermines the central premise that justifies the market-based approach to regulating farm animal welfare.

IV MARKET CONSIDERATIONS

There are several market considerations that limit the ability of the market-based approach to regulate animal welfare in food production. This Part analyses the effect that price, product information and other exogenous factors have on

51 See Ogus, above n 17, 1; Blewett et al, above n 11, 47–8, 98.
52 See, eg, Parker, Brunswick and Kotey, above n 4, 182.
53 Ibid 165–6; Parker, above n 4, 52–3. See also *Australian Competition and Consumer Commission v Pirovic Enterprises Pty Ltd [No 2]* [2014] ATPR 42-483, in which the defendant company was fined $300 000 for misleading consumers that their eggs were free-range.
54 Parker, Brunswick and Kotey, above n 4, 166.
55 See Blewett et al, above n 11, 48, 98.
56 *Competition and Consumer Act 2010* (Cth) sch 2.
57 Parker, above n 4, 53. Cf Roff, above n 4.

consumer demand. In addition, this Part examines domestic and overseas research demonstrating that an individual's stated willingness to pay for more humane products may not actually translate into purchasing behaviour. These market considerations demonstrate that consumer demand does not accurately represent individuals' values, which is necessary for the market-based approach to effectively regulate farm animal welfare.

Price is a significant limitation that may interfere with a consumer's ability to purchase more humanely produced goods.[58] As a result, demand for farm animal products produced under cruel conditions will remain high, not due to a lack of concern, but a lack of means. According to a survey conducted by one of Australia's major supermarkets, 95 per cent of respondents would switch to free-range eggs if the price was lower.[59] Bloom, whose analysis on improving animal welfare outcomes under the Australian Animal Welfare Strategy is sympathetic to a market-based approach,[60] concedes that:

> Because there are so many determinants of which products a consumer buys, and *because price is so often the dominating factor, it is hard even for well-informed consumers to express any animal welfare values they might have through their purchasing decisions*.[61]

This is especially the case in respect of 'staple' products, such as eggs and milk, which supermarkets offer at a very low cost in the hope that customers, once in the store, will purchase other products.[62]

In considering some of the influences present in the supermarket, Mike Radford states that the average shopper who is 'preoccupied with more immediate concerns' is 'much more likely to be swayed by a spontaneous response to the price, appearance, advertising, or simply the force of habit' in his or her purchase of farm animal products.[63] Carrington, Neville and Whitwell also note that factors affecting behaviour control, such as 'cooperation of others,

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58 See also Robert B Gielissen, 'Why Do Consumers Buy Socially Reponsible Products?' (2011) 2(3) *International Journal of Business and Social Science* 21, 25, which found that the price premium for organic meat was the most common reason Dutch consumers did not buy the product; cf F Montossi et al, 'Sustainable Sheep Production and Consumer Preference Trends: Compatibilities, Contradictions, and Unresolved Dilemmas' (2013) 95 *Meat Science* 772, 781, citing Gemma Harper and Spencer Henson, 'Consumer Concerns about Animal Welfare and the Impact on Food Choice' (Final Report No EU FAIR CT98-3678, Centre for Food Economics Research, December 2001), which found that 'consumers in Western countries are more influenced by the ethical aspects of food production than by their cost'.

59 Coles, 'Free Range Eggs' on *Coles Blog* (28 November 2011) <http://blog.coles.com.au/2011/11/28/free-range-eggs/>. See also Parker, Brunswick and Kotey, above n 4, 170.

60 Bloom, above n 16, 4–5, 9–10, recommends a separation of animal cruelty and animal welfare in regulation, with animal welfare shifting from a legal process to a social process. Animal welfare would therefore be regulated (depending on the circumstances) through licensing, disclosure, labelling, non-government standards, co-regulation, and regulating the regulators.

61 Ibid 28 (emphasis added).

62 Parker, above n 4, 62.

63 Radford, above n 16, 108. See also Harvey and Hubbard, above n 35, 112. For an analysis of how the control of production, distribution, and exchange processes in the egg industry influences the expression of customer values in purchasing decisions, see Parker, above n 4.

finances, knowledge and habits', and situation control, including 'price promotion or being accompanied by a child on this shopping occasion', may similarly inhibit an ethically-minded consumer from ethical buying behaviour.[64] These factors challenge even the conscientious consumer to give due consideration to all the ethical issues concerning a particular product before making a selection.[65] This process must be repeated across all food items that contain animal products, if one is to fully realise his or her values regarding the welfare of farm animals. According to Parker, Brunswick and Kotey, this 'puts a significant moral and cognitive burden' on consumers who wish to buy ethically produced products – a burden which is 'beyond the time and capacity of many consumers'.[66] The unrealistic nature of this expectation leads Radford to conclude that government regulation 'reflecting society's perceived collective values' is required to unburden individual consumers from this pressure.[67]

As noted earlier, the market-based approach to regulating farm animal welfare relies upon consumers 'voting' with their wallets or purses.[68] Consumers must, therefore, be willing to switch from their usual farm animal products to more humanely produced alternatives that better reflect their values for the approach to be effective. The market-based approach also requires a willingness by consumers to pay a price premium for more humane products, in order to encourage suppliers to abandon less humane (but cheaper) production systems. In Australia, there is some evidence to indicate a growing sensitivity to the treatment of animals used in food production, and a willingness by consumers to pay a price premium for humanely produced goods.[69] Choice, the leading consumer advocacy organisation in Australia, found that the 'vast majority' of its members surveyed claimed that purchasing free-range eggs was 'essential or important to them', and that they were willing to pay a price premium for eggs

64 Michal J Carrington, Benjamin A Neville and Gregory J Whitwell, 'Why Ethical Consumers Don't Walk Their Talk: Towards a Framework for Understanding the Gap between the Ethical Purchase Intentions and Actual Buying Behaviour of Ethically Minded Consumers' (2010) 97 *Journal of Business Ethics* 139, 146–7. See also Michal J Carrington, Benjamin A Neville and Gregory J Whitwell, 'Lost in Translation: Exploring the Ethical Consumer Intention-Behaviour Gap' (2014) 67 *Journal of Business Research* 2759, 2760.

65 Radford, above n 16, 108.

66 Parker, Brunswick and Kotey, above n 4, 183.

67 Radford, above n 16, 109. See also Gielissen, above n 58, 25, which found that several consumers who did not buy socially responsible products failed to consider the social aspects of products they purchased when they went shopping – they often purchased out of habit.

68 This may also be referred to as 'voting with your fork': Parker, above n 4, 53.

69 Bruce, above n 13, 19, 20–1; Katrina Sharman, *From Label to Liable: Scams, Scandals and Secrecy – Lifting the Veil on Animal-Derived Food Product Labelling in Australia* (Report, Voiceless, May 2007) 10–11; Richard Bennett, 'The Value of Farm Animal Welfare' (1995) 46 *Journal of Agricultural Economics* 46, 46. See also Parker, above n 4, 53; Blewett et al, above n 11, 97, which states: 'It is clear from the submissions received by the Panel and the results of both trans-Tasman and international consumer surveys that many people feel strongly about the origins of the food they buy and how and under what conditions it was produced'.

produced accordingly.[70] Although the members of Choice are not a representative sample of the Australian population, a similar preference for free-range eggs has been reflected in recent consumer behaviour. In 2012, free-range eggs cost approximately 61 per cent more than caged eggs.[71] Despite the significant price difference, the sale of free-range eggs increased from 14.5 per cent in 2005 to 38 per cent in 2013.[72] The price premium therefore acts as a financial incentive to encourage suppliers to use more humane production systems in order to access this lucrative market segment.[73] In response, suppliers have been targeting this growing demand with labels such as 'free-range', 'free-to-roam', 'barn-laid' or 'organic'.[74]

Although, for the market-based approach to animal welfare regulation to function effectively, consumers must not only be *willing* to pay more for humanely produced products, but must actually do so at the retail outlet. Numerous studies cite a growing concern among consumers about the treatment of animals in food production.[75] This is often accompanied with a commensurate willingness to pay more for humanely produced products.[76] For example, a 2005 study of 2795 Queenslanders found that 36 per cent of respondents were 'concerned' about the general welfare of farm animals,[77] and 34 per cent stated that they would be willing to pay 5–10 per cent more for animal-based food products that were produced in accordance with the 'five freedoms'.[78] In another Australian study, 63 per cent of respondents reported that they 'would be more inclined' to purchase free-range pork products after learning about factory farming conditions for pigs.[79] The authors of the former study, however, noted

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70 Rachel Clemons and Angela Cartwright, *Free Range Eggs: What Does 'Free Range' Really Mean, and Are Consumers Being Misled?* (26 March 2014) Choice <http://www.choice.com.au/reviews-and-tests/food-and-health/food-and-drink/organic-and-free-range/free-range-eggs-2012/page.aspx>. See also Parker, Brunswick and Kotey, above n 4, 168.

71 Calculated using data from Australian Egg Corporation Limited, above n 2, 3.

72 Ibid; Australian Egg Corporation Limited, 'Unifying for Results' (Annual Report, Australian Egg Corporation, 2005). See also Parker, above n 4, 53.

73 Blewett et al, above n 11, 98.

74 Bruce, above n 13, 19.

75 Ibid 19, 20; Sharman, *From Label to Liable*, above n 69, 7–11; Bennett, 'The Value of Farm Animal Welfare', above n 69, 46; Harvey and Hubbard, above n 35, 109. See also Michiel Korthals, 'Taking Consumers Seriously: Two Concepts of Consumer Sovereignty' (2001) 14 *Journal of Agricultural and Environmental Ethics* 201, 203; Jacqueline Tawse, 'Consumer Attitudes towards Farm Animals and Their Welfare: A Pig Production Case Study' (2010) 3 *Bioscience Horizons* 156, 156.

76 Harvey and Hubbard, above n 35, 109.

77 Nik Taylor and Tania D Signal, 'Willingness To Pay: Australian Consumers and "on the Farm" Welfare' (2009) 12 *Journal of Applied Animal Welfare Science* 345, 354.

78 Ibid 351, 354. The five freedoms are commonly cited as essential to provide for the welfare of animals; namely, freedom from hunger, thirst, and malnutrition; freedom from discomfort; freedom from pain, injury, and disease; freedom to express normal behaviour; and freedom from fear and distress: at 347.

79 Sharman, *From Label to Liable*, above n 69, 11. The study was 'based on questions included in a National Omnibus survey of 1001 people (2–4 June 2006) (Research by OmniAccess Consumer Omnibus and Connect Research and Strategy)'.

that the stated willingness to pay may not result in actual purchasing behaviour.[80] Other studies similarly concluded that although consumers *appear* willing to pay more for humanely produced products, few actually do when it comes to making the purchase.[81] This finding supports the central thesis of this article – that there are other considerations that prevent market-based mechanisms from accurately reflecting consumers' values.

A United Kingdom study on the public support for caged egg production hypothesised that a lack of correlation between consumers' stated willingness to pay and their actual purchasing behaviour suggests that 'although people say they support the banning of cage eggs they do not, in reality, act accordingly by buying free-range or other non-cage eggs'.[82] Sullivan refers to this 'gap' between statement and behaviour as the 'welfare-preference paradox'.[83] Citing another study (which examined the political support for government poverty reduction programs versus individual willingness to donate to the poor), Anderson extrapolates that 'the public may be more willing to enact legislative restrictions on agriculture than to vote for such products with their dollars'.[84] This issue is explored further in the analysis of political considerations below.

A stated willingness to pay more, is not, therefore, an accurate predictor of consumer behaviour or demand. This is well understood by marketers, who rarely use willingness to pay as a metric in calculating the market for a new product.[85] Sunstein states that '[w]illingness to pay is a function of ability to pay, and it is an extremely crude proxy for utility'.[86] That is, willingness to pay is affected by 'the amount of goods that have been (legally) allocated' to a person.[87] As stated by Ogus, 'individual preferences, as revealed in market behaviour, are a function not only of what people want but also of their income and wealth, what is sometimes referred to as the "starting position"'.[88] Thus, product demand cannot be relied upon as an indication of consumer values on animal welfare as it fails to account for those individuals who are concerned about the treatment of

80 Taylor and Signal, above n 77, 356. See also Bennett, 'The Value of Farm Animal Welfare', above n 69, 56; but see Harvey and Hubbard, above n 35, 108.

81 Jerry L Anderson, 'Protection for the Powerless: Political Economy History Lessons for the Animal Welfare Movement' (2011) 4 *Stanford Journal of Animal Law and Policy* 1, 55; Norwood and Lusk, above n 9, 210. See also Tawse, above n 75, 156; Harvey and Hubbard, above n 35, 109.

82 R Bennett, 'Measuring Public Support for Animal Welfare Legislation: A Case Study of Cage Egg Production' (1998) 7 *Animal Welfare* 1, 6.

83 Sean P Sullivan, 'Empowering Market Regulation of Agricultural Animal Welfare through Product Labelling' (2013) 19(2) *Animal Law Review* 391, 405.

84 Anderson, above n 81, 55, citing Michael E DeBow and Dwight R Lee, 'Understanding (and Misunderstanding) Public Choice: A Response to Farber and Frickey' (1988) 66 *Texas Law Review* 993, 998.

85 Harvey and Hubbard, above n 35, 112.

86 Cass R Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Harvard University Press, 1990) 59.

87 Ibid 41. See Feintuck, above n 12, 45.

88 Ogus, above n 17, 58.

animals but are unable to afford the more expensive, welfare-friendly products.[89] This fact appears to be conveniently ignored by governments and proponents of the market-based approach. It is, however, something understood by consumers. According to a study conducted by Giellissen, some respondents stated that the inability to afford the more expensive (but socially responsible) products absolved the consumer of their moral obligation to buy such products.[90]

The market-based approach to the regulation of farm animal welfare also relies on consumers having adequate product information, including information about production systems, and alternative products and production systems, so they are able to make informed purchasing decisions that represent their values.[91] A closely related issue is the quality of the information and its communicability. This may arise where the labelling of more humanely produced products fails to attract the customers' attention, or convey the perceived merits of improved farm animal welfare.[92] To address this concern, proponents of the market-based approach may support government regulation to facilitate the accurate communication of such information. For example, the Independent Panel for the Review of Food Labelling Law and Policy endorsed 'a governmentally supported framework of operational definitions and insistence on accurate and consistent terminology' to ensure that marketing needs do not corrupt consumer information and undermine the food system.[93] Similarly, Bloom proposes the use of mandatory disclosure and labelling, supported by governmental regulation, to address the need for product information.[94]

The lack of product information is particularly acute in relation to farm animal welfare. As noted by Parker, Brunswick and Kotey, 'most egg labels do not tell the consumer vital information such as what the stocking density is, what proportion of birds access the range for what length of time, or whether birds are de-beaked'.[95] While it is possible for consumers to access this information from some suppliers' websites, many suppliers do not provide this information.[96] Even if this information was made readily available, it frequently requires some broader context or understanding of the issue(s), which consumers may also be lacking. A study commissioned by the Department of Agriculture, Fisheries and Forestry found that Australians have a 'shallow understanding' of animal welfare

89 Bennett, 'The Value of Farm Animal Welfare', above n 69, 57–8; Roff, above n 4, 516. See also Harvey and Hubbard, above n 35, 108; Norwood and Lusk, above n 9, 262–3.

90 Gielissen, above n 58, 25.

91 Bennett, 'The Value of Farm Animal Welfare', above n 69, 58; Harvey and Hubbard, above n 35, 112. See generally Parker, above n 4, 67.

92 Harvey and Hubbard, above n 35, 112.

93 Blewett et al, above n 11, 47.

94 Bloom, above n 16, 37.

95 Parker, Brunswick and Kotey, above n 4, 180.

96 Parker, above n 4, 64.

issues.[97] Specifically, the study found that 'a certain amount of misinformation' existed in relation to animal agriculture.[98] A 2010 study in the United Kingdom found that a lack of information about animal welfare contributed to an inconsistency between consumers' purchasing behaviour and their values towards farm animal welfare.[99] In another study of British, Italian and Swedish consumers, a lack of information about farm animal welfare issues at the time of purchase was found to be a cause of cognitive dissonance among consumers of farm animal products.[100] Such cognitive dissonance represents a real cost to the consumer, as the psychological discomfort is a source of disutility that reduces the consumer's welfare.[101] In summarising the findings of this study, Bruce stated that '[w]ithout sufficient information concerning farm animal welfare, consumers were unwilling or unable to exercise purchasing decisions that reflected their animal welfare concerns'.[102] Even if one assumes that the information deficit can be successfully overcome, Bennett remains sceptical, stating that 'the market mechanism would still fail to adequately capture the negative animal welfare externalities'.[103] The importance of addressing externalities is discussed later in this article.

V POLITICAL CONSIDERATIONS

This Part examines another potential source of interference between the transmission of consumers' values regarding farm animal welfare and their food purchases. This influence derives from the principles of representative democracy and the ability of individuals to act as political participants (citizens), rather than mere consumers. In the first instance, consumers may feel that their humane purchasing choices are inconsequential, and so turn to the political sphere for realisation of their altruistic values. Closely related to this is the belief that legislation is more efficacious for public interest issues, especially where a collective action problem exists. Alternatively, consumers may want to pre-commit themselves to their meta-preferences (such as only purchasing free-range

97 Angela Southwell, Amarylise Bessey and Barbara Barker, 'Attitudes towards Animal Welfare' (Research Report No 90248, TNS Social Research, September 2006) 12; Bloom, above n 16, 27.

98 Southwell, Bessey and Barker, above n 97, 13. Similarly, Tawse, above n 75, 157, reported: 'ignorance and/or misconceptions regarding livestock production are prevalent amongst consumers'. See also Norwood and Lusk, above n 9, 327.

99 Tawse, above n 75, 162. See also Bruce, above n 13, 43–4.

100 L E Mayfield et al, '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, 70–1. See also Bruce, above n 13, 43; Bennett, 'The Value of Farm Animal Welfare', above n 69, 51.

101 Mayfield et al, above n 100, 60; Bennett, 'The Value of Farm Animal Welfare', above n 69, 51.

102 Bruce, above n 13, 43.

103 Bennett, 'The Value of Farm Animal Welfare', above n 69, 58.

eggs or sow stall free pork) through supporting legislative change, rather than change their consumption. The political sphere may thus satisfy an individual's expression of his or her animal welfare values, leaving some consumers feeling as though they have discharged their ethical duties. Where this occurs, the market-based approach to regulating farm animal welfare does not reflect these consumers' values.

Consumers may not act according to their values, and purchase more humanely produced farm animal products, as they feel their purchase is inconsequential.[104] Millions of animals in Australia are reared in intensive or semi-intensive conditions every year for meat and eggs.[105] The decision by one consumer to reduce (or cease) his or her consumption, or to commit to purchasing free-range or organic farm animal products, will realistically do little to change the conditions faced by these animals, and many consumers intrinsically know this.[106] So, instead of purchasing the more humanely produced (and more expensive) product, some individuals prefer to pursue their values regarding the treatment of animals used in food production by supporting the introduction of legislation.[107]

In a 1996 study conducted in the United States by Bennett, 81 per cent of respondents were concerned about the suffering of animals in the production of food and other agricultural products.[108] Seventy two per cent of respondents stated that they would support legislation to phase out battery cages, with 80 per cent willing to pay more for their eggs as a result of this legislation.[109] These results, however, must be interpreted carefully as this study was designed to test the methodology, rather than represent the population.[110] Nevertheless, remarkably similar results were found in a subsequent study by the same author, conducted in the United Kingdom. The 1998 study used a random sample of

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104 See Stephen F Hamilton, David L Sunding and David Zilberman, 'Public Goods and the Value of Product Quality Regulations: The Case of Food Safety' (2003) 87 *Journal of Public Economics* 799, 815, which, in respect of pesticide use, states: 'Personal consumption choices do not influence the level of public goods since an individual has a miniscule effect in the market'; cf Norwood and Lusk, above n 9, 174.

105 Voiceless Limited, above n 2, 3. See also Sharman, *From Label to Liable*, above n 69, 4, which states that '[m]ore than 540 million farm animals are raised in Australia every year for food or food production purposes. The overwhelming majority of these animals spend their lives suffering in factory farms'.

106 See Harvey and Hubbard, above n 35, 111.

107 In applying a public choice analysis, Michael E DeBow and Dwight R Lee, 'Understanding (and Misunderstanding) Public Choice: A Response to Farber and Frickey' (1988) 66 *Texas Law Review* 993, 998–9, conclude that the costs to the individual are lower when voting on ideological grounds in the political sphere than acting accordingly in the private market. See Bennett, 'Measuring Public Support for Animal Welfare Legislation', above n 82, 6–7; Anderson, above n 81, 55; Bennett, 'The Value of Farm Animal Welfare', above n 69, 57; Norwood and Lusk, above n 9, 208, 343–4.

108 R M Bennett, 'People's Willingness To Pay for Farm Animal Welfare' (1996) 5 *Animal Welfare* 3, 7.

109 Ibid 8. See also Norwood and Lusk, above n 9, 344–5.

110 Bennett, 'People's Willingness To Pay for Farm Animal Welfare', above n 108, 9; but see Taylor and Signal, above n 77, 348.

2000 citizens of Great Britain.[111] Bennett found that 86 per cent of respondents were either 'very concerned' or 'somewhat concerned' about animal welfare.[112] Almost 79 per cent of respondents supported legislation to phase out the use of cages in egg production throughout the European Union.[113] Despite a high level of concern for animal welfare, and a commensurate level of support for legislation improving farm animal welfare, only 61 per cent of respondents stated that they purchased more humanely produced products in line with these concerns.[114] Given the disparity between stated willingness to pay and actual purchasing behaviour identified in the previous Part, the number of consumers who actually purchased these products is likely to be even lower. These results suggest that many consumers would prefer to support legislation than change their purchasing behaviour.

The disparity between animal welfare values and purchasing behaviour may be indicative of a belief among consumers that legislation is more likely to achieve the goal of improved animal welfare than changing their product choices.[115] Without any way of knowing whether others are willing to change their purchasing behaviour consumers may be reluctant to incur any additional expense associated with purchasing more humanely produced products, undermining the potential success of a consumer-led movement.[116] Framed in this way, the gap between consumers' values and their purchasing behaviours is a type of collective action problem. Typically associated with the provision of public goods, collective action problems arise if everyone pursues their own self-interest (often in the form of free-riding), thus threatening the provision of the public good.[117] An example of free-riding in this context is where an individual advocates for free-range eggs to improve layer hen welfare, while continuing to purchase caged eggs for his or her own consumption.[118]

Supporting legislation may also be a form of pre-commitment by individuals, who would rather not rely on their self-discipline in expressing their values.[119] As noted earlier, even conscientious consumers may be tempted to compromise their values regarding animal welfare due to factors such as 'price, appearance,

111 Bennett, 'Measuring Public Support for Animal Welfare Legislation', above n 82, 2.
112 Calculated using data from ibid 3.
113 Ibid.
114 Ibid. See also Taylor and Signal, above n 77, 348.
115 See Bennett, 'Measuring Public Support for Animal Welfare Legislation', above n 82, 6–7; Bennett, 'The Value of Farm Animal Welfare', above n 69, 57.
116 See Sunstein, above n 86, 58; Harvey and Hubbard, above n 35, 111; Anderson, above n 81, 12; Norwood and Lusk, above n 9, 264, 315.
117 Sunstein, above n 86, 49. See also Parker, above n 4, 66, who notes that the growth in egg sales at farmers' markets, and organic and whole food retail outlets, will encourage new market entrants to free-ride on the reputation of those producers with more stringent standards.
118 See also Norwood and Lusk, above n 9, 264, 315; Sunstein, above n 86, 49.
119 See Sunstein, above n 86, 58.

advertising, or simply the force of habit'.[120] Pre-commitment, in the form of supporting legislative change, can therefore be seen as an expression of the individual's normative desires or meta-preferences. The desire to pre-commit oneself to a considered course of conduct has been used to explain why an individual supports seat belts or anti-littering legislation, even though these rules may be against their own interests.[121] Although in the short-term consumers may experience increased prices for more humanely produced products (due to the improved statutory protections for animals), consumers will avoid disutility as the legislation is aligned with their values.

Research also indicates that individuals may be more inclined to act selflessly in the political sphere than they otherwise would in the market.[122] This assumes, of course, that individuals are capable of acting selflessly – a point which has been contested. According to 'renowned public philosophical pundit',[123] Lippman, '[i]n ordinary circumstances voters cannot be expected to transcend their particular, localized and self-regarding opinions'.[124] Lippman concludes that most individuals will 'suppose that whatever seems obviously good to them must be good for the country, and good in the sight of God'.[125] Nevertheless, studies on voting behaviour indicate that individuals are less self-interested as political participants because citizens do not always vote for the party that will benefit them most financially.[126] Altruistic values can also be found in the push by citizens to have

> non-entertainment broadcasting on television, even though their own consumption patterns favor situation comedies; they may seek stringent environmental laws even though they do not use the public parks; they may approve of laws calling for social security and welfare even though they do not save or give to the poor; they may support antidiscrimination laws even though their own behavior is hardly race- or gender-neutral. The choices people make as political participants are different from those they make as consumers.[127]

Even some scholars who are generally sceptical of altruistic motivations[128] concede that individuals may be 'more willing to pursue altruistic goals in political decisions than in market decisions'.[129] Sunstein suggests that this

120 Radford, above n 16, 108.
121 Sunstein, above n 86, 51.
122 See ibid 58.
123 According to Stephen M King, Bradley S Chilton and Gary E Roberts, 'Reflection on Defining the Public Interest' (2010) 41 *Administration and Society* 954, 956.
124 Walter Lippman, *The Public Philosophy* (Hamish Hamilton, 1955) 43.
125 Ibid.
126 Ogus, above n 17, 74.
127 Sunstein, above n 86, 57. See also Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007) 29.
128 See Anderson, above n 81, 12, referring to some public choice theorists. According to Morgan and Yeung, above n 127, 17, private interest theories are 'skeptical of the so-called "public interestedness" of legislators and policy-makers'.
129 Anderson, above n 81, 12–13.

phenomenon might be attributable to the nature of politics.[130] Individuals may turn to legislation to fulfil non-economic values, which are not being realised through the operation of the market.[131] The nature of non-economic values makes them largely incompatible with the market sphere, which is often characterised by the pursuit of self-interest.[132] So, in order to realise their altruistic values and aspirations, individuals turn to the political sphere.[133] If, however, values-based issues are regulated by the market-based approach, as is the case for the welfare of farm animals, then the subsequent regulation is not reflective of society's *actual* values on the topic of regulation.

The above analysis suggests that representative democracies, such as Australia, encourage individuals to pursue their non-economic values in the political sphere. As a result, citizens may then feel they have done all that they can for animal welfare, and not change their purchasing behaviour. This is likely to occur where citizens feel as though purchasing more humanely produced products will have little effect on changing industry practices. Or, it is likely to occur where citizens are only willing to change their consumption when others are similarly committed through legislative decree, as in the case of prohibiting certain production systems. This is not to suggest that targeting the political sphere is entirely misguided or ineffectual; in fact, legislation could achieve significant improvements in animal welfare in less time than the market-based approach. An issue arises, however, where government has deferred the regulation of values-based issues, such as animal welfare, to market forces. Without an awareness that the market-based approach is being employed to regulate farm animal welfare, efforts by concerned citizens in the political sphere will not have the intended effect on the scope and content of animal welfare regulations.

VI SOCIAL CONSIDERATIONS

There are social considerations which also inhibit the ability of the market to accurately reflect individuals' values regarding farm animal welfare. The existence of such social considerations undermines the central premise of the market-based approach – that consumers' demand for more humanely produced products will encourage suppliers to improve their animal welfare standards. Specifically, consumers may be influenced by their family, significant others or broader social forces such that they do not purchase the product or products that best reflect their values regarding farm animal welfare. If demand fails to

130 Sunstein, above n 86, 58.
131 Ibid.
132 See ibid; Harvey and Hubbard, above n 35, 110.
133 Sunstein, above n 86, 58.

consistently and accurately represent consumers' values, then leaving values-based issues (such as animal welfare) to be regulated through market forces is flawed. This Part demonstrates that social influences may create a clash between multiple values, with the consumer having to prioritise one over the other. Or, consumers may 'detach' their values from their purchasing behaviour. Both, however, indicate that a market-based approach to the regulation of farm animal welfare is defective.

Consumers may be influenced by the opinions of others through their desire to be in harmony or in conflict with others.[134] For most consumers, it is the former, rather than the latter, that affects their purchasing behaviour. The opportunity for influence arises as consumers try to understand reality, and maintain positive relationships with others and themselves.[135] As Wood and Hayes observe, '[c]onsumers are influenced by the preferences of others to the extent that these others help them to understand reality, to maintain positive relationships, and to be themselves'.[136] Through the pursuit of these informational and socio-normative goals, consumers focus on information that supports these ends.[137] In doing so, they may change the meaning or definition of a product.[138] This may occur as consumers reinterpret marketing messages so that their attitudes are consistent with the attitudes of members from positive self-relevant groups, and sufficiently dissimilar from those in negative self-relevant groups.[139] For example, an individual who is concerned about the suffering of layer hens in intensive conditions may come to accept the 'stories' that free-range egg suppliers 'sell' on their packaging so as to distance themselves from 'radical animal activists' who expose the intensive conditions in many free-range production systems. Or, alternatively, the consumer may convince themselves that layer hens must have a better quality of life in free-range systems because all their friends buy free-range eggs.

In changing the meaning of a product, consumers may be attempting to reconcile conflicting values. There is a values conflict each time satisfying one value precludes the satisfaction of another.[140] Unless the consumer is able to find a product that satisfies all their values, the individual will need to resolve one or more conflicts by prioritising values.[141] How the conflicting values are

134 Wendy Wood and Timothy Hayes, 'Social Influence on Consumer Decisions: Motives, Modes, and Consequences' (2012) 22 *Journal of Consumer Psychology* 324, 324.
135 Ibid 324–5.
136 Ibid 325.
137 Ibid 326.
138 Ibid.
139 Ibid.
140 M Connors et al, 'Managing Values in Personal Food Systems' (2001) 36 *Appetite* 189, 194.
141 Ibid.

prioritised, and in what order they appear, is context dependent.[142] According to Connors:

> Who someone ate with, what day of the week it was, what was eaten previously, whether children were affected by the food decision, and many other situational considerations affected the priorities of salient values and ultimately, the food choice decision.[143]

A common conflict in respect of farm animal welfare occurs between the values of ethical consumption and saving money.[144] In resolving the conflict, as previously discussed, consumers may commit themselves to values-based action in the political sphere to reduce cognitive dissonance.

Secondly, the influence of others may affect the intention to buy farm animal products, irrespective of the consumer's values. According to a study conducted by Zey and McIntosh, perceived social pressure had the same, or a greater, effect on an individual's intention to consume beef than his or her own attitudes and salient beliefs.[145] This suggests that real or perceived social pressure to consume farm animal products may indeed override one's concerns for animal welfare.[146] Although this study only measured the intention to purchase, rather than actual purchasing behaviour, according to Shepherd and Raats, the intention to perform a volitional behaviour is the best predictor of actual behaviour.[147] In citing two separate studies, McCarthy et al concluded that perceived social pressure to act a particular way has a 'significant impact on the intention and actual consumption towards beef'.[148] This Part explores the influence of family members, significant others, and culture and tradition on purchasing behaviour.

Family members may exert influence on purchasing behaviour by way of the purchasers' desire for more information about a product, or by alerting them to the effect that the purchase will have on themselves or other family members.[149] Any one of these motivations will cause the prospective purchaser to attend to, or avoid, specific types of information in order to construct an appropriate meaning or definition around the product.[150] This is a process that can be manipulated by

142 Ibid.
143 Ibid.
144 Norwood and Lusk, above n 9, 241.
145 Mary Zey and Wm Alex McIntosh, 'Predicting Intent to Consume Beef: Normative versus Attitudinal Influences' (1992) 57 *Rural Sociology* 250, 261. See also M McCarthy et al, 'Factors Influencing Consumption of Pork and Poultry in the Irish Market' (2004) 43 *Appetite* 19, 27.
146 This is especially true for decisions regarding consumption behaviour in the next year rather than in the next week, where the individual's attitude was seen to have a greater effect: McCarthy et al, 'Factors Influencing Consumption of Pork and Poultry', above n 145, 27.
147 Richard Shepherd and Monique M Raats, 'Attitudes and Beliefs in Food Habit' in H L Meiselman and H J H MacFie (eds), *Food Choice, Acceptance and Consumption* (Blackie Academic and Professional, 1996) 346, 348. See also McCarthy et al, 'Factors Influencing Consumption of Pork and Poultry', above n 145, 20.
148 McCarthy et al, 'Factors Influencing Consumption of Pork and Poultry', above n 145, 21.
149 Wood and Hayes, above n 134, 328.
150 Ibid.

family members.[151] A parent may succumb to the influence of a child and purchase a product, such as a snack food that uses caged eggs, because he or she values their child's happiness. In doing so, the parent may avoid the product's ingredients label entirely, or they may overlook the reference to 'eggs' or 'egg whites' without further consideration of the production system. Applying the research of Zey and McIntosh and McCarthy et al, it can be argued that this hypothetical consumer would have otherwise noted the generic reference to 'eggs' and not purchased the product had it not been for the influence of his or her child.

Rarely are consumers solely motivated by their own ethical beliefs when making food choices for their family. Lindeman and Stark examined the eating habits of women and found that their food choices were the result of numerous motivations, and not solely their ethical beliefs regarding meat.[152] The opinions of family members, among significant others, are a noted influence on food choices.[153] This study has been corroborated by subsequent research which also found that the purchasing decisions of female consumers may be heavily influenced by members of their family. A study of 200 mothers with young children from northern England in 1986, found that '[w]omen could name their husband's food likes and dislikes but had to be pushed to name their own, while children's food preferences came a clear second to men's'.[154] Although this study is almost 20 years old, similar findings were reported in a 2001 study.[155] Connors et al found that women were more likely than men to prioritise social relationships when there was a conflict between their food-choice values.[156] According to the authors, women would more frequently prioritise 'the management of their social relationships above all of their other food specific values'.[157] This resulted in some individuals eating 'what was served to them even if they disliked it or it did not meet their other values, in order to avoid creating a food incident and disrupting social relationships'.[158] While 'traditional' family dynamics have changed in recent years,[159] these studies nevertheless

151 See ibid 327–8.

152 M Lindeman and K Stark, 'Pleasure, Pursuit of Health or Negotiation of Identity? Personality Correlates of Food Choice Motives among Young and Middle-Aged Women' (1999) 33 *Appetite* 141, 156; M McCarthy et al, 'Factors Influencing Intention to Purchase Beef in the Irish Market' (2003) 65 *Meat Science* 1071, 1074.

153 McCarthy et al, 'Factors Influencing Intention to Purchase Beef', above n 152, 1074.

154 Jane Dixon, *The Changing Chicken: Chooks, Cooks and Culinary Culture* (UNSW Press, 2002) 19; Nickie Charles and Marion Kerr, 'Issues of Responsibility and Control in the Feeding of Families' in Sue Rodmell and Alison Watt (eds), *The Politics of Health Education: Raising the Issues* (Routledge & Kegan Paul, 1986) 57, 60.

155 Connors et al, above n 140.

156 Ibid 195.

157 Ibid.

158 Ibid.

159 See, eg, Dixon, above n 154, 19.

demonstrate the influence that family members may exert over the purchasing of farm animal products.

In another study examining relationship influence, Wood and Hayes found that the purchasing behaviour of individuals may synchronise with their partners through the development of shared meanings.[160] This process develops organically as close relationship partners generally make purchasing decisions together.[161] In time, 'couples develop standard purchase and consumption patterns that are interpreted by both as supporting the relationship'.[162] As such, these consumers will still be influenced by the preferences of their partner, even when they are making purchasing decisions alone.[163] The above research supports the conclusion that consumers may purchase farm animal products produced under poor welfare conditions (such as processed hamburger patties or chicken nuggets) due to the preferences of their spouse or children.

Consumers may also be swayed into purchasing a product that does not align with their values by 'significant others', such as friends, work colleagues, doctors and dieticians. The influence of significant others on the consumption of socially responsible products was examined by Gielissen.[164] Gielissen found that there was a significant correlation between the opinions of significant others and purchasing socially responsible products, such as a fair trade coffee or organic meat.[165] For example, some of the respondents stated that '"I would like to have Fair Trade coffee cups, so that my friends know I'm serving them Fair Trade coffee" and "I wouldn't like it if I'd have to admit that I never buy organic meat, if the topic would be brought up"'.[166] While Gielissen cautions that the strength of correlation may be 'overestimated' due to people's tendency to project their way of thinking onto others, known as the 'false consensus effect', he nevertheless concludes that the opinion of significant others remains an important influence on consumer behaviour.[167]

Similarly, the opinions of doctors and dieticians have been found to influence the consumption of meat. In examining the factors influencing the consumption of beef, pork and poultry in Ireland, McCarthy et al discovered that the advice of doctors and dieticians affected levels of consumption.[168] In quantifying the influence of significant others in beef consumption, McCarthy et al concluded

160 Wood and Hayes, above n 134, 324, 327.
161 Ibid 324, citing Jeffry A Simpson, Vladas Griskevicius and Alexander J Rothman, 'Consumer Decisions in Relationships' (2012) 22 *Journal of Consumer Psychology* 304.
162 Ibid 327.
163 Ibid 324, citing Jeffry A Simpson, Vladas Griskevicius and Alexander J Rothman, 'Consumer Decisions in Relationships' (2012) 22 *Journal of Consumer Psychology* 304.
164 Gielissen, above n 58.
165 Ibid 26, 29.
166 Ibid 26.
167 Ibid 26–7, 29.
168 McCarthy et al, 'Factors Influencing Consumption of Pork and Poultry', above n 145, 27; McCarthy et al, 'Factors Influencing Intention to Purchase Beef', above n 152, 1081.

that the influence was significant (at the 10 per cent level), although it was not as strong a determinant as the consumer's own attitude towards beef consumption in the immediate future.[169] While these findings are based on the *intention* to consume meat, rather than actual purchasing behaviour, these results contribute to the totality of evidence that significant others influence purchasing behaviour.

The findings of Gielissen and McCarthy et al suggest that the influence of significant others may actually result in better outcomes for farm animals by either encouraging the purchase of ethically produced products (eg, organic meat or free-range eggs), or by reducing total demand (on advice of their doctor or dietician). However, where this occurs consumers are motivated by the opinions of others, rather than their own values towards farm animals. While this change in purchasing behaviour may be welcomed by animal welfare advocates, it further supports the present thesis that consumers do not express *their* values through their purchasing behaviour because they are concerned about the opinions of others.

The effect of reference groups may also be relevant in resolving conflicts between a consumer's food-related values. Cohen, in studying the effect of group influence (specifically, political party allegiances) on an individual's attitudes, found a strong correlative effect.[170] The study found that the judgments of others in a reference group could influence the social meaning given to an object. These findings, which were based on the evaluation of social welfare policy proposals, may be cautiously extended to the consumption of farm animal products. One could argue that the influence of others in meaningful social groups (such as friends, extended family, and workplace colleagues) may encourage people to disassociate farm animal products from their production systems. This argument is further supported by the study's finding that individuals base their attitudes on social meaning, rather than knowledge they may acquire; and any attitude change was subsequently reflected in actual behaviour.[171] The effect that group information had on the assumed factual qualities of an object was also found to influence the moral connotations of the object.[172] Thus, Cohen states:

> Conservatives thus appeal to the sanctity of life in the context of abortion but then downplay the value of 'protecting life' in favor of 'vindicating justice' in the context of capital punishment. They can thus be both 'pro life' and 'pro death penalty,' even though no inherent factual or philosophical connection exists between these two positions. Likewise, liberals can simultaneously support

169 McCarthy et al, 'Factors Influencing Intention to Purchase Beef', above n 152, 1081; cf Zey and McIntosh, above n 145, 256, 261, which found that attitudes towards beef consumption were less important than the opinion of others in respect of their consumption in the coming year.

170 Geoffrey L Cohen, 'Party over Policy: The Dominating Impact of Group Influence on Political Beliefs' (2003) 85 *Journal of Personality and Social Psychology* 808.

171 Ibid 811, 819.

172 Ibid 819.

> abortion rights and oppose the death penalty largely because they see different values at stake for each of the two issues.[173]

The influence of reference groups may, therefore, serve to explain how some individuals are able to reconcile their values regarding the care and treatment of animals with their consumption of food produced in intensive production systems.

Individuals may also purchase farm animal products that do not align with their values due to the influence of culture or tradition. Cultural and traditional norms may surround a particular event, such as the consumption of lamb on Australia Day,[174] or they may be more pervasive and enduring. For instance, several scholars have noted the prominent role that meat plays in Western food culture, due to the belief that a meal is not complete without it.[175] The broad acceptance of cultural norms makes this a particularly strong influence on consumer behaviour. A study of Swiss consumers found that there was a conflict between consumers' personal food consumption values and perceived food culture.[176] In examining the source of the conflict, the study found that 'different personal food constructs are associated with different social eating situations, and the same is true of different product categories'.[177] Thus, the researchers found that in some situations, or for some products, individuals were consuming food items that did not reflect (and thus were in conflict with) their personal values.[178] Although the study was specific to Switzerland,[179] 'one of the study's main findings is that people recognise quite clearly that their personally important values are only partially represented in the current eating culture – of which they are part'.[180] Extending the scope of this research to include purchasing behaviour would suggest that individuals will not purchase products that align with their 'personally important values' due to the perceived 'eating culture'. Thus, culture (eating or otherwise) prevents some consumers from purchasing farm animal products that align with their values, and the aggregation of consumer demand will fail to capture societies' true values regarding the care and treatment of animals used in food production.

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173 Ibid 808 (citations omitted).

174 Grant Jones, 'Sam Kekovich Generation Lamb Ad Campaign Strikes Again', *News.com.au* (online), 9 January 2014 <http://www.news.com.au/lifestyle/food/sam-kekovich-generation-lamb-ad-campaign-strikes-again/story-fneuz8wn-1226798473902>. See also Bruce, above n 13, 14.

175 Deborah Lupton, *Food, the Body and the Self* (Sage Publications, 1998) 9–10, 40; Charles and Kerr, above n 154, 59; McCarthy et al, 'Factors Influencing Consumption of Pork and Poultry', above n 145, 27.

176 Mirjam Hauser, Klaus Jonas and Rainer Riemann, 'Measuring Salient Food Attitudes and Food-Related Values. An Elaborated, Conflicting and Interdependent System' (2011) 57 *Appetite* 329, 336.

177 Ibid.

178 Ibid.

179 Ibid 331.

180 Ibid 337.

Not all the research suggests that culture and tradition will obfuscate the expression of ethical values in purchasing behaviour. In examining the role of traditional values in ethical consumer decision-making, Shaw et al concluded that values such as 'respect, commitment and acceptance of the customs and ideas that one's culture or religion imposes on the individual were not important influences in grocery shopping.[181] The authors argue that society's increased emphasis on the individual and growing secularism could explain the lack of influence that tradition has on purchasing behaviour.[182] However, this study appears to be an anomaly, which may be attributable to the small sample of relatively homogenous consumers.[183]

This Part highlighted several social considerations that may inhibit the protection of animal welfare through market forces. In some cases, the opinions of others may serve to promote the welfare of farm animals. In either situation, the consumer's behaviour is influenced by the desire to live in harmony with others, rather than act in accordance with their own values. Specifically, family members, significant others, and broader social forces such as reference groups, and culture and tradition, were shown to affect consumers' food purchasing decisions. The research suggests that purchasing decisions are complex and multifaceted, and it is too simplistic to suggest that an individual's values are expressed in their purchasing behaviour, as is presumed in the market-based approach to regulation.

VII JUSTIFIYING GOVERNMENT REGULATION

Government regulatory intervention is justifiable where there is an absence or failure in the market.[184] The preceding Parts have demonstrated that in the case of farm animal welfare, the economic, political and social considerations result in a form of market failure. Specifically, the above considerations obstruct the ability of consumers to express their values regarding animal welfare through their purchasing behaviour, which means that the market forces are not reflecting the true values of consumers. In this way, there is a failure in the operation of the market.

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181 Deirdre Shaw et al, 'An Exploration of Values in Ethical Consumer Decision Making' (2005) 4 *Journal of Consumer Behaviour* 185, 195, quoting Shalom H Schwartz, 'Universals in the Content and Structure of Values: Theoretical Advances and Empirical Tests in 20 Countries' in Mark P Zanna (ed), *Advances in Experimental Social Psychology* (Academic Press, 1992) vol 25, 10.

182 Ibid.

183 The exploratory study interviewed 35 ethically-minded Scottish consumers, who were members of the Scottish Cooperative Society: ibid 187.

184 Baldwin, Cave and Lodge, above n 19, 15. See also Ogus, above n 17, 30, who states that market failure must be accompanied by private law failure in order for public interest regulation to be justified.

There are numerous causes of market failure.[185] However, the causes of greatest significance in animal welfare are: the 'public good' nature of animal welfare; information asymmetries; and the inability to account for negative externalities. Each will be considered in turn.

It has been argued elsewhere that animal welfare is a type of public good as it is a non-excludable and non-rival good.[186] The public 'good' in animal welfare is the enjoyment or comfort an individual experiences in knowing that animals are well cared for and not treated cruelly, which extends to the ability to restrict others from purchasing products produced under cruel conditions.[187] Conscientious consumers may otherwise experience some personal cost, in the form of disutility, in the knowledge that people are consuming products that cause animal suffering.[188] Animal welfare is a non-excludable good as it is not possible to exclude those who do not purchase more humanely produced products from the enjoyment of better animal welfare.[189] It is a non-rival good as a purchaser of more humanely produced products cannot prevent others from enjoying improved animal welfare.[190] Where public goods are non-excludable and non-rival, the need for government intervention is self-evident. Without intervention, the public good would cease to exist as conscientious consumers tire of 'free-riders' benefiting from their ethical (and more expensive) purchasing decisions.[191] Government intervention can also overcome the difficulty in coordinating ethically-minded consumers so that individuals can realise their values regarding farm animal welfare.[192] In fact, Sunstein goes as far as to state that governmental regulation may be *necessary* to help individuals fulfil their non-economic goals and values.[193] According to Sunstein, 'if individual freedom is the goal, laissez-faire is not the solution'.[194]

The lack of adequate information regarding the production system for many farm animal products was previously identified as a market consideration affecting consumers' ability to purchase products representative of their values. Arguably the inadequacy of information exists due to the negative effect such

185 For a discussion of the other market failure rationales, see Baldwin, Cave and Lodge, above n 19, 15–22; Sunstein, above n 86, 48–55.

186 Norwood and Lusk, above n 9, 294–5, 310–11; Harvey and Hubbard, above n 35, 108, 113. See also Bennett, 'Measuring Public Support for Animal Welfare Legislation', above n 82, 8.

187 Norwood and Lusk, above n 9, 294, 310; Bennett, 'Measuring Public Support for Animal Welfare Legislation', above n 82, 8; Harvey and Hubbard, above n 35, 108–9. See also Bennett, 'The Value of Farm Animal Welfare', above n 69, 53. See generally Mayfield et al, above n 100, 60, 63.

188 Bennett, 'Measuring Public Support for Animal Welfare Legislation', above n 82, 8; Norwood and Lusk, above n 9, 294; Harvey and Hubbard, above n 35, 108–9. See generally Mayfield et al, above n 100, 60, 63.

189 Norwood and Lusk, above n 9, 310; Harvey and Hubbard, above n 35, 108.

190 Norwood and Lusk, above n 9, 310; Harvey and Hubbard, above n 35, 108.

191 See Sunstein, above n 86, 49.

192 Ibid 43, 45.

193 Ibid 42, 51.

194 Ibid 42.

information is likely to have on demand.[195] This could explain the lengths to which suppliers go to keep information about production systems secret.[196] It is also very difficult for consumers to independently verify the information they are provided with from the supplier, which, combined with the price premium that more humanely produced products attract, increases the incentive to release inaccurate information or misrepresent the situation entirely.[197] The difficulties caused by information asymmetry are clearly evident when illegally obtained footage exposes the disparity between the marketing of animal products and actual conditions. A pertinent example is the 2012 footage taken from inside a Canberra battery egg farm, which found free-range egg cartons inside the facility.[198] This, no doubt, led some consumers to conclude that caged eggs were being packaged and sold as free-range. Where such information asymmetry and incentives exists, government regulation may redress the situation so consumers can make informed decisions regarding the types of production systems they want to support when purchasing farm animal products.[199]

Government intervention is also justified where externalities exist. Externalities exist where the 'price of a product does not reflect the true cost to society of producing that good, and excessive consumption accordingly results'.[200] Externalities in the production of farm animal products are the pain and suffering endured by the animals.[201] As better conditions for animals are generally more costly,[202] the suffering endured in more efficient production systems is not represented in the final price for the product. To properly account for this externality would require, for example, a tax to increase the cost of products produced under intensive production systems.[203]

In light of the above discussion, what conclusions may be drawn about governments that continue to defer the treatment of animals to the purchasing decisions of individual consumers? Two observations may be possible. First, the

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195 See Baldwin, Cave and Lodge, above n 19, 18.

196 See, eg, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; Colin Bettles, *Test Case Tackles Activists* (6 May 2014) Farmonline <http://www.farmonline.com.au/news/agriculture/livestock/general-news/test-case-tackles-activists/2696957.aspx>; Australian Broadcasting Corporation, 'Australian Pork Industry Calls for Tougher Penalties against Animal Activists Illegally Filming on Farms', *ABC News* (online), 25 May 2014 <http://www.abc.net.au/news/2014-05-25/pork-industry-tougher-penalties-animal-activists-illegal-filming/5474958>.

197 See generally Baldwin, Cave and Lodge, above n 19, 18; Ogus, above n 17, 40.

198 Christopher Knaus, 'Animal Activists Attack "Industrial Sabotage"', *The Sydney Morning Herald* (online), 13 March 2012 <http://www.smh.com.au/environment/animals/animal-activists-attack-industrial-sabotage-20120313-1uxd7.html>; Leonoosthuizen100, *Parkwood Battery Hen Farm Canberra* (12 March 2012) YouTube <https://www.youtube.com/watch?v=bEwhPUlM3AA#t=105>.

199 Baldwin, Cave and Lodge, above n 19, 19.

200 Ibid 18.

201 Norwood and Lusk, above n 9, 338–9.

202 See Harvey and Hubbard, above n 35, 107; Bennett, 'The Value of Farm Animal Welfare', above n 69, 47.

203 Bennett, 'The Value of Farm Animal Welfare', above n 69, 58; Norwood and Lusk, above n 9, 339.

reluctance of governments to intervene may stem from self-interest. Increased regulatory protections are likely to be considered as an unnecessary burden by suppliers, who are better organised politically than ethically-concerned citizens.[204] Suppliers are, therefore, likely to represent a threat to a government's chances of re-election. Secondly, the deference to the market-based approach may be indicative of a broader, philosophical belief that the treatment of animals is matter of individual preference, rather than a social justice issue.[205] This approach, however, is flawed as it fails to give due weight to the sentiency of non-human animals and the responsibility governments owe to protect the vulnerable and defenceless in society.[206]

VIII CONCLUSION

This article set out to critically examine the market-based approach to the regulation of farm animal welfare. As a theory, the market-based approach to the regulation of values-based issues holds obvious appeal in neoliberal economies such as Australia. After all, if people really care about the welfare of farm animals they can either purchase more humanely produced products, or stop purchasing the products altogether. The market-based approach also reduces the regulatory burden on industry, leaving it to do what it does best – respond to market demand. From a governmental perspective, the approach reduces friction with well-resourced and organised industry lobby groups. The approach is well supported by neoliberal rhetoric and the government shirks responsibility should the regulatory regime fail to deliver. Finally, the market-based approach also appeals to animal protection organisations which view it as an opportunity to change the behaviours of consumers in a time where the widespread dissemination of information is easier than ever. Ironically, the success of such campaigns depends on their ability to generate a groundswell of support among the general public, which is likely to be stymied by many of the market, political and social considerations discussed in this article.

The market-based approach to the regulation of farm animal welfare, however, does not operate according to theory. The market, political and social considerations either override an individual's animal welfare values due to necessity, or, faced with the complex task of evaluating the ethics of each brand or product, the consumer prioritises harmonious relationships with significant others over better welfare for farm animals. Given the millions of animals

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204 But see Matt Grossman, 'Interest Group Influence on United States Policy Change: An Assessment Based on Policy History' (2012) 1 *Interest Groups and Advocacy* 171, 179.

205 See, eg, Rob Garner, 'Who Is Responsible for Animal Welfare?' on Centre for Animals and Social Justice, *Animal Republic* (11 June 2014) <http://www.casj.org.uk/blogs/responsible-animal-welfare/>.

206 Tony Ciro and Vivien Goldwasser, 'From Private Law to Public Regulation: A New Role for Courts?' (2003) 15(2) *Bond Law Review* 154, 163.

involved in satisfying Australia's demand for animal products, and the lack of knowledge the average consumer has on the conditions in which these animals are produced, it is little wonder consumers prioritise other values over farm animal welfare. Some consumers may turn to the political sphere to try to prevent themselves and others from purchasing products from cruel production systems. The government has, however, deferred its regulatory powers to the market.

This is not to suggest that the market does not have any regulatory function, or that purchases made by ethical consumers are in vain. Although a growing number of Australian consumers are switching to more humanely produced products, the individual costs remain high. As a public good, the enjoyment that citizens derive from knowing animals are not experiencing high levels of pain or discomfort cannot be the responsibility of ethical consumers. The reality is that many consumers are not going to purchase the more humane and expensive farm animal products until there is widespread social change. Without government intervention, the free-rider problem will keep farms that utilise intensive production systems in business.

This article is therefore a defence of government regulatory intervention into the operations and production systems of suppliers of farm animal products. Only government regulation can provide a level of animal welfare protection that reflects society's actual values on the subject. Relying upon consumer demand to influence suppliers to improve their animal welfare standards will not achieve this, as it ignores the market, political and social considerations that influence an individual's purchasing decisions. Government regulatory intervention may take the form of legislation, such as prohibiting caged eggs, gestation crates and sow stalls, or through enforceable regulations. Alternatively, the government could tax suppliers that incur 'negative animal welfare externalities',[207] or provide subsidies to suppliers 'producing animal welfare goods, where those goods are not valued by the market'.[208] The precise level of animal welfare protections, however, is a matter for the 'democratic deliberative process'.[209]

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207 Bennett, 'The Value of Farm Animal Welfare', above n 69, 58; Norwood and Lusk, above n 9, 339, referred to these taxes as 'Pigouvian taxes'.

208 Bennett, 'The Value of Farm Animal Welfare', above n 69, 58; Norwood and Lusk, above n 9, 339.

209 See Harvey and Hubbard, above n 35, 107.