

**Ag-Gag Laws in Australia: Activists under Fire May Not Be out of the Woods Yet**

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# AG-GAG LAWS IN AUSTRALIA: ACTIVISTS UNDER FIRE MAY NOT BE OUT OF THE WOODS YET

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*This paper examines the potential impact of Australia's proposed 'ag-gag' laws in light of the decision of the High Court in ABC v Lenah Game Meats. It also explores the possible consequences of the (suggested) reforms on animal advocates, animal welfare, and our democratic and constitutional right to free political communication. The paper concludes that while the proposed laws may be unable to achieve their intended effect, they still present an inchoate threat to public debate and have the potential to undermine the democracy envisaged by the Australian Constitution.*

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## I INTRODUCTION

Unless someone like you cares a whole awful lot.

Nothing is going to get better. It's not.<sup>1</sup>

— Dr Seuss, *The Lorax*

This paper reviews Australia's proposed 'ag-gag' laws and their significance for Australian consumers, animal advocates, and the animals themselves. Ag-gag laws have been proposed and considered within 25 states of the United States of America and have entered into law in six of those states.<sup>2</sup> Ag-gag laws are laws which effectively 'gag' or reduce discussion of some of the more controversial aspects of animal agriculture and its practices. By preventing public oversight and criticism of factory farms and their practices, ag-gag laws can allow some of the more egregious forms of animal cruelty to continue. Evidence suggests that ag-gag laws have prevented external scrutiny and may contribute to reduced animal welfare under the guise of animal welfare protection.

Part I of this paper will commence with an introduction to animal law in Australia and considers and offers a concise comparison of the legislative approaches within each jurisdiction. The section concludes with a review of the defences and protections which apply to farm animals or livestock. Part II begins with a brief explanation of the proposed reforms. Part III considers these amendments in light of *ABC v Lenah Game Meats* ('*Lenah*').<sup>3</sup> Part IV presents a detailed analysis of the use and impact of visual records of animal cruelty within the context of increased consumer interest in the origins of their food. Part V provides a concise analysis of the use of these laws in other international jurisdictions. The paper concludes with the argument that not only are the proposed laws largely ineffective given the decision in *Lenah* but also that Australia's proposed ag-gag laws provide an unnecessary criminal sanction which disproportionately affects activists and whistle-blowers and has a chilling effect on free political communication regarding animal welfare concerns. Prevention of legitimate public discourse and debate over food production and the treatment of animals during the food production process may also undermine the democratic process.

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<sup>1</sup> Dr Seuss, *The Lorax* (Random house, United States, 1971).

<sup>2</sup> Daniel L Sternberg, 'Why Can't I Know How the Sausage is Made?: How Ag-Gag Statutes Threaten Animal Welfare Groups and the First Amendment' [2015] 13 *Cardozo Public Law, Policy and Ethics Journal* 625.

<sup>3</sup> *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] 208 CLR 199 ('*Lenah*').

## II WELFARE AND UTILITY

More than 90 per cent of Australian farm animals are now raised intensively in facilities commonly known as ‘factory farms’ which are also associated with systemic or institutionalised cruelty.<sup>4</sup>

— Jed Goodfellow

Each of Australia’s states and territories has enacted legislation intended to protect animals from cruelty, abuse, or unnecessary suffering while on Australian soil.<sup>5</sup> Academics such as White and Cao suggest that the language within the various pieces of legislation highlights the ‘animal welfare approach’ embraced in Australian law. This approach seeks to balance the pain and suffering animals experience with the utility of particular forms of treatment.<sup>6</sup> Presently, legislation in each jurisdiction remains focused on prevention and protection of mistreatment, abandonment, suffering, neglect, or cruelty. Queensland, Tasmania, and the Northern Territory have gone one step further by including additional provisions which impose a duty of care on those with the custody, control, or responsibility for these animals.<sup>7</sup>

Each Australian jurisdiction and its legislative instruments have one or more criminal offences for the abuse or mistreatment of animals.<sup>8</sup> The exemption and protection offered to those who engage in apparently cruel acts that comply with the relevant industrial code is another common feature of Australia’s anti-cruelty provisions. While Tasmanian legislation contains no such exemption,<sup>9</sup> the use of qualifying language, such

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<sup>4</sup> Jed Goodfellow, ‘Regulatory Capture and the Welfare of Farm Animals in Australia’ in Deborah Cao and Steven White (eds), *Animal Law and Welfare — International Perspectives* (Springer, 2016) 197–8.

<sup>5</sup> *Animal Welfare Act 1992* (ACT); *Prevention of Cruelty to Animals Act 1986* (Vic); *Prevention of Cruelty to Animals Act 1979* (NSW); *Animal Welfare Act 1999* (NT); *Animal Welfare Act 1985* (SA); *Animal Welfare Act 2002* (WA); *Animal Welfare Act 1993* (Tas); *Animal Care and Protection Act 2001* (Qld).

<sup>6</sup> Deborah Cao, Katrina Sharman and Steven White, ‘Animal Law in Australia’ (Thomson Reuters Australia, 2<sup>nd</sup> ed, 2015) 214.

<sup>7</sup> *Animal Care and Protection Act 2001* (Qld) s 17; *Animal Welfare Act 1993* (Tas) s 6; *Animal Welfare Act* (NT) s 8.

<sup>8</sup> See, eg, *Criminal Code Act 1899* (Qld) s 242, which states that ‘a person who, with the intention of inflicting sever pain or suffering, unlawfully kills, causes serious injury, or prolonged suffering to, an animal commits a crime’ and sets a maximum penalty of seven years imprisonment.

<sup>9</sup> Cao, Sharman and White, above n 6, 219.

as 'reasonable', 'unreasonable and unjustifiable', 'appropriate and sufficient',<sup>10</sup> adds a measure of subjectivity into any assessment of animal cruelty.<sup>11</sup>

The *Pigs: Model Code of Conduct for the Welfare of Animals* applies to the farming of pigs in Australia. It provides that male pigs over the age of 21 days must be castrated under anaesthesia and by a veterinary surgeon.<sup>12</sup> The Code also recommends that farmers castrate piglets while between two to seven days of age.<sup>13</sup> Castration occurs in the piglets' first week of life without any form of anaesthetic, and those carrying out the procedure (with or without training) are immune from prosecution.<sup>14</sup> Likewise, the *Australian Animal Welfare Standards and Guidelines for Cattle* endorse many apparently harsh protocols.<sup>15</sup> The *Standards* do not specify any minimum age when the calf can be removed from its mother,<sup>16</sup> requiring instead that they receive adequate colostrum within 12 hours of birth,<sup>17</sup> have high protein diets if weaned very early,<sup>18</sup> and have the company of other calves (according to size)<sup>19</sup> from three weeks of age.<sup>20</sup> Calves housed in individual pens must at least be able to see nearby calves.<sup>21</sup> The intention is to balance what is manageable or profitable for Australian farmers against what we can reasonably expect animals to endure. Activist groups seek to reveal the reality of factory farms and allow consumers to "vote with their dollar". Ag-gag laws, irrespective of state or country, reduce public access to the realities of factory farming and prevent consumers making an informed choice when it comes to the purchase of animal products.

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<sup>10</sup> *Animal Welfare Act 1993* (Tas) ss 6–7, 8(1), 8(2)(e), (g), 8(3), 11, cited in Cao, Sharman and White, above n 6, 214.

<sup>11</sup> *Ibid.*

<sup>12</sup> Primary Industries Standing Committee, *Pigs: Model Code of Conduct for the Welfare of Animals* (PISC Report No 32, 3<sup>rd</sup> ed, 2008) 5.6.2.

<sup>13</sup> *Ibid* 5.6.7.

<sup>14</sup> *Animal Welfare Act 1992* (ACT) s 20; *Prevention of Cruelty to Animals Act 1986* (Vic) s 6; *Prevention of Cruelty to Animals Act 1979* (NSW) s 6; *Animal Welfare Act 1999* (NT) s 79; *Animal Welfare Act 1985* (SA) s 43; *Animal Welfare Act 2002* (WA) s 25; *Animal Care and Protection Act 2001* (Qld) ss 38, 40.

<sup>15</sup> Animal Health Australia, *Australian Animal Welfare Standards and Guidelines for Cattle* (Australian Government Department of Agriculture, 1<sup>st</sup> ed, 2016).

<sup>16</sup> *Ibid* G 8.

<sup>17</sup> *Ibid* G 8.1.

<sup>18</sup> *Ibid* G 8.15.

<sup>19</sup> *Ibid* G 8.5.

<sup>20</sup> *Ibid* G 8.7.

<sup>21</sup> *Ibid* G 8.6.

## III THE CRIMINAL CODE AMENDMENT (ANIMAL PROTECTION) BILL 2015

I reject the argument that circumstances may favour a case in which someone may want to accumulate a number of incidences of alleged malicious cruelty before drawing this to the attention of authorities.<sup>22</sup>

— Senator Chris Back

In February 2015, (then) Senator Chris Back presented the Criminal Code Amendment (Animal Protection) Bill ('the Bill') to the Australian Senate for its first reading.<sup>23</sup> The Bill proposed that it could improve animal welfare by ensuring that any recordings of malicious cruelty or abuse of animals were reported to authorities immediately. By bringing valuable evidence to the attention of the authorities, this could lead to investigations that may in turn lead to the cessation of the allegedly cruel or inhumane acts. Involving police and regulatory authorities earlier could, therefore, facilitate immediate action.<sup>24</sup> In addition, the highly controversial Bill would create new animal cruelty offences that impose a positive duty to report on anyone who filmed or recorded instances of animal cruelty.<sup>25</sup> The Bill would also criminalise many of the methods by which activists obtain footage of animal abuse and proposes severe penalties for any activities or conduct which causes a person associated with animal agriculture to fear death or serious injury as a result of the actions of trespassers — regardless of activist's motivation or concern for the animals housed within the facility.<sup>26</sup>

Division 383 of the Bill — 'Failing to report malicious cruelty to animals after recording it' — would create a criminal offence where a person makes a record of what they believe to be an act of malicious cruelty,<sup>27</sup> does not report the acts to an authority within one business day,<sup>28</sup> and/or fails to give the record to an authority within five business days.<sup>29</sup> In addition, division 383 would reverse the onus of proof for this offence — requiring the defendant to prove they have reported the cruelty as required by the proposed reforms

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<sup>22</sup> Commonwealth, *Parliamentary Debates*, Senate, 11 February 2015, 482 (Chris Back).

<sup>23</sup> Criminal Code Amendment (Animal Protection) Bill 2015 (Cth).

<sup>24</sup> Commonwealth, *Parliamentary Debates*, above n 22, 481 (Chris Back).

<sup>25</sup> The Senate Inquiry into the Bill received 1671 written submissions as well as multiple form letters from the public: Rural and Regional Affairs and Transport Legislation Committee, Parliament of Australia, *Criminal Code Amendment (Animal Protection) Bill (2015) 1.4*.

<sup>26</sup> Criminal Code Amendment (Animal Protection) Bill 2015 (Cth) div 385.

<sup>27</sup> *Ibid* s 383.5(1)(a)-(b).

<sup>28</sup> *Ibid* s 383.5(1)(c)(i).

<sup>29</sup> *Ibid* s 383.5(1)(c)(ii).

— yet the division fails to define who the relevant authorities are.<sup>30</sup> The Rural and Regional Affairs and Transport Legislation Committee Inquiry ('the Inquiry') into the Bill questioned the appropriateness of this aspect of the legislation.<sup>31</sup> The Inquiry requested an explanation from Senator Back as to why this aspect of the proposed legislation had not been more clearly defined and recommended that the reporting requirement of one day be amended to require that instances of animal cruelty are, instead, reported 'as soon as practicable'.<sup>32</sup> According to the *Guide to Framing Offences*, the burden of proof should only be reversed where the justification meets the requirements of section 28 of the *Human Rights Act 2004* (Cth) and amounts to a limitation of human rights.<sup>33</sup> Any limitation on human rights must be reasonable and 'set by laws that can be demonstrably justified in a free and democratic society'.<sup>34</sup>

The most troubling aspect of the Bill is perhaps the potential for the prosecution of animal activists under animal cruelty provisions. The rapid-reporting requirement potentially runs contrary to public policy by preventing the chronicling of abuse or the collation of sufficient evidence required to prove institutionalised, rather than ad hoc or isolated, cruelty. As a consequence, individual workers are charged with specific instances of animal abuse while companies that rely on, dismiss, or encourage inhumane practices cannot be prosecuted.<sup>35</sup> "Trojan horse" legislation, such as the New South Wales *Biosecurity Act*,<sup>36</sup> also include similar provisions which provide advanced warning for abusers and their employers before any serious action can be brought.<sup>37</sup> Greater transparency within these industries and adequate government oversight would remove the need for covert surveillance and filming operations.<sup>38</sup> However, rather than increasing accountability and conditions for farm animals and condemning the institutions responsible for these acts, rapid reporting requirements place the burden of proof on animal activists who seek to expose systematic, cruel, and illegal practices.<sup>39</sup> The

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<sup>30</sup> Ibid s 383.5(3).

<sup>31</sup> Rural and Regional Affairs and Transport Legislation Committee, above n 25, 2.20.

<sup>32</sup> Rural and Regional Affairs and Transport Legislation Committee, above n 25, 3.36.

<sup>33</sup> Department of Justice and Community Safety, *Guide for Framing Offences* (2<sup>nd</sup> version, April 2010) 1.

<sup>34</sup> *Human Rights Act 2004* (Cth).

<sup>35</sup> Matthew Shea, 'Punishing Animal Rights Activists for Animal Abuse: Rapid Reporting and the New Wave of Ag-Gag Laws' [2015] 48(3) *Columbia Journal of Law and Social Problems* 337, 364.

<sup>36</sup> *Biosecurity Act 2015 No 24* (NSW) ss 38–40.

<sup>37</sup> Ibid 368.

<sup>38</sup> Will Potter, 'Ag-Gag Laws: Corporate Attempts to Keep Consumers in the Dark' (2017) 5(1) *Griffith Journal of Law and Human Dignity* 1, 10.

<sup>39</sup> Ibid 1.

castration of piglets under a week of age and the removal of calves from their mothers are merely two examples of systematic practices that, if publicised, are likely to draw public censure while remaining legal according to the relevant codes of agricultural practice.<sup>40</sup> An important way to help reduce these practices is by exposing them to the public. Informed consumers may then choose to abstain from products which they deem to be cruel, enabling them to vote with their dollar for produce or producers that align with their personal beliefs.<sup>41</sup> Cases such as the *ACCC v Pirovic Enterprises Pty Ltd (No 2)*,<sup>42</sup> *ACCC v C I & Co Pty Ltd & Anors*,<sup>43</sup> *ACCC v Rosemary Bruhn*,<sup>44</sup> and *ACCC v Luv-a-Duck Pty Ltd*,<sup>45</sup> show that misrepresentation is common and that many animal products are not obtained or produced in ethical and/or free-range conditions despite advertising to the contrary. It is difficult to predict how many cases of misrepresentation would remain unknown without the intervention of animal activists and their subsequent exposure to the public.<sup>46</sup> It is the public outcry generated by these exposés that precipitate change. The Bill is designed to ‘enhance the protection of domestic animals’ by ensuring investigation occurs as early as possible and considers any delays in reporting to be ‘unacceptable’ but rejects arguments that prosecution may be better served by accumulating evidence of repeated offences.<sup>47</sup> It therefore remains unclear whether these proposed reforms could be appropriately adapted to meet the objectives as set out by Senator Back. It remains similarly unclear whether the proposed section 383.20 further reduces the value of any such amendment.

Section 383.20 would limit the application of division 383 ‘to the extent (if any) that it would ... infringe any constitutional doctrine of implied freedom of political communication’.<sup>48</sup> This matter was considered in depth in *ABC v Lenah Game Meats*.<sup>49</sup> In

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<sup>40</sup> See, eg, *Animal Care and Protection Act 2001* (Qld) s 41, which provides a defence for unnecessarily painful methods of animal processing provided that they comply with the relevant agricultural code.

<sup>41</sup> Zak Franklin, ‘Giving Slaughterhouses Glass walls: A New Direction in Food Labelling and Animal Welfare’ (2015) 21 *Animal Law* 285, 302.

<sup>42</sup> See *ACCC v Pirovic Enterprises Pty Ltd (No 2)* [2014] FCA 1028 regarding free-range eggs.

<sup>43</sup> See *ACCC v C I & Co Pty Ltd & Anors* [2010] FCA 1511 regarding the misleading labelling of eggs as ‘free-range’.

<sup>44</sup> See also *ACCC v Rosemary Bruhn* [2012] FCA 959 regarding the misrepresentation of cage eggs as free-range eggs.

<sup>45</sup> See *ACCC v Luv-a-Duck Pty Ltd* [2013] FCA 1136 regarding duck meat sold as free-range.

<sup>46</sup> See, eg, *Australian Competition and Consumer Commission v Pepe’s Ducks Ltd* [2013] FCA 570; *Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 5)* [2013] FCA 1109.

<sup>47</sup> Commonwealth, *Parliamentary Debates*, above n 22, 481–2 (Chris Back).

<sup>48</sup> Criminal Code Amendment (Animal Protection) Bill 2015 (Cth) pt 9.7 div 383 s 320.20(1)(a).

<sup>49</sup> [2001] 208 CLR 199.

this case, the ABC had obtained illegally secured surveillance footage from a Tasmanian possum processing plant that showed the (sometimes failed) stunning and slaughtering practices within the plant. The graphic footage was passed on to members of the animal rights group, Animal Liberation Ltd. The High Court was asked to consider whether the grant of an interlocutory injunction, which would prevent the publication of this material by ABC, was justifiable under legal or equitable causes. The High Court also considered whether illegally obtained footage should be subjected to any greater constraints on publication than that which has been obtained by legal means.<sup>50</sup> The High Court held, by a 6:1 majority, that the power to grant an interlocutory injunction would not be properly exercised if it operated in a way which prevented free and open debate in areas of legitimate public concern.<sup>51</sup> Other key aspects of this decision will be examined in more detail in Part III of this paper.

In addition, the Bill also creates division 385 — the offence of ‘interfering with the carrying on of animal enterprises’.<sup>52</sup> This relates to any conduct which destroys or damages property,<sup>53</sup> which is used in the carrying on of an animal enterprise,<sup>54</sup> belongs to a person who carries on an animal enterprise,<sup>55</sup> or belongs to a person ‘otherwise connected with, or related to, an animal enterprise’,<sup>56</sup> where that person ‘intends for their conduct to interfere with the carrying on of that enterprise’.<sup>57</sup> Penalties range from one year’s imprisonment to 20 years, or even life imprisonment.<sup>58</sup> This punishment is extremely disproportionate when one considers the broad array of actions that may qualify for prosecution under this section. Within Queensland, minor infractions such as the slashing of tyres on a delivery vehicle used to transport high-grade meat from farms to wholesalers could be held to be in contravention of this division, with penalties of up to 5 years where economic damages exceed \$10 000.<sup>59</sup> The unlawful killing of an animal

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<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid* [217].

<sup>52</sup> Criminal Code Amendment (Animal Protection) Bill 2015 (Cth) div 385.

<sup>53</sup> *Ibid* s 385.5(1)(a).

<sup>54</sup> *Ibid* s 385.5(1)(a)(i).

<sup>55</sup> *Ibid* s 385.5(1)(a)(ii).

<sup>56</sup> *Ibid* s 385.5(1)(a)(iii).

<sup>57</sup> *Ibid* s 385.5(1)(b).

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid* ss 385.5, 385.20(1).

(in the absence of a defence under the relevant agricultural codes)<sup>60</sup> has a maximum penalty of seven years.<sup>61</sup>

The proposed offences are set out in divisions 383 and 385 of the Bill and would be incorporated into the Commonwealth *Criminal Code Act* should both Houses of Parliament pass the Bill. At this stage, the Bill has been restored to the status of 'Notice Paper' for reconsideration at an, as yet, undetermined date by the 44<sup>th</sup> Parliament.<sup>62</sup> Senator Chris Back resigned from his position in the Senate on 31 July 2017.<sup>63</sup> As a result, the Bill's future remains unclear. Its impact also remains uncertain given the ruling of the High Court in *Lenah*.<sup>64</sup> In the meantime, the *Biosecurity Act 2015 No 24* (NSW) ('the Act') entered into force on 14 October 2017. The Act is designed to minimise biosecurity risks and thereby protect animals and humans against biological disease. However, much like the Criminal Code Amendment (Animal Protection) Bill, the Act contains provisions that could be used to target traditional methods of animal activism — particularly those related to covert surveillance of animal processing facilities — and, once again, creates unnecessarily broad offences such as a 'biosecurity duty'.<sup>65</sup> The Act requires '[a]ny person who deals with biosecurity matter or a carrier' to ensure that any risk, whether real or potential, is 'prevented, eliminated or minimised'.<sup>66</sup> A person who intentionally fails to meet this duty — such as animal activists installing potential 'carriers' such as surveillance equipment or the activists themselves — are guilty of an offence which continues 'for each day that the failure continues' or remains unreported.<sup>67</sup> The Act also creates an offence related to the inciting of others to create an offence and may leave those indirectly involved in animal activism liable for the same criminal penalties as those involved in the commission of a biosecurity offence.<sup>68</sup> Perhaps more troubling are the powers of search and seizure granted by section 98 of the Act which allows for the entry of 'commercial premises' — by force, if necessary, and without a warrant — during which time any materials believed to be connected to the commission of an offence may be

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<sup>60</sup> See *Animal Care and Protection Act 2001* (Qld) s 41.

<sup>61</sup> *Criminal Code Act 1899* (Qld) s 468(2).

<sup>62</sup> Commonwealth, *Parliamentary Debates*, Senate, 31 August 2016, 254 (Chris Back).

<sup>63</sup> Parliament of Australia, *Former Senator Chris Back*

<[http://www.aph.gov.au/Senators\\_and\\_Members/Parliamentarian?MPID=J7Q](http://www.aph.gov.au/Senators_and_Members/Parliamentarian?MPID=J7Q)>.

<sup>64</sup> [2001] 208 CLR 199.

<sup>65</sup> *Biosecurity Act 2015 No 24* (NSW) s 22.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid* s 2.

<sup>68</sup> *Ibid* ss 279–280, 307(b).

seized.<sup>69</sup> Interestingly, and perhaps somewhat ironically, these powers also extend to the installation of surveillance materials necessary to ‘captur[e] any biosecurity matter or thing’.<sup>70</sup> This is an interesting contradiction given the agricultural industry’s continued opposition to any form of covert surveillance within its premises as highlighted in *ABC v Lenah Game Meats*.<sup>71</sup>

#### IV *LENAH GAME MEATS* AND THE PROPOSED ‘AG-GAG’ REFORMS

No such rules or practice may burden freedom of communication of the specified kind unless the burden or practice is proportionate to, and compatible with, the Constitution.<sup>72</sup>

— Kirby J, *ABC v Lenah Game Meats*

There are several key aspects of the *Lenah* decision that are relevant to the implementation of the proposed ag-gag reforms. The decision offered clarity as to whether any real “right” to privacy existed within Australia as well as offering guidance on the limits of our implied constitutional right to free speech. The decision also confirmed that animal welfare was a federal concern and a legitimate area of public interest.<sup>73</sup>

In holding that no enforceable right to privacy existed within Australia,<sup>74</sup> the court also held that any such right would not extend to corporations and confirmed that the mere fact that an Act took place on private property, did not make the activity private in nature.<sup>75</sup> Furthermore, the court held that illegally obtained material should not be prevented from publication by a law-abiding possessor of that information and that statutory sanctions against the trespasser are a more appropriate means of deterrence (than the prohibition of publication by the lawful possessor of that footage).<sup>76</sup> Chief Justice Gleeson also acknowledged that the expansion of these sanctions might be

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<sup>69</sup> *Ibid* s 102.

<sup>70</sup> sub-ss 102 (j)-(k).

<sup>71</sup> [2001] 208 CLR 199.

<sup>72</sup> *Ibid* [194].

<sup>73</sup> *Ibid* [217], [220].

<sup>74</sup> *Ibid* [187].

<sup>75</sup> *Ibid* [43], [116], [190], [279].

<sup>76</sup> *Ibid* [48] (Gleeson CJ).

necessary where actions such as unlawful trespass were not adequately deterred by the current statutory framework.<sup>77</sup>

On face value, Gleeson CJ's position may appear compatible with the new criminal sanctions proposed by the Bill. However, this may not be the case. The High Court made several comments that suggest they would not support any laws which would have a chilling effect on political and democratic debate. Such laws would have a restrictive or inhibitory effect on 'the operation of the representative democracy ... envisaged by the constitution'.<sup>78</sup> While such measures may be justified against matters of general public concern to prevent serious personal denigration or humiliation,<sup>79</sup> many advances in animal welfare would not have occurred without public debate and political pressure from special interest groups that have caused a public outcry.<sup>80</sup> The fact that the proposed reforms target recorded footage of animal cruelty may also be particularly problematic. The High Court has also acknowledged the importance of television (and presumably other visual media) for raising public awareness.<sup>81</sup> Without visual footage, these stories may go unreported, and without this media attention, the level of political debate may be compromised and opportunities for nationwide discussion reduced.<sup>82</sup> Section 383.20 of the Bill would also require the 'failure to report' offence to apply only where it does not 'infringe any constitutional doctrine of implied freedom of political communication',<sup>83</sup> thereby raising a legitimate question as to the actual utility of these laws. Perhaps the greatest impact of the Bill would be on 'open rescues' where activists choose not to conceal their identities when 'rescuing' animals from private property.<sup>84</sup>

It is important to note that Lenah Game Meats argued that the footage would have caused economic harm and a public backlash against otherwise legitimate slaughtering practices which were 'no different from any other animal slaughtering operation in Australia'.<sup>85</sup> While a reasonable argument, Gummow and Hayne JJ noted the tendency of many

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<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid* [217].

<sup>79</sup> *Ibid* [219].

<sup>80</sup> *Ibid* [217].

<sup>81</sup> *Ibid* [195].

<sup>82</sup> *Ibid* [197].

<sup>83</sup> Criminal Code Amendment (Animal Protection) Bill 2015 (Cth) s 383.20(1)(a).

<sup>84</sup> Potter, above n 38, 17.

<sup>85</sup> [2001] 208 CLR 199, [79].

commercial enterprises to sustain economic harm as a result of lawful competition.<sup>86</sup> To argue that, on these grounds, Lenah Game Meats qualified for injunctive relief required an ‘indulgence of idiosyncratic notions of what is fair in the market place’.<sup>87</sup> These arguments weighed the individual’s legitimate expectation of privacy against the public interest in free political communication.<sup>88</sup> Nonetheless, it appears that the proposed legislation (at least indirectly) contradicts the principles espoused by the High Court in *Lenah*. Interestingly, experiences in other jurisdictions where similar laws have been implemented suggest that public pressure may also have impacted the efficacy of these laws. This will be discussed further in Part V; however, before we examine the effect of these laws in the United States, we will first examine the importance of visual imagery as a means to promote and create change.

#### V THE IMPORTANCE OF IMAGERY

What we witness inside animal agriculture is beyond comprehension ... The public would not believe us, if we were not able to bring out the video and photographs of the extreme torture, humiliation, deprivation, terror, and pain the animals suffer endlessly in their incarceration.<sup>89</sup>

— Patty Mark, Animal Liberation Victoria

The importance of imagery in exposing the cruelty endemic in some of the world’s animal processing plants cannot be understated. Viewers consider it more persuasive than partisan or ‘preachy’ footage.<sup>90</sup> Exposure to these images can influence the viewer’s behaviour and help promote social change.<sup>91</sup> The effect is especially profound where consumers are faced with the disconnect between the idealised imagery of farming and the realities of agriculture. When this occurs, the public outcry can be loud, and the demand for change can have lasting results.<sup>92</sup>

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<sup>86</sup> Ibid [80].

<sup>87</sup> Ibid.

<sup>88</sup> Which, of course, does not extend to corporations: *Lenah* [2001] 208 CLR 199, [279].

<sup>89</sup> Potter, above n 38, 20, citing YouTube, *Patty Mark — President of Animal Liberation Victoria* (21 June 2010) <<https://www.youtube.com/watch?v=49G4luRsOmo>>.

<sup>90</sup> Lara Newman, ‘The Effects of The Cove and Bold Native on Audience Attitudes towards Animals’ (2015) 4(1) *Animal Studies Journal* 77, 85.

<sup>91</sup> Ibid 81.

<sup>92</sup> Potter, above n 38, 6.

In February 2015, the news program 'Four Corners' aired an exposé on the practice of 'live baiting' within the greyhound racing industry.<sup>93</sup> The response from the public, authorities, and regulators was swift. Police and RSPCA officers raided greyhound facilities, trainers were banned for life and charged with cruelty, and inquiries were launched in New South Wales, Victoria, South Australia, and Western Australia while sponsors withdrew their support from the support.<sup>94</sup>

At the time of this piece's publication, Animals Australia and Change.org have mounted campaigns to ban the live export of sheep from Australia. Footage shows sheep drowning in a 'deadly soup' of 'untreated waste' and being 'cooked alive'.<sup>95</sup>

Traditional and social media exposure raises public awareness and places important pressure on government and regulatory bodies to address these issues. Where this approach fails, public petitions can force public votes or legislative review of problematic practices that are, otherwise, legally conducted,<sup>96</sup> albeit at the animal's expense.<sup>97</sup> The involvement of select celebrities or their endorsement also has an important 'halo effect' which gives additional media coverage to less popular animal welfare concerns and helps to keep the issue within the media spotlight.<sup>98</sup>

'Moralisation' is a crucial component of social and ideological change. Moralisation normally involves two strategies: one which is related to the provision of information and evidence about abusive practices, while the other provides visual or emotional appeals to the conscience of society.<sup>99</sup> 'Moral shocks' are another catalyst for change and occur when 'information raises such a sense of public outrage in a person that she becomes inclined toward political action ... and may also come from new information about something [which exists already but] has already done unseen damage'.<sup>100</sup> The response

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<sup>93</sup> Four Corners, *Making a Killing* (16 February 2015) ABC News <<http://www.abc.net.au/4corners/making-a-killing/6127124>>.

<sup>94</sup> Animals Australia, *11 Ways You Helped Achieve Justice for Greyhound Racing Victims* (4 July 2017) Animals Australia <<http://www.animalsaustralia.org/features/live-baiting-investigation-outcomes.php>>.

<sup>95</sup> Animals Australia, *Animals Don't Belong Here*, Animals Australia <[https://secure.animalsaustralia.org/take\\_action/live-export-shipboard-cruelty/?ua\\_s=HPH](https://secure.animalsaustralia.org/take_action/live-export-shipboard-cruelty/?ua_s=HPH)>.

<sup>96</sup> *Ibid* 7.

<sup>97</sup> Franklin, above n 41, 325.

<sup>98</sup> Brian M Lowe, 'Spectacular Animal Law: Imagery, Morality, and Narratives Impacting Legal Outcomes for Nonhuman Animals' (2016) 9 *Albany Government Law Review* 48, 101.

<sup>99</sup> *Ibid* 72.

<sup>100</sup> James M Jasper, 'The Emotions of Protest: Affective and Reactive Emotions In and Around Social Movements' (1998) 13(3) *Sociological Forum* 397, 409.

to confronting footage of animal suffering is often visceral and relies heavily on arresting imagery.<sup>101</sup> Animal rights protestors often cite their own exposure to these types of images as a significant contributor in their move towards animal activism.<sup>102</sup>

A key part of the public response to reports of animal cruelty is the creation of moral shocks or outrage. Activists then help direct public action toward the authorities and institutions that permit or ignore cruel practices and use this public support to lobby decision-makers for change.<sup>103</sup> The injustice inherent in the mistreatment of animals is a particularly powerful means by which activists promote public anger and translate that anger into a demand for government to find a solution to the problem.<sup>104</sup> Factory farming conditions create abnormal behaviours within species of animals that require human intervention and often inhumane practices to mitigate the suffering of the animals. Pig cannibalism is one example of an aberrant behaviour exhibited by animals in factory farming scenarios. In pigs, cannibalism is a manifestation of the animal's frustration at not being able to engage in its 'natural foraging and exploratory instincts'.<sup>105</sup> To prevent pig cannibalism, the pigs' tails are docked. The result is a tail 'stump' so sensitive and painful that the pig will quickly escape if another pig bites its tail.<sup>106</sup> The procedure is therefore considered 'protective' or 'preventative' and therefore in compliance with *Pigs: Model Code of Conduct for the Welfare of Animals*.<sup>107</sup> Otherwise, tail-docking is likely to be held to be an act of animal cruelty within the relevant jurisdiction.<sup>108</sup> If the Bill were to pass through the Australian Senate, the reality of factory farming and their impact on species such as pigs would remain unknown by members of the general public.

Major world-wide conglomerates such as McDonalds and Walmart also recognised the increasing public interest in the origin of their food and have committed to making their food practices more transparent to consumers.<sup>109</sup> Transparency can be of particular

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<sup>101</sup> Ibid.

<sup>102</sup> James M Jasper and Jane D Poulsen, 'Recruiting Strangers and Friends: Moral Shocks and Social Networks in Animal Rights and Anti-Nuclear Protests' (1995) 42(4) *Social Problems* 493, 506.

<sup>103</sup> Jasper, above n 107, 409.

<sup>104</sup> Ibid 412-3.

<sup>105</sup> Franklin, above n 41, 326.

<sup>106</sup> Ibid 326.

<sup>107</sup> Primary Industries Standing Committee, above n 12, 5.6.8-5.6.10.

<sup>108</sup> Ibid 5.6.8-5.6.9 states that the practice of docking should 'be avoided wherever possible' and that 'all aspects of the environment, feeding and management should be investigated ... so that remedial action can be taken'.

<sup>109</sup> Nicole E Negowetti, 'Opening the Barnyard Door: Transparency and the Resurgence of Ag-Gag & Veggie Libel Laws' [2015] 38 *Seattle University Law Review* 1345, 1390.

importance for religious, political, family, co-operative, economic, environmental, and health-related reasons.<sup>110</sup> Concerns for animal welfare have begun to have a significant impact on consumer spending, but consumers are often lulled into a false sense of security and the belief that animals live acceptable lives up until the point of slaughter.<sup>111</sup> Laws that inhibit the activities of animal activists and thereby prevent the raising of public awareness as to the plight of these animals indirectly allow producers to continue their misrepresentation of the animals' living conditions.<sup>112</sup> Greater transparency would allow consumers to 'harmonise their purchases and moral preferences'.<sup>113</sup> Some suspect that the lack of transparency is a means for the deliberate concealment of inhumane or unjustifiable cruelty. The backlash against animal producers is not limited to those engaging in cruel or inhumane practices, with informal polls suggesting that up to 63 per cent of American farmers claim these laws have a detrimental effect on public relations by implying that these producers 'have something to hide'.<sup>114</sup>

Virilio believes we are in the presence of a 'tangible appearances business' that may well be [a] form of pernicious *industrialisation of vision*'.<sup>115</sup> According to Virilio, even war does not exist without representation.<sup>116</sup> In the mind of the public, unseen atrocities do not exist. Herman and Chomsky have referred to this as a 'filtering of news by mass media' and have noted that this filtering favours the interests of media owners and their affiliates and therefore serves to conceal information that would otherwise be harmful to these actors.<sup>117</sup> Ag-gag laws that limit the exposure of animal cruelty and reduce the opportunity for public debate have a similar 'filtering' effect.

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<sup>110</sup> Ronald K L Collins, 'Free Speech, Food Libel, and the First Amendment ... in Ohio' (2000) 26(1) *Ohio Northern University Law Review* 1, 7, cited in Negowetti, above n 109, 1384.

<sup>111</sup> Franklin, above n 41, 294.

<sup>112</sup> *Ibid* 327.

<sup>113</sup> *Ibid* 328.

<sup>114</sup> Negowetti, above n 109, 1389.

<sup>115</sup> Lowe, above n 98, 64 (emphasis in original).

<sup>116</sup> *Ibid* 63.

<sup>117</sup> *Ibid* 78, citing Edward Herman and Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (Pantheon Books, 2<sup>nd</sup> ed, 2002) xix, xlii.

## VI CONSIDERATION OF AG-GAG LAWS AND THEIR IMPLEMENTATION IN THE UNITED STATES

Rather than condemn these abuses, change their policies, and respond to consumer demand, the agriculture industry has responded by attempting to shoot the messenger.<sup>118</sup>

— Will Potter

Some refer to the American ag-gag laws as having occurred in three waves.<sup>119</sup> The first wave expanded trespass protections and prevented unauthorised recording in states such as Minnesota, Kansas, and North Dakota.<sup>120</sup> The second wave expanded these laws again to include ‘agricultural production facility fraud’ and specifically targets activists obtaining footage of animal welfare violations by masquerading as an employee of the facility.<sup>121</sup> These laws have been implemented in both Iowa and Utah, with Iowa also allowing for third party, and therefore journalistic, liability for illegally obtained footage.<sup>122</sup> The third wave of ag-gag laws added rapid reporting requirements such as those proposed by Australia’s own Criminal Code Amendment (Animal Protection) Bill 2015.<sup>123</sup> Many states proposed these laws, but the majority failed to pass — only Missouri succeeded.<sup>124</sup>

Despite the more troubling aspects of these laws, they may have a more limited effect than intended. The rapid reporting requirements led to charges against Americans, Amy Meyer and Taylor Radig, who filmed footage of animal cruelty and released it to the public.<sup>125</sup> The women were both prosecuted for animal cruelty offences, and in both instances, public outcry led to the charges being dropped. In addition, these laws duplicate existing protections already in place and offer remedies (in the form of damages) to those who suffer economic loss due to the actions of animal advocates. Many

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<sup>118</sup> Potter, above n 38, 1.

<sup>119</sup> See, eg, Sternberg, above n 2; Franklin, above n 41; Shea, above n 35.

<sup>120</sup> Sternberg, above n 2, 628.

<sup>121</sup> Ibid 632; An important aspect of these laws is that the perpetrator has claimed to be a legitimate job applicant and employee, while their motivation is based solely on their interest in obtaining incriminating footage.

<sup>122</sup> Ibid 634.

<sup>123</sup> Jacob Coleman, ‘ALDF v Otter: What Does It Mean for Other State’s “Ag-gag” Laws?’ (2017) 13 *Journal of Food Law and Policy* 198, 1388; Potter, above n 38, 15.

<sup>124</sup> Coleman, above n 123, 1388.

<sup>125</sup> Potter, above n 38, 20–21.

commentators question the need for further criminal sanctions.<sup>126</sup> 'By prohibiting the recording of ... agricultural operations' these laws also inhibit constitutional free speech and as a consequence have been ruled as unconstitutional by a Utah court.<sup>127</sup> According to Negowetti, 'these laws have only one purpose: to hide factory farming conditions from a public that is beginning to think seriously about animal rights and the way food is produced.'<sup>128</sup>

## VII CONCLUSION

What at first sight might appear to be exclusively an animal abuse issue is, on closer inspection, clearly also a freedom of expression issue, a worker's rights issue, an environmental issue and a public health issue.<sup>129</sup>

— Amnesty International

While Queensland may have dodged ag-gag laws at present, Trojan horse legislation, such as the *NSW Biosecurity Act* and the *Surveillance Devices Act 2016 (SA)*,<sup>130</sup> and the continuing push for an Australian right to privacy have the potential to deter and reduce the activities of animal activists. The consequent inhibition of free speech or political communication raises significant questions about the ever-increasing commodification of animals and their entitlement to live free from fear, distress, pain, injury, disease, discomfort, thirst, and hunger and to enjoy the natural behaviours of their species.<sup>131</sup> While international consumers have increasingly begun to exhibit a real interest in improving the lives of the animals involved in the production of our food, ag-gag laws in Australia and overseas pose a significant threat to the transparency relied on by consumers who seek to make informed purchases based on their own moral beliefs. These laws offer no additional benefit to legitimate and humane agricultural producers beyond those protections already in place. The only additional benefit comes from the

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<sup>126</sup> Voiceless, Submission No 56 to the Senate Rural and Regional Affairs and Transport Legislation Committee, *Inquiry into the Criminal Code Amendment (Animal Protection) Bill 2015*, 10 March 2015, 5 [3].

<sup>127</sup> Complaint at 19, *Animal Legal Defense Fund v Herbert*, No 2:13-CV-00679 (D Utah, 22 July 2013), ECF No 2, 36.

<sup>128</sup> Negowetti, above n 109, 1347.

<sup>129</sup> Vienna Colucci, 'Amnesty Makes It 60' on *Amnesty International USA* (24 May 2013) <<http://blog.amnestyusa.org/us/amnesty-makes-it-60/>>, cited in Potter, above n 38, 21.

<sup>130</sup> *Biosecurity Act 2015 No 24* (NSW); *Surveillance Devices Act 2016* (SA) (came into force on 18 December 2017).

<sup>131</sup> *Animal Care and Protection Act 2001* (Qld) s 17.

laws' potential to silence animal activists and chill political communication and debate regarding animal welfare. Experience within the United States suggests that these laws can and will be used to stifle the actions of those who seek to open the barnyard door and promote public awareness about the realities of animal agriculture and leave individual workers to face criminal penalties while the corporations that allow or encourage them to escape unscathed.<sup>132</sup> Such fetters on political free speech strike at the very core of democracy envisioned by the Australian Constitution and are contrary to interests of the Australian public and Australian livestock. It appears the animals and their activists may not be out of the woods yet.

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<sup>132</sup> See, eg, Vandhana Bala, *Yet Another Butterball Turkey Employee Convicted of Cruelty to Animals* (4 April 2013) Mercy for Animals <<http://www.mercyforanimals.org/breaking-news-yet-another-butterball-turkey-employee-convicted-of-cruelty-to-animals>>: The Butterball turkey controversy in the United States where multiple employees have been charged with animal cruelty and yet no charges have been laid against the company itself.

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