

REPUTATION, REGULATORY CAPTURE,
AND REFORM: THE CASE OF NEW ZEALAND'S
BOBBY CALVES

By
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In 2015, two animal rights organizations in New Zealand released undercover footage exposing widespread cruelty to some of the country's most vulnerable, and invisible, farm animals: young male calves born into the dairy industry. The footage shocked the New Zealand public. In order to put pressure on the government to adopt meaningful reforms for the protection of these animals, an animal rights organization, Save Animals From Exploitation, placed advertisements in The Guardian highlighting the cruelty in the New Zealand dairy industry. The resulting publicity led to an unprecedented response from the regulating agency, the Ministry for Primary Industries, which swiftly promulgated new regulations governing the treatment of young calves in New Zealand.

This Article analyzes the impact of the regulatory reforms introduced. It then uses the reforms as a case study to determine the principal drivers of animal law reform in New Zealand. This Article argues that the most influential force that shaped the Ministry's response to the undercover investigations was a desire, prompted by The Guardian advertisements, to protect New Zealand's international reputation as an ethical producer of animal products. This Article then explores the implications of these findings for the future of animal welfare activism and reform in New Zealand.

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I. INTRODUCTION

The dairy industry in New Zealand is, for many, a source of national pride.¹ This country of 4.8 million people has more dairy cows than people, and until 2017, the industry was New Zealand's largest export earner.² Internationally, the country is considered a global leader in the dairy trade, exporting its products to more than 140 countries³ and accounting for approximately 35% of world trade in dairy products.⁴

In 2015, two animal rights organizations in New Zealand, Farmwatch and Save Animals From Exploitation (SAFE), released undercover footage exposing cruelty to young male calves born into the dairy industry, only a few days old, prior to being picked up for slaugh-

¹ There has, however, been an increase in criticism in recent years of the negative environmental impact dairy farming is having in New Zealand. See, e.g., Gerard Hutching, *Milking It: The True Cost of Dairy on the Environment*, STUFF (Aug. 25, 2018, 05:00), <https://www.stuff.co.nz/business/farming/106546688/milking-it-the-true-cost-of-dairy-on-the-environment> [<https://perma.cc/Y8S3-2L36>] (accessed May 26, 2020) (stating that New Zealand is known for its dairy products and is home to one of the biggest dairy companies in the world).

² In 2017, tourism overtook dairy products as New Zealand's largest export earner. Grant Bradley, *Tourism Roars Past Dairy as N.Z.'s Biggest Export Earner*, N.Z. HERALD (Apr. 30, 2017), http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11847120 [<https://perma.cc/XNU2-US3N>] (accessed May 26, 2020); see also Rob Cook, *World Cattle Inventory vs. Human Population*, BEEF2LIVE (Jan. 24, 2020), <https://beef2live.com/story-world-cattle-inventory-vs-human-population-country-0-111575> [<https://perma.cc/7P2Z-E2RT>] (accessed May 26, 2020) (stating New Zealand is one of five countries that has more cows than people).

³ *Our Markets*, FONTERRA, <https://www.fonterra.com/nz/en/about/our-markets.html> [<https://perma.cc/P846-U2Y7>] (accessed May 26, 2020).

⁴ *New Zealand Dairy Fast Facts*, N.Z. DAIRY CAREERS, <http://www.nzdairy careers.co.nz/dairy-facts.html> [<https://perma.cc/GGR6-TP2V>] (accessed May 26, 2020).

ter.⁵ Taken at farms throughout the country, the footage showed young calves expressing distress as they were separated from their mothers, left for hours unattended in the heat, and thrown into trucks “like sacks of potatoes.”⁶ The footage also showed calves being forcibly thrown, kicked, dragged along the ground, and bludgeoned to death at a slaughterhouse.⁷

The investigation generated a media storm. Parts of the footage were played on national news channels throughout the country and generated considerable discourse about inhumane practices in the country’s leading industry.⁸ Dairy industry representatives condemned the treatment, claiming that it was perpetrated by a “small minority” and was not representative of the industry as a whole.⁹ SAFE then added heat to the issue by placing advertisements in the prominent British newspaper *The Guardian*, highlighting the cruelty in the New Zealand dairy industry.¹⁰

The New Zealand Ministry for Primary Industries (MPI) responded to the events by launching an investigation into the footage.¹¹ Following the investigation, the MPI urgently promulgated new regulations governing the treatment of bobby calves, or newborn calves separated from their mothers, in New Zealand.¹² These regulations, among other things, require that loading and unloading facilities be provided when young calves are transported, that they be provided

⁵ *Calves ‘Beaten to Death’—Shocking Video Exposes Dairy Industry Cruelty*, N.Z. HERALD (Nov. 30, 2015, 5:30 AM), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11553152 [https://perma.cc/7SM9-SMDQ] (accessed May 26, 2020).

⁶ Charlie Mitchell, *Animal Rights Ad on New Zealand Dairy Is ‘Emotional Scaremongering,’ Farmers Say*, STUFF (Dec. 7, 2015, 17:17), <https://www.stuff.co.nz/business/farming/74810392/animal-rights-ad-on-new-zealand-dairy-is-emotional-scaremongering-farmers-say> [https://perma.cc/8Z29-7ZGJ] (accessed May 26, 2020); *Calves ‘Beaten to Death’—Shocking Video Exposes Dairy Industry Cruelty*, *supra* note 5.

⁷ SAFE, *2015 Exposé—The Dark Side of Dairy*, YOUTUBE (Dec. 8, 2016), https://www.youtube.com/watch?v=qytEj_k0h6I [https://perma.cc/384R-UR6F] (accessed May 26, 2020).

⁸ See *Calves ‘Beaten to Death’—Shocking Video Exposes Dairy Industry Cruelty*, *supra* note 5 (describing a broadcast on Sunday evening television and the shocked responses of farmers and a dairy executive).

⁹ *Waikato Dairy Farmers Disgusted at Abusive Behavior*, STUFF (Nov. 30, 2015, 19:13), <https://www.stuff.co.nz/business/farming/74542356/nz-dairy-industry-in-the-spotlight-as-investigation-reveals-violent-abuse> [https://perma.cc/SQR4-V77W] (accessed May 26, 2020).

¹⁰ Mitchell, *supra* note 6.

¹¹ *Calves ‘Beaten to Death’—Shocking Video Exposes Dairy Industry Cruelty*, *supra* note 5.

¹² Animal Welfare (Calves) Regulations 2016 (N.Z.). These regulations were revoked after the full suite of animal welfare regulations were promulgated in 2018, and the calf regulations were moved into the new regulations. They are now contained in Animal Welfare (Care and Procedure) Regulations 2018, regs 8, 9, 10, 33, 34, 35, 36, 37 (N.Z.). *Guide to the Animal Welfare (Care and Procedures) Regulations*, MINISTRY FOR PRIMARY INDUST.: AGRIC. & INVEST. SERV., <https://www.mpi.govt.nz/protection-and-response/animal-welfare/guide-to-the-animal-welfare-care-and-procedures-regulations/> [https://perma.cc/PJ5D-EEGU] (accessed May 26, 2020).

with suitable shelter before and during transportation, and prohibit the killing of calves by the use of blunt force to the head, except in emergency situations.¹³ The MPI also filed prosecutions under the Animal Welfare Act 1999, the principal statute governing animal welfare in New Zealand, in relation to the acts of cruelty perpetrated at the slaughterhouse.¹⁴

While the exposé roused awareness of cruelty in the dairy industry and triggered regulatory reform, the investigations and regulatory response that followed have been subject to very little scholarship. In particular, no research has analyzed the background to the undercover footage and government investigation, the impact of the government's response on New Zealand's bobby calves, or what the reforms tell us about the factors motivating animal law reform in New Zealand.

Against this background, the purpose of this Article is two-fold: to examine—using the dairy industry as a case study—what is driving animal law reform in New Zealand, and to ask what these factors tell us about the future of animal welfare activism in New Zealand. Accordingly, the first part of this Article examines the undercover investigations by animal rights organizations in 2015, the regulatory environment in which the investigations occurred, and the impact of the government's response in terms of improving bobby calf welfare. This Article then scrutinizes documents obtained pursuant to a request made to the MPI under the Official Information Act 1982, publicly available reports, and media statements by the MPI and government officials, in order to ascertain what ultimately drove the regulatory reform. Finally, this Article explores what these findings tell us about inconsistent animal welfare policy positions adopted by the MPI, whether the MPI could be considered subject to regulatory capture, and how the findings might guide future activism and reform.

Based on a review of documents obtained under the Official Information Act 1982, publicly available reports, and government statements to media outlets, this Article argues that the most influential force driving the MPI's response to the undercover investigations was a desire to protect New Zealand's international reputation as a responsible producer of animal products. It posits that this policy motivation indicates a clear desire by the MPI to improve animal welfare standards only to the extent that it considers necessary to protect the country's reputation, and that this purely instrumental approach to animal welfare deviates from the non-instrumental public interest embodied in the Animal Welfare Act 1999. Further, this instrumental approach can be viewed as consistent with the presence of regulatory capture. This Article concludes by finding that many of the institutional reforms proposed by Jed Goodfellow, an Australian legal scholar, to circumvent regulatory capture of animal welfare policy in Australia must

¹³ Animal Welfare (Care and Procedure) Regulations 2018, regs 8, 10, 35 (N.Z.).

¹⁴ *Erickson v. Ministry for Primary Industries* [2017] NZCA 271 at [1, 4] (N.Z.); *Ministry for Primary Industries v. Down Cow Ltd.* [2018] NZDC 20169 at [1] (N.Z.).

be adopted in New Zealand. However, it also finds that the MPI's concern with promoting New Zealand's international reputation provides opportunities for animal activists that have not yet been fully realized.

II. THE REGULATION OF THE DAIRY INDUSTRY IN NEW ZEALAND

A. *The Role of Animal Agriculture in New Zealand's Economy*

Dairy farming has taken place in New Zealand since 1814, when Samuel Marsden, one of the first English settlers, brought cattle to New Zealand.¹⁵ In 1846, New Zealand exported its first dairy products, and in 1871, the first dairy cooperative was formed in Otago, New Zealand.¹⁶

Today, the dairy industry—New Zealand's second-largest export earner after tourism¹⁷—is regarded as vital to New Zealand's economy.¹⁸ The country has approximately 5 million milking cows located across 12,000 dairy farms throughout New Zealand.¹⁹ Including both on-farm and processing, the industry employs nearly 40,000 New Zealanders.²⁰ Together with meat, which is exported to more than 120 countries around the world,²¹ and other animal product exports, dairy products make up approximately 50% of New Zealand's export earnings.²²

¹⁵ *A Timeline of Dairy in N.Z.*, CALDER STEWART (Dec. 18, 2019, 10:55 AM), <https://www.dairybarnsystems.co.nz/knowledge-centre/a-timeline-of-dairy-in-nz/> [https://perma.cc/XG89-K86N] (accessed May 26, 2020).

¹⁶ *Id.*

¹⁷ Bradley, *supra* note 2.

¹⁸ *Dairy's \$17B Contribution to N.Z. Economy*, DAIRY NEWS (Jan. 9, 2019), <https://www.ruralnewsgroup.co.nz/dairy-news/dairy-general-news/dairy-s-17b-contribution-to-nz-economy> [https://perma.cc/652M-4CP6] (accessed May 26, 2020).

¹⁹ *Dairy Sector Quickfacts*, DAIRYNZ, https://www.dairynznewslink.co.nz/wp-content/uploads/2018/12/Dairy-sector-quick-facts-2017-18_Farms-and-herds_newslink-002_LATEST-VERSION-061218-1.pdf [https://perma.cc/HCX4-AH7W] (accessed May 26, 2020). There are approximately 12,000 dairy herds, and the average herd size is approximately 400 cows. *Id.*

²⁰ *About the N.Z. Dairy Industry*, DAIRY COMPANIES ASS'N N.Z., <https://www.dcanz.com/about-the-nz-dairy-industry> [https://perma.cc/5Q9W-RYQJ] (accessed May 26, 2020).

²¹ *About MIA*, MEAT INDUS. ASS'N, <https://www.mia.co.nz/about-the-mia/> [https://perma.cc/A962-5948] (accessed May 26, 2020). In 2016, meat and edible offal was New Zealand's second largest category of good exports after dairy, rising to \$1.5 billion for the year ending March 2017. *Overseas Merchandise Trade: March 2017*, STATS NZ (Apr. 28, 2017), http://archive.stats.govt.nz/browse_for_stats/industry_sectors/imports_and_exports/OverseasMerchandiseTrade_HOTPMar17/Commentary.aspx [https://perma.cc/6V7C-5UN8] (accessed May 26, 2020).

²² *See Animal Welfare Amendment Bill—Second Reading*, N.Z. Parliament (Nov. 26, 2014), https://www.parliament.nz/en/pb/hansard-debates/rhr/document/51HansD_20141126_00000040/animal-welfare-amendment-bill-second-reading [https://perma.cc/5YRR-Z89R] (accessed May 26, 2020) (stating in the transcript of the Animal Welfare Amendment Bill's second reading that 50% of each year's export earnings comes from animals and animal products).

Internationally, the country is considered a leader in the dairy trade.²³ New Zealand exports approximately 95% of its dairy produce, including whole milk powder, cheese, skim milk powder, and butter, to more than 140 different markets each year.²⁴ The country is the main global exporter of butter.²⁵ The top five purchasers of New Zealand dairy exports are China, Australia, the United States, the United Arab Emirates, and Japan.²⁶ The European Union is also an important market, particularly for butter.²⁷

B. *New Zealand's Animal Welfare Regime*

New Zealand's animal welfare regime is considered by many to be among the world's most progressive. In 2014, World Animal Protection ranked New Zealand's animal welfare regime as first in the world, tied with the United Kingdom, Austria, and Switzerland.²⁸ The New Zealand government and its animal agricultural industries frequently publicized this fact.²⁹ In contrast to many jurisdictions,³⁰ the principal statute governing the treatment of animals, the Animal Welfare Act 1999 (the AWA), applies to *all* animals, including mammals, birds, rep-

²³ See *About the N.Z. Dairy Industry*, *supra* note 20 (listing New Zealand as the eighth largest producer of dairy in the world).

²⁴ *Id.*

²⁵ Daniel Workman, *Butter Exports By Country*, WORLD'S TOP EXPORTS (Oct. 22 2019), <http://www.worldstopexports.com/butter-exports-by-country/> [<https://perma.cc/L8SU-B9S6>] (accessed Apr. 20, 2020).

²⁶ *About the N.Z. Dairy Industry*, *supra* note 20.

²⁷ MILK MARKET OBSERVATORY, EUR. COMM'N, EU DAIRY EXPORTS TO THIRD COUNTRIES 5 (2020), https://ec.europa.eu/agriculture/sites/agriculture/files/market-observatory/milk/pdf/eu-extra-trade_en.pdf [<https://perma.cc/2PZT-ZNWB>] (accessed May 26, 2020).

²⁸ *Animal Protection Index*, WORLD ANIMAL PROTECTION, <https://api.worldanimalprotection.org> [<https://perma.cc/H9ZY-5GHU>] (accessed May 26, 2020); see also *Four Countries Receive Highest Animal Welfare Rating*, POULTRY WORLD (Mar. 9, 2016), <https://www.poultryworld.net/Meat/Articles/2014/12/Only-four-countries-receive-highest-animal-welfare-rating-1661627W/> [<https://perma.cc/3647-A2AV>] (accessed May 26, 2020) (discussing New Zealand, the United Kingdom, Switzerland, and Austria as receiving the highest animal welfare ranking from World Animal Protection). In 2020, New Zealand's ranking fell and was given a "C" grade. See *Animal Protection Index (API) 2020, New Zealand: Ranking C*, WORLD ANIMAL PROTECTION, https://api.worldanimalprotection.org/sites/default/files/api_2020_-_new_zealand_0.pdf [<https://perma.cc/58TN-B2Q4>] (accessed May 26, 2020).

²⁹ See, e.g., *About the N.Z. Dairy Industry*, *supra* note 20 (displaying New Zealand's top animal welfare ranking on a dairy industry website); *New Animal Welfare Regulations Progressed*, BEEHIVE.GOV'T.NZ (July 20, 2017), <https://www.beehive.govt.nz/release/new-animal-welfare-regulations-progressed> [<https://perma.cc/KH9P-NM4K>] (accessed May 26, 2020) ("In 2014, New Zealand's animal welfare system was ranked 1st equal out of 50 countries assessed by the global animal protection charity World Animal Protection.").

³⁰ See, e.g., Animal Welfare Act, 7 U.S.C. § 2132(g) (2009) (excluding rats, horses, and birds, when used for research purposes, from the term *animal* in United States animal welfare statutes); *Animal Welfare Act 2002* (WA) pt 1, s 5(1) (Austl.) (excluding fish from Western Australian animal welfare laws).

tiles, amphibians, fish, octopus, squid, crab, lobster, and crayfish.³¹ The Act also prohibits the ill-treatment of animals³² and requires that all animals be provided with the “five freedoms”—including the opportunity to display normal patterns of behavior.³³

Under Part 5 of the AWA, codes of welfare are developed that establish minimum standards for certain industries and types of animals.³⁴ There are currently nineteen codes of welfare, including a code for dairy cattle³⁵ and a code of welfare for the transport of animals within New Zealand.³⁶ A breach of a code of welfare is rebuttable evidence that a person failed to comply with a provision of the AWA (for example, the prohibition of ill-treatment).³⁷ However, the codes themselves are not directly enforceable, meaning that a person cannot be prosecuted solely for failing to comply with a standard in a code of welfare.³⁸ Compliance with a code is also an absolute defense to a prosecution for the offenses of ill-treatment and the failure to meet the behavioral needs of animals under the AWA.³⁹

³¹ Animal Welfare Act 1999, s 2(1) (N.Z.).

³² Animal Welfare Act 1999, s 29(a) (N.Z.).

³³ Animal Welfare Act 1999, ss 4, 10 (N.Z.).

³⁴ Animal Welfare Act 1999, s 68 (N.Z.).

³⁵ See *Codes of Welfare*, MINISTRY FOR PRIMARY INDUST., <https://www.mpi.govt.nz/protection-and-response/animal-welfare/codes-of-welfare/> [<https://perma.cc/ND7K-GPEK>] (accessed May 26, 2020) (containing links to the particular details of the New Zealand code for dairy cattle); Code of Welfare: Dairy Cattle 2019 (N.Z.) (stating the code applies to dairy cows, calves born from dairy cows until weaning, all dairy replacement stock, calves sent for slaughter, cows kept as house cows, and bulls used for mating on farms or breeding centers).

³⁶ See *Codes of Welfare*, MINISTRY FOR PRIMARY INDUST., <https://www.mpi.govt.nz/protection-and-response/animal-welfare/codes-of-welfare/> [<https://perma.cc/TV8L-UR2W>] (accessed May 26, 2020) (containing links to the particular details of New Zealand code for animal transport within the country); Code of Welfare: Transport within New Zealand 2018 (N.Z.) (stating the code applies to the transportation of any animal within New Zealand by any means).

³⁷ Animal Welfare Act 1999, s 24(1) (N.Z.).

³⁸ *Regulations and the Animal Welfare System*, MINISTRY FOR PRIMARY INDUST. (Dec. 23, 2019), <https://www.mpi.govt.nz/protection-and-response/animal-welfare/guide-to-the-animal-welfare-care-and-procedures-regulations/regulations-and-the-animal-welfare-system/> [<https://perma.cc/36NE-YQ42>] (accessed May 26, 2020); *Codes of Welfare*, MINISTRY FOR PRIMARY INDUST. (Dec. 23, 2019), <https://www.agriculture.govt.nz/protection-and-response/animal-welfare/codes-of-welfare/> [<https://perma.cc/Y4KC-UEC9>] (accessed May 26, 2020). That is, a breach of a minimum standard will not form the basis for a prosecution unless the conduct has also met the standard of ill-treatment or otherwise constitutes any other offense under the Act. Animal Welfare Act 1999, ss 12–13 (N.Z.).

³⁹ Animal Welfare Act 1999, ss 30(1)–(2) (N.Z.). These provisions effectively allow the sweeping protections provided in the principal Act to be undermined where standards are permitted in codes that do not, for example, allow animals to express normal patterns of behavior. See Animal Welfare Act 1999, ss 13, 30 (N.Z.) (allowing the defendant to use compliance with minimum standards provided in a code of welfare as a defense).

The Animal Welfare Amendment Act (No 2) 2015 (Amendment Act 2015) introduced a series of changes to the AWA.⁴⁰ These included an acknowledgement in the long title of the AWA that all animals are sentient, a provision empowering the government to develop enforceable regulations to address the lack of enforceability of the codes of welfare, and new enforcement tools, including infringement fines and compliance notices.⁴¹

Operating in conjunction with this legislative regime is a policy strategy developed in 2010 by the Ministry of Agriculture and Forestry, the predecessor to the Ministry for Primary Industries (MPI).⁴² The strategy is set out in a policy paper, *Safeguarding Our Animals, Safeguarding Our Reputation*, which focuses on improving compliance with the Animal Welfare Act 1999.⁴³ The paper states:

[B]ecause consumers are becoming increasingly concerned about animal welfare issues, there is mounting international pressure for stronger welfare standards. Some restaurant and supermarket chains in Europe and North America are emerging as drivers behind new and stronger animal welfare standards. If New Zealand fails to meet international market-place expectations, its reputation will be harmed. Conversely, high standards of animal welfare will contribute to New Zealand's reputation as a trusted and sustainable producer of animals and animal products in key overseas markets.⁴⁴

During the public consultation on the proposed strategy, many submissions expressed concern that the policy was too instrumental: it was overly concerned with adding value to New Zealand's exports, as opposed to genuinely addressing animal welfare concerns.⁴⁵ For example, the New Zealand Veterinary Association commented that it was concerned that the focus of the policy was "perhaps too outward looking i.e. preserving our reputation rather than on the rightness of treating animals humanely."⁴⁶

⁴⁰ Animal Welfare Amendment Act (No 2) 2015, s 3 (N.Z.).

⁴¹ Animal Welfare Amendment Act (No 2) 2015, ss 4, 31, 55, 59 (N.Z.). Compliance notices require a person to stop doing something that would contravene an animal welfare law or do something to bring the person into compliance with an animal welfare law. Animal Welfare Amendment Act (No 2) 2015, s 55 (N.Z.). They are enforceable by prosecution. Animal Welfare Amendment Act (No 2) 2015, s 55 (N.Z.).

⁴² See N.Z. MINISTRY OF AGRIC. AND FORESTRY, *SAFEGUARDING OUR ANIMALS, SAFEGUARDING OUR REPUTATION* 4 (2010) (discussing the MPI's goal of using its policy strategy to reduce the number of increasingly serious Animal Welfare Act violations).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ MINISTRY FOR PRIMARY INDUS., *SUMMARY OF SUBMISSIONS RECEIVED ON: ANIMAL WELFARE MATTERS—PROPOSALS FOR A NEW ZEALAND ANIMAL WELFARE STRATEGY AND AMENDMENTS TO THE ANIMAL WELFARE ACT 1999* 4 (MPI Information Paper No: 2012/08, October 2012) (obtained under Official Information Act 1982 Request to the Ministry for Primary Industries); E-mail from Yuuki Smithers, Advisor, Official Information Act Government Services, Public Affairs Ministry for Primary Industries (N.Z.), to author (Apr. 2, 2020, 5:12 AM) (on file with author).

⁴⁶ MINISTRY FOR PRIMARY INDUS., *SUMMARY OF SUBMISSIONS RECEIVED ON: ANIMAL WELFARE MATTERS—PROPOSALS FOR A NEW ZEALAND ANIMAL WELFARE STRATEGY AND*

C. Animal Welfare in the New Zealand Dairy Industry

New Zealand regards itself as a world leader in dairy cow welfare.⁴⁷ Unlike many other countries, dairy farming in New Zealand is still predominantly pasture-based.⁴⁸ This fact is well-promoted by the dairy industry, with butter labels proudly showing cows in lush green paddocks.⁴⁹

In addition to the general obligations imposed by the Animal Welfare Act 1999, requirements for young calf management and dairy calf welfare are set out in the Code of Welfare: Dairy Cattle 2019.⁵⁰ The code sets out standards that all persons responsible for the welfare of dairy cattle must meet, including requirements as to stockmanship, feed and water, the physical environment, husbandry, health, and quality management.⁵¹ Certain standards relevant to young calves are also set out in Code of Welfare: Transport within New Zealand 2018.⁵² The Code of Welfare Report 2010 for dairy cattle states:

In addition to setting out the expectations of New Zealanders for the welfare of dairy cattle, it is an important statement to the international community and in particular, to overseas consumers of our animal and milk product exports of the welfare standards which prevail in New Zealand.⁵³

AMENDMENTS TO THE ANIMAL WELFARE ACT 1999 4 (MPI Information Paper No: 2012/08, October 2012) (obtained under Official Information Act 1982 Request to the Ministry for Primary Industries); E-mail from Yuuki Smithers to author, *supra* note 45.

⁴⁷ See MINISTRY FOR PRIMARY INDUS., ANIMAL WELFARE (CALVES) REGULATIONS 2016: REGULATORY IMPACT STATEMENT 4 (July 2016) (listing New Zealand as a global leader in animal welfare, alongside the United Kingdom, Austria, and Denmark).

⁴⁸ See D. A. Clark et al., *Issues and Options for Future Dairy Farming in New Zealand*, 50 N.Z. J. AGRIC. RES. 203, 204 (2007) (discussing increases in pasteurization efficiency in New Zealand).

⁴⁹ See, e.g., *Products*, ANCHOR, <http://anchorbutter.com/products> [<https://perma.cc/6UML-RJR7>] (accessed May 26, 2020) (depicting butter and other dairy products marketed with a picture of a cow in an open, green field).

⁵⁰ See Code of Welfare: Dairy Cattle 2019, pts 3.2, 3.3, 6.7, 6.10 (N.Z.) (discussing the required treatment of calves). This version revoked and replaced the Code of Welfare: Dairy Cattle 2018. *Id.* at 2. The 2018 version amended the Dairy Cattle Code of Welfare 2016 by incorporating the Animal Welfare (Care and Procedures) Regulations 2018. See Code of Welfare: Dairy Cattle 2018 (N.Z.). The earlier 2014 version of the Code replicated the original version of the code which came into force on February 19, 2010, but contained an amendment prohibiting the use of blunt force trauma except in emergencies. JOHN HELLSTRÖM, NAT'L WELFARE ADVISORY COMM., REPORT TO ACCOMPANY AN AMENDMENT TO THE CODE OF WELFARE FOR DAIRY CATTLE 1 (2014). It is very unusual for the MPI to replace a code of welfare so quickly. For example, the Animal Welfare (Layer Hens) Code of Welfare 2005 was not replaced until 2012. Animal Welfare (Layer Hens) Code of Welfare 2012 (N.Z.).

⁵¹ See Code of Welfare: Dairy Cattle 2019, pts 2, 3, 5, 6, 7, 8 (N.Z.) (discussing required standards for stockmanship, feed and water, physical environment, health, and quality management in these parts respectively).

⁵² See e.g., Code of Welfare: Transport within New Zealand 2018, pt 5.2 (N.Z.) (providing a "checklist" of standards for the transportation of calves). MINISTRY FOR PRIMARY INDUS., *supra* note 47, at 3.

⁵³ MINISTRY FOR PRIMARY INDUS., ANIMAL WELFARE (DAIRY CATTLE) CODE OF WELFARE 2010 REPORT 2 (2010).

As will be discussed further below, following the 2015 undercover investigations, the government went on to promulgate enforceable regulations governing calf welfare.⁵⁴

D. *The Role of Young Calves in the Dairy Industry*

Young male calves, also known as ‘bobby calves,’⁵⁵ are invisible to many consumers of dairy products. This is likely true even of the many New Zealanders who grow up surrounded by dairy farms, as most male calves live only for a few days before being sent to slaughter.⁵⁶ As they cannot produce milk, they are effectively ‘waste products’ of the dairy industry, and there is little economic value to farmers in keeping them.⁵⁷ Thus, they are separated from their mothers shortly after birth and slaughtered.⁵⁸

In New Zealand, the pasture-based method of farming has significant implications for young calf management.⁵⁹ In order to coordinate the increase in the herd’s feeding requirements with the increase in pasture available during the spring time,⁶⁰ the majority of young calves born on New Zealand dairy farms are born at the same time,

⁵⁴ See MINISTRY FOR PRIMARY INDUS., MORTALITY RATES IN BOBBY CALVES 2008 TO 2016 6 (2017), <https://www.mpi.govt.nz/dmsdocument/16501/direct> [<https://perma.cc/LNK6-V6VJ>] (accessed May 26, 2020) (describing the need for and subsequent development of the new regulations); Animal Welfare (Care and Procedure) Regulations 2018, regs 8–10, 33–37 (N.Z.) (regulating calf welfare issues, including transport and slaughter).

⁵⁵ A young calf is “a bovine that is up to 14 days of age and has been separated from its mother.” Animal Welfare (Care and Procedure) Regulations 2018, reg 3 (N.Z.). This Article adopts this definition when referring to young calves, which are also referred to interchangeably in this Article as ‘bobby calves.’

⁵⁶ MINISTRY FOR PRIMARY INDUS., *supra* note 54, at 4.

⁵⁷ See *id.* at 6, 8 (describing bobby calves as “surplus to farm requirements” and that there are “more calves than are required for dairy herd replacements,” and explaining that while dairy cows must give birth to lactate, the resulting numbers of calves exceed the need for replacement dairy cows, beef cattle, or breeding bulls); Gerard Hutching, *Q&A: Bobby Calves, New Zealand vs the Rest of the World*, STUFF (Dec. 4, 2015, 17:41), <https://www.stuff.co.nz/business/farming/74762096/qa-bobby-calves-new-zealand-vs-the-rest-of-the-world> [<https://perma.cc/3HSJ-LMGG>] (accessed May 26, 2020) (“Most bobby calves are bulls which are not wanted because they do not provide milk or are not suitable for becoming beef cattle.”); *The Horrific Life Of New Zealand Bobby Calves*, VEGANS N.Z. (July 8, 2014), <http://www.vegans.co.nz/vegan-blog/the-horrific-life-of-new-zealand-bobby-calves/> [<https://perma.cc/Z6RG-DUGA>] (accessed May 26, 2020) (describing how “cows will only produce milk when they have a calf to feed” and how this “creates another issue for dairy farmers—a large number of unwanted and unneeded bobby calves”).

⁵⁸ The Ministry for Primary Industries notes, “[A]round 20–25% of . . . calves are raised as replacements for dairy herds, . . . [a]bout 20–30% of calves are kept for beef raising, and a small number are kept as dairy bulls. Calves not kept for beef or breeding may be sent for slaughter for meat for human consumption or for pet food.” MINISTRY FOR PRIMARY INDUS., *supra* note 54, at 8.

⁵⁹ Hutching, *supra* note 57.

⁶⁰ S.C. Garcia & C.W. Holmes, *Effects of Time of Calving on the Productivity of Pasture-Based Dairy Systems: A Review*, 42 N.Z. J. AGRIC. RES. 347, 347 (1999).

during the period from July to October.⁶¹ This period is known as the ‘calving season.’⁶²

In 2015, approximately 2.17 million bobby calves were sent for slaughter, of which 5,390 were recorded as having died prematurely or were euthanized for welfare reasons in the period from pick up on farms to the period immediately prior to slaughter.⁶³ This represented a mortality rate of 0.25%.⁶⁴

III. THE UNDERCOVER INVESTIGATIONS BY ANIMAL RIGHTS ORGANIZATIONS

In November 2015, a national New Zealand news program, *Sunday*, aired an undercover investigation that sought to dismantle the rosy view of animal welfare in the dairy industry that many consumers of New Zealand dairy products hold.⁶⁵ The footage was filmed by the animal rights organization Farmwatch, which used hidden cameras to film twelve farms and one slaughterhouse during 2014 and 2015.⁶⁶ In explaining the background to the investigation, Farmwatch investigator John Darroch stated:

We have been getting calls from people in rural communities—including farmers—for many years asking us to look into the treatment of bobby calves. But I had no idea that every time we posted a hidden camera we would get brutal treatment of calves. The scale and the frequency absolutely stunned me.⁶⁷

⁶¹ See Craig Littin, *Extra Busy Times on Dairy Farms*, STUFF (July 30, 2014, 05:00), <http://www.stuff.co.nz/business/farming/opinion/10322158/Extra-busy-times-on-dairy-farms> [<https://perma.cc/9CSC-JY8U>] (accessed May 26, 2020) (“Between the wet months of July and October, dairy farmers are in calving season.”); *Dairy Herd Manager*, N.Z. GOV’T (Jan. 28, 2020), <https://www.careers.govt.nz/jobs-database/farming-fishing-for-estry-and-mining/agriculture-horticulture/herd-manager/> [<https://perma.cc/7LCR-LCGC>] (accessed May 26, 2020) (“Dairy farms are busiest during the calving season, which is usually between July and October.”).

⁶² Littin, *supra* note 61.

⁶³ MINISTRY FOR PRIMARY INDUS., *supra* note 54, at 20.

⁶⁴ *Id.* This was considerably lower than the corresponding rate of 0.68% in 2008. *Id.* The MPI has claimed that decline was in response to educational initiatives in place since 2008, which aim to improve awareness of best practices for bobby calf management. *Id.* at 6.

⁶⁵ ‘We Saw Calves Torn From Mothers’—Shocking Video Exposes Dairy Industry Cruelty, N.Z. HERALD (Nov. 30, 2015), http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11553342 [<https://perma.cc/5Z7C-XPMJ>] (accessed May 26, 2020).

⁶⁶ *Undercover Video Shows Bobby Calf Bashings*, WIRELESS (Nov. 30, 2015), <http://thewireless.co.nz/articles/undercover-video-shows-bobby-calf-bashings> [<https://perma.cc/95YU-4DJV>] (accessed Apr. 20, 2020); *Waikato Dairy Farmers Disgusted at Abusive Behaviour*, STUFF (Nov. 30, 2015, 19:13), www.stuff.co.nz/business/farming/74542356/nz-dairy-industry-in-the-spotlight-as-investigation-reveals-violent-abuse [<https://perma.cc/PT7W-7FGE>] (accessed May 26, 2020).

⁶⁷ ‘We Saw Calves Torn From Mothers’—Shocking Video Exposes Dairy Industry Cruelty, *supra* note 65.

The full exposé, entitled *The Dark Side of the New Zealand Dairy Industry*,⁶⁸ exposed footage, as one Save Animals From Exploitation (SAFE) investigator put it, of “calves being torn from their mothers and left in the hot sun for hour after hour, thrown into trucks and then beaten to death.”⁶⁹ The footage covered all levels of what one might consider ‘the cruelty spectrum’: egregious and clearly prosecutable cruelty, cruelty that was not necessarily prosecutable, and systemic cruelty that could not be prosecuted.⁷⁰ The cruelty exposé also spanned each stage of the supply chain, from farmers, to transporters, to slaughterhouse workers.⁷¹

The most egregious incident filmed took place at Down Cow Limited, a slaughterhouse that produces pet food.⁷² The footage showed Noel Erickson, a casual slaughterhouse worker, hitting calves over the head with a foot-long metal bar—in an attempt to stun them—and failing to check whether the attempts had been fully effective before severing blood vessels.⁷³ One calf, which had been hung up for processing, was conscious and mooing constantly before another worker hit him on the head with the blunt end of an axe.⁷⁴ The footage also showed him forcibly throwing and kicking calves, dragging calves with a metal gate, and hitting one calf with enough force to knock him over.⁷⁵

The footage also exposed young calves being left by farmers for extended periods of time in the heat as they waited to be picked up and transported to slaughterhouses.⁷⁶ Moreover, the footage showed trans-

⁶⁸ SAFE, *supra* note 7.

⁶⁹ ‘We Saw Calves Torn From Mothers’—Shocking Video Exposes Dairy Industry Cruelty, *supra* note 65.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Donna-Lee Biddle, *Down Cow Owner Pleads Not Guilty To Animal Welfare Charges*, STUFF (Aug. 17, 2016, 12:11), <https://www.stuff.co.nz/business/farming/83251595/down-cow-owner-pleads-not-guilty-to-animal-welfare-charges> [https://perma.cc/B85A-ZYMF] (accessed May 26, 2020); Libby Wilson, *Man Pleads Guilty To Very Serious Bobby Calf Mistreatment Charges*, STUFF (Jun. 2, 2016, 16:42), <https://www.stuff.co.nz/business/farming/80655872/man-pleads-guilty-to-very-serious-bobby-calf-mistreatment-charges> [https://perma.cc/9SP5-8U7C] (accessed May 26, 2020) (placing these incidents at this slaughterhouse in Te Kauwhata, Waikato over two days, August 27 and 28, 2015).

⁷³ Wilson, *supra* note 72.

⁷⁴ *Erickson v. Ministry for Primary Industries* [2017] NZCA 271; see *Waikato Bobby Calf Basher Successfully Appeals Sentence*, STUFF (Jun. 29, 2017, 20:55), <https://www.stuff.co.nz/national/crime/94231010/Waikato-bobby-calf-basher-successfully-appeals-sentence> [https://perma.cc/DZ55-5R53] (accessed May 26, 2020) (describing how Erickson continued to process other animals while one calf continue to hang upside down on the hook, mooing).

⁷⁵ SAFE, *supra* note 7.

⁷⁶ *Calves ‘Beaten to Death’—Shocking Video Exposes Dairy Industry Cruelty*, *supra* note 5.

portation operators throwing cows roughly on to the transportation trucks.⁷⁷

Finally, the footage exposed what some animal rights activists argue is the inherent cruelty of the dairy industry: young calves being separated from their mothers within hours of being born.⁷⁸ The footage showed grieving mothers attempting to follow their sons as they were taken away from them.⁷⁹ This practice of separating the calves from their mothers is a standard practice throughout the dairy industry worldwide and is not prosecutable under the Animal Welfare Act 1999.⁸⁰

The video narration states that the calves were treated as “waste products” and that “there is cruelty in every glass of milk.”⁸¹ Reinforcing the notion of calves as discarded waste, the video highlighted crates on farms that were covered in blood and which bore the labels “casualty calves” and “dead calves.”⁸²

The footage generated public outrage.⁸³ Attracting sustained attention from leading national news outlets, the controversy placed the issue of animal welfare on New Zealand’s dairy farms at the forefront of national political discussion.⁸⁴ The dairy industry immediately con-

⁷⁷ *Id.* According to SAFE, the full footage showed numerous different transport operators throwing calves into trucks, resulting in Hans Kriek, SAFE Ambassador, concluding this practice could well be “commonplace.” Ciaran Moran, *Shocking Video Footage Puts Spotlight On New Zealand’s Dairy Industry*, AGRILAND (Nov. 29, 2015, 4:36 PM), <https://www.agriland.ie/farming-news/shocking-video-footage-puts-spotlight-on-new-zealands-dairy-industry/> [<https://perma.cc/2UVZ-CV3R>] (accessed May 26, 2020).

⁷⁸ *Calves ‘Beaten to Death’—Shocking Video Exposes Dairy Industry Cruelty*, *supra* note 5.

⁷⁹ SAFE, *supra* note 7.

⁸⁰ Joel Maxwell, ‘New Zealand Dairy Cruelty’ Claims Target UK Consumer in *Guardian Ad Campaign*, STUFF, (Dec. 6, 2015, 16:24), <https://www.stuff.co.nz/business/farming/74783076/new-zealand-dairy-cruelty-claims-target-uk-consumer-in-guardian-ad-campaign> [<https://perma.cc/LT65-YSHT>] (accessed May 26, 2020); *See generally* Animal Welfare Act 1999 (N.Z.) (excluding the separation of mothers and calves from prosecutable offenses).

⁸¹ SAFE, *supra* note 7.

⁸² *Id.* at 1:37.

⁸³ *See* Fiona Rotherham, *Bobby Calf Standards Plan*, AGRIHQ (Jan. 7, 2016), <https://agrihq.co.nz/section/all/view/bobby-calf-standards-plan> [<https://perma.cc/8TUD-GCGY>] (accessed May 26, 2020) (“The moves are in response to public outrage after hidden cameras by animal rights activists from Farmwatch and SAFE exposed bobby calves being mistreated by farmers, stock truck operators, and slaughterhouse workers during a televised Sunday programme.”). Gerald Piddock, *MPI Inspections Reveal a High Level of Compliance Among Dairy Farmers Around Calf Facilities*, STUFF (Sep. 7, 2017, 11:22), <https://www.stuff.co.nz/business/farming/96569924/mpi-inspections-reveal-high-levels-of-compliance-among-dairy-farmers-around-calf-facilities> [<https://perma.cc/ESX2-GJ66>] (accessed May 26, 2020).

⁸⁴ *See, e.g.*, Shannon Williams, *NZ in a Frenzy After Undercover Video Shows Animal Cruelty*, FUTURE FIVE (Nov. 30, 2015), <https://futurefive.co.nz/story/nz-frenzy-after-undercover-video-shows-animal-cruelty> [<https://perma.cc/8F2C-JQV5>] (accessed May 26, 2020).

demned, and distanced itself from, the cruelty.⁸⁵ Andrew Hoggard, dairy section chair for Federated Farmers, said that the footage was “appalling behaviour from a minority of people who worked in the industry and would not be tolerated.”⁸⁶ Miles Hurrell, Fonterra group director for cooperative affairs, described the footage as “disgusting,” but claimed that “[t]he vast majority of our farmers operate responsibly.”⁸⁷

In order to amplify political pressure, SAFE published advertisements in *The Guardian*⁸⁸ highlighting the cruelty in the New Zealand dairy industry.⁸⁹ The advertisement stated that New Zealand dairy was “contaminated with cruelty” and featured a graphic picture of a glass of milk with a cow inside, with blood visible at the bottom of the glass.⁹⁰

As soon as these advertisements were published, public support for SAFE and Farmwatch became more polarized.⁹¹ Industry groups claimed that the advertisements were not representative of the whole industry and had the potential to cause significant damage to New Zealand’s economy and the “livelihood of thousands of farmers.”⁹² A prominent conservative media commentator, Mike Hosking, described the actions of SAFE as “poisoning the industry” and “bordering on espionage.”⁹³ Others accused the animal rights groups of economic sabo-

⁸⁵ *Shocking Video Shows Dairy Farmers Bashing Baby Calves*, BULLVINE (2 Dec. 2015), <http://www.thebullvine.com/news/shocking-video-shows-dairy-farmers-bashing-baby-calves/> [<https://perma.cc/A4KY-3QSJ>] (accessed May 26, 2020).

⁸⁶ Tiana Barnes, *Fed Farmers Appalled by Abuse Video*, RADIO N.Z. (Nov. 30, 2015, 9:03 PM), <https://www.rnz.co.nz/news/national/290877/fed-farmers-appalled-by-abuse-video> [<https://perma.cc/UEV8-83FE>] (accessed May 26, 2020).

⁸⁷ *Calves ‘Beaten to Death’—Shocking Video Exposes Dairy Industry Cruelty*, *supra* note 5.

⁸⁸ Joel Maxwell, ‘*New Zealand Dairy Cruelty*’ Claims Target UK Consumer in *Guardian Ad Campaign*, STUFF (Dec. 6, 2015, 16:24), <https://www.stuff.co.nz/business/farming/74783076/New-Zealand-dairy-cruelty-claims-target-UK-consumer-in-Guardian-ad-campaign> [<https://perma.cc/3BAL-NXTP>] (accessed May 26, 2020). These were comprised of a full-page, one-off print advertisement and two weeks of online advertising. *Id.*

⁸⁹ Mitchell, *supra* note 6.

⁹⁰ See Maxwell, *supra* note 88 (describing the impact of SAFE’s “Contaminated with Cruelty” global ad campaign).

⁹¹ Mitchell, *supra* note 6 (giving farmers’ testimonies, which describe the ad published by SAFE as “grossly irresponsible” and “emotional scaremongering”).

⁹² Emily Cooper, *SAFE Ad: N.Z. Dairy ‘Contaminated with Cruelty,’* NEWSHUB (Dec. 6, 2015), <http://www.newshub.co.nz/home/new-zealand/2015/12/safe-ad-nz-dairy-contaminated-with-cruelty.html> [<https://perma.cc/QU5A-GZTK>] (accessed May 26, 2020). Primary Industries Minister Nathan Guy also described the tactic as a “bad move.” *Id.*

⁹³ *Kriek Tells Hosking All SAFE Gets Out of Calves Campaign is ‘S*** From People Like Yourself,’* 1 NEWS (Dec. 1, 2015), <https://www.tvnz.co.nz/one-news/new-zealand/kriek-tells-hosking-all-safe-gets-out-of-calves-campaign-is-s-from-people-like-yourself> [<https://perma.cc/US5M-HJGD>] (accessed May 26, 2020).

tage and undermining the economic infrastructure of New Zealand.⁹⁴ One Farmwatch activist received death threats.⁹⁵

But SAFE was steadfast in defending its actions. Its ambassador, Hans Kriek, explained in clear terms why it considered the measure necessary: “We want real change and we know that the threat to our international reputation is going to make sure that something will get done in this country.”⁹⁶ Kriek emphasized that in sharing the issue internationally, the organization was speaking to consumers of New Zealand dairy products—95% of whom are based overseas.⁹⁷

IV. REGULATORY REFORM: THE IMPACT OF THE UNDERCOVER INVESTIGATIONS

The New Zealand government responded to these cruelty investigations by immediately advancing a multi-faceted regulatory agenda that spanned all levels of the compliance spectrum, including prosecutions, the development of new regulations, and educational initiatives.⁹⁸ These developments are discussed below.

A. A Cruelty Investigation and Prosecution

Following its investigation into the cruelty incidents, the Ministry for Primary Industries (MPI) prosecuted Noel Erickson—the worker who perpetrated the acts of cruelty against the calves at the slaughterhouse—under the Animal Welfare Act 1999.⁹⁹ Erickson pleaded guilty to, and was convicted of, ten charges in relation to the abuse of 111 bobby calves, including willfully ill-treating a calf, recklessly ill-treating calves, and ill-treating calves.¹⁰⁰ In July 2016 in the Huntly District Court, Erickson was sentenced to ten months of home detention and 200 hours of community work.¹⁰¹ The MPI appealed to the High Court, which increased Erickson’s sentence to two years’ imprisonment.¹⁰² However, the Court of Appeal quashed the sentence and re-

⁹⁴ Radio N.Z., *Dairy N.Z. Responds to New Video of Bobby Calf Treatment*, YOUTUBE (Oct. 24, 2016), <https://www.youtube.com/watch?v=2Z-HVzf-bQM> [<https://perma.cc/495U-3BFR>] (accessed May 26, 2020).

⁹⁵ *Id.*

⁹⁶ *Kriek Tells Hosking All SAFE Gets Out of Calves Campaign is ‘S*** From People Like Yourself,’ supra* note 93.

⁹⁷ *Id.*; Mitchell, *supra* note 6.

⁹⁸ Lynley Tulloch & Paul Judge, *Bringing the Calf Back From the Dead: Video Activism, the Politics of Sight and the New Zealand Dairy Industry*, 3 J. OF EDUC. & PEDAGOGY 7, 8, 18 (2018).

⁹⁹ *Id.* at 8.

¹⁰⁰ See *Erickson v. Ministry for Primary Industries* [2017] NZCA 271 at [4] (N.Z.) (listing Noel Erikson’s charges related to his abuse of bobby calves).

¹⁰¹ *Id.* at [12].

¹⁰² *Id.* at [13, 15].

placed it with a sentence of eighteen months' imprisonment.¹⁰³ The company and its owner were also prosecuted.¹⁰⁴

These prosecutions were clearly intended to send a strong message to farmers, transporters, and slaughterhouse workers that such acts of wanton cruelty would not be tolerated.¹⁰⁵ However, while the footage taken at the slaughterhouse exposed acts of egregious cruelty inflicted on the calves, the more prevalent problem exposed by the undercover investigations was neglect and mishandling of calves at earlier stages of 'processing': on the farm and during transportation to slaughterhouses.¹⁰⁶

B. New Regulations

In response to this more systemic mistreatment, on April 14, 2016, the MPI released a draft of the animal welfare regulations for consultation.¹⁰⁷ The MPI had always intended to develop animal welfare regulations following the new power it was given under the Animal Welfare Amendment Act (No 2) 2015.¹⁰⁸ However, it is unclear whether prior to the undercover investigations the MPI intended to promulgate any regulations prescribing standards specifically in relation to the treatment of bobby calves. In addition to the proposals addressing young calf welfare, the regulatory proposals covered the care and conduct toward animals (including farm animals and companion animals), surgical and painful procedures, and live exports.¹⁰⁹ Mem-

¹⁰³ *Id.* at [72].

¹⁰⁴ *Ministry for Primary Industries v. Down Cow Ltd.* [2018] NZDC 20169 at [1]; *Pet-Food Firm Owner Sentenced on Animal Abuse Charges*, STUFF (Sep. 20, 2018, 14:22), <https://www.stuff.co.nz/national/crime/107225744/petfood-firm-owner-sentenced-on-animal-abuse-charges> [<https://perma.cc/4CTT-GTZ4>] (accessed May 26, 2020).

¹⁰⁵ See Press Release, Ministry for Primary Industries, MPI Wins Appeal over Bobby Calf Sentence—Home Detention Replaced with Imprisonment (Nov. 7, 2016), <https://www.mpi.govt.nz/news-and-resources/media-releases/mpi-wins-appeal-over-bobby-calf-sentence-home-detention-replaced-with-imprisonment/> [<https://perma.cc/4C3E-875A>] (accessed May 26, 2020) (quoting MPI Compliance Operations Manager Gary Orr who commented that "MPI takes animal abuse very seriously. When we get information about the mistreatment of animals, we conduct thorough investigations. When there is offending, we take action and people are held to account.").

¹⁰⁶ See, e.g., *Erickson v. Ministry for Primary Industries* [2017] NZCA 271, 1 at [5]–[6] (stating hidden cameras caught Erickson ill-treating calves during processing and before slaughtering).

¹⁰⁷ Proposed Animal Welfare Regulations (Care & Conduct and Surgical & Painful Procedures) 2016, reg 1. (N.Z.).

¹⁰⁸ Proposed Animal Welfare Regulations (Care & Conduct and Surgical & Painful Procedures) 2016, reg 1. (N.Z.). See *Overview of the Animal Welfare Amendment Bill*, MINISTRY FOR PRIMARY INDUST.: AGRIC. & INVEST. SERV., <https://www.agriculture.govt.nz/dmsdocument/6766/direct> [<https://perma.cc/E72E-SZ76>] (accessed July 2, 2020) (stating that one reason for enacting what became the Animal Welfare Amendment Act (No. 2) 2015, was to expand the enforcement toolkit to include "[n]ew regulations that will complement codes of welfare by specifying mandatory and enforceable animal welfare standards").

¹⁰⁹ Animal Welfare (Care and Procedure) Regulations 2018, regs 50–59 (N.Z.).

bers of the public were given just five weeks to file submissions as part of a public consultation.¹¹⁰

On June 11, 2016, following this brief public consultation period, the then-Minister for Primary Industries, Nathan Guy, announced seven new regulations to improve the treatment of bobby calves.¹¹¹ These regulations, now contained in the Animal Welfare (Care and Procedure) Regulations 2018, require that:

- A young calf be at least four full days of age before it is transported for sale or slaughter.¹¹² The calf must also display certain physical characteristics, including the ability to stand and walk, freedom from disease, firm hooves, and a shrivelled navel cord.¹¹³
- Calves must not be killed by blunt force trauma except in emergency circumstances.¹¹⁴
- “A person in charge of a young calf must not transport the calf unless the total duration of the journey from the point of loading the calf onto the vehicle to the point of arrival at the final destination of the journey is no more than 12 hours.”¹¹⁵

¹¹⁰ See *Consultation on Proposed Animal Welfare Regulations*, MINISTRY FOR PRIMARY INDUS. (July 13, 2017), <https://www.mpi.govt.nz/news-and-resources/consultations/consultation-on-proposed-animal-welfare-regulations/> [<https://perma.cc/FFP3-AKVV>] (accessed May 26, 2020) (promulgating the May 19, 2016, closing date for receipt of submissions by individuals, organizations, and companies).

¹¹¹ Press Release, Nathan Guy, Minister for Primary Industries, Ministry for Primary Industries, New Regulations for Bobby Calves (June 11, 2016), <https://www.beehive.govt.nz/release/new-regulations-bobby-calves> [<https://perma.cc/N5AM-5RB6>] (accessed May 26, 2020). The majority of the regulations apply to young calves. See, e.g., Animal Welfare (Care and Procedure) Regulations 2018, regs 3, 8 (N.Z.) (describing new regulations implemented for young calves). However, the prohibition on killing a calf using blunt force applies to any calf. Animal Welfare (Care and Procedure) Regulations 2018, reg 8 (N.Z.). See MINISTRY FOR PRIMARY INDUS., MORTALITY RATE IN YOUNG CALVES IN THE 2017 SPRING CALVING SEASON 4, 6 (2018), <https://www.mpi.govt.nz/dmsdocument/27675/direct> [<https://perma.cc/N5AM-5RB6>] (accessed May 26, 2020) (describing the 2016 and 2017 regulations protecting calves, as announced by Nathan Guy).

¹¹² Animal Welfare (Care and Procedure) Regulations 2018, reg 33 (N.Z.). This regulation was previously contained in the Animal Welfare (Calves) Regulations 2016, reg 6 (N.Z.), and came into effect on August 1, 2016 with a punishable \$500 infringement fine. Animal Welfare (Calves) Regulations 2016, regs 2(1), 6 (N.Z.).

¹¹³ Animal Welfare (Care and Procedure) Regulations 2018, reg 33 (N.Z.).

¹¹⁴ Animal Welfare (Care and Procedure) Regulations 2018, reg 8 (N.Z.) (describing violation of the regulation as a prosecutable offense punishable by a penalty of up to \$3,000 for individuals or up to \$15,000 for body corporates). The regulation was previously contained in the Animal Welfare (Calves) Regulations 2016, reg 5 (N.Z.), and came into effect on August 1, 2016. Animal Welfare (Calves) Regulations 2016, regs 2(1), 5 (N.Z.).

¹¹⁵ Animal Welfare (Care and Procedure) Regulations 2018, reg 34 (N.Z.). This regulation was previously contained in Animal Welfare (Calves) Regulations 2016, reg 7 (N.Z.) which came into effect August 1, 2016, and is a prosecutable offense punishable by a penalty of up to \$5,000 for individuals or up to \$25,000 for body corporates. Animal Welfare (Calves) Regulations 2016, regs 2(1), 7 (N.Z.).

- Young calves must not be transported by sea across the Cook Strait, which separates the North and South Islands of New Zealand.¹¹⁶
- “A person in charge of a young calf being held at slaughter premises for slaughter must ensure that the calf is slaughtered as soon as possible after its arrival at the premises.¹¹⁷ If it is not possible to slaughter a young calf within 24 hours after the calf was last fed on the farm on which it resided, the person in charge of the calf at the slaughter premises must” feed the calf (if it is willing and able to be fed), or if it “is unwilling or unable to be fed, humanely euthanize or slaughter the calf without delay.”¹¹⁸
- Suitable shelter must be provided “for young calves before transportation and at points of sale and slaughter.”¹¹⁹
- Loading and unloading facilities must be provided when young calves are transported for sale or slaughter.¹²⁰ This regulation “applies in situations where young calves are going to be loaded onto or unloaded from a stock transport vehicle, including on a farm, at a saleyard, and at processing premises.”¹²¹ “[R]esponsibility for the provision of loading and unloading facilities does not apply to the transporter. However, the use of unloading and loading facilities does apply to transporters.”¹²² People must also take all reasonable and practical steps to use these facilities.¹²³

¹¹⁶ Animal Welfare (Care and Procedure) Regulations 2018, reg 37 (N.Z.). This regulation was previously contained in the Animal Welfare (Calves) Regulations 2016, reg 11 (N.Z.) which came into effect on August 1, 2016, and is a prosecutable offense attracting a penalty of up to \$5,000 for individuals or up to \$25,000 for body corporates. Animal Welfare (Calves) Regulations 2016, regs 2(1), 11 (N.Z.).

¹¹⁷ Animal Welfare (Care and Procedure) Regulations 2018, reg 9(1) (N.Z.). This regulation was previously contained in the Animal Welfare (Calves) Regulations 2016, reg 10 (N.Z.) which came into force on February 1, 2017, and is punishable by a fine of up to \$5,000 for individuals or \$25,000 for body corporates. Animal Welfare (Calves) Regulations 2016, regs 2(2)(a), 10 (N.Z.).

¹¹⁸ Animal Welfare (Care and Procedure) Regulations 2018, reg 9(2) (N.Z.).

¹¹⁹ Animal Welfare (Care and Procedure) Regulations 2018, reg 10 (N.Z.). This regulation was previously contained in the Animal Welfare (Calves) Regulations 2016, reg 9 (N.Z.) which came into effect on August 1, 2017, and is a prosecutable offense attracting a penalty of up to \$2,000 for individuals and up to \$10,000 for body corporates. Animal Welfare (Calves) Regulations 2016, regs 2(2)(b), 9 (N.Z.).

¹²⁰ Animal Welfare (Care and Procedure) Regulations 2018, reg 35 (N.Z.). This regulation was previously contained in the Animal Welfare (Calves) Regulations 2016, reg 8 (N.Z.), which requires that facilities be made available to allow the calf to walk onto and off the stock truck by its own action, and to minimize risk of the calf slipping, falling or otherwise injuring itself. Animal Welfare (Calves) Regulations 2016, reg 8 (N.Z.).

¹²¹ MINISTRY FOR PRIMARY INDUS., *supra* note 111, at 7.

¹²² *Id.*; Animal Welfare (Care and Procedure) Regulations 2018, reg 35 (N.Z.). This regulation came into force on August 1, 2017. Animal Welfare (Calves) Regulations 2016, reg 2(2)(b), 8 (N.Z.). The offense of not *providing* the facilities is an infringement offense subject to a \$500 infringement fine, or a fine of up to \$1,500 on conviction, and the offense of not *using* the facilities is a prosecutable offence subject to a penalty of \$2,000 for individuals or \$10,000 for body corporates. Animal Welfare (Care and Procedure) Regulations 2018, reg 35(5–7) (N.Z.).

¹²³ Animal Welfare (Care and Procedure) Regulations 2018, reg 35(3) (N.Z.). This applies to vehicles with a loading height of 90 cm or higher. Animal Welfare (Care and Procedure) Regulations 2018, reg 35(4) (N.Z.).

These regulations first came into effect in the Animal Welfare (Calves) Regulations 2016.¹²⁴ The MPI stated in its regulatory impact statement that the offenses set out in the regulations were designed to complement the codes of welfare and that the more serious offenses would continue to be dealt with primarily through prosecution under the Act.¹²⁵

In conjunction with these regulations, the MPI developed a series of educational initiatives aimed at raising awareness of the new requirements, including: industry-led events for farmers, transporters, and processors; training sessions; regional meetings; guidance documents; and videos.¹²⁶

C. *Impact of the Government's Response*

Although the scale of the MPI's response to the investigations was unprecedented, and the reforms represent an improvement on the status quo, the new bobby calf regulations do not represent a radically new regime for bobby calf welfare.¹²⁷ Rather, it appears that the MPI has simply adopted a basic number of reforms that it considered necessary to preserve New Zealand's international reputation. As the MPI has itself observed, more than half of the regulations reflect minimum standards or recommended best practices from codes of welfare or accepted good practice across the industry.¹²⁸ However, it is intended that these standards will now have more 'teeth,' as offenders can receive instant fines or be prosecuted for their breaches.¹²⁹

The most significant changes implemented by the new regulations are: the requirements for loading and unloading facilities; the requirement that calves be at least four days old before they are transported for sale or slaughter; the new maximum time off feed before slaughter; and the requirement for shelter before transportation and at points of sale and slaughter.¹³⁰ These regulations required farmers to build new

¹²⁴ Animal Welfare (Calves) Regulations 2016 (N.Z.).

¹²⁵ MINISTRY FOR PRIMARY INDUS., *supra* note 47, at 4.

¹²⁶ MINISTRY FOR PRIMARY INDUS., *supra* note 111, at 8. One of these initiatives was the Bobby Calf Action Group, which was formed at the end of 2015. This group includes government, farmers, transport companies, vets and processing companies, and claims to work to ensure best practices are adopted in relation to the care of bobby calves. *Bobby Calf Welfare: Everyone Has a Role to Play*, MINISTRY FOR PRIMARY INDUS. (July 7, 2016), <https://www.mpi.govt.nz/news-and-resources/media-releases/bobby-calf-welfare-everyone-has-a-role-to-play/> [<https://perma.cc/85YK-GN5D>] (accessed May 26, 2020); E-mail from Yuuki Smithers to author, *supra* note 45.

¹²⁷ See MINISTRY FOR PRIMARY INDUS., *supra* note 54, at 14 (describing the regulations modestly as "good practice" and alluding to nominal resulting effects, if any).

¹²⁸ MINISTRY FOR PRIMARY INDUS., *supra* note 47, at 11; see also MINISTRY FOR PRIMARY INDUS., *supra* note 54, at 14 (highlighting the MPI's assertion that "[a]ll seven regulations represent standards that are already being achieved by many practitioners and which are recognised in the industry as current good practice").

¹²⁹ MINISTRY FOR PRIMARY INDUS., *supra* note 47, at 9.

¹³⁰ *Id.* at 14–15. As the MPI indicates, there were already a number of minimum standards requiring that shelter be provided for different classes of animals. *Id.* at 22. However, the lack of enforceability of the codes of welfare meant that many farmers did

facilities, renegotiate existing supply contracts, or both.¹³¹ Although the prohibition on transporting young calves by sea across Cook Strait is a new requirement, as the MPI acknowledged, this regulation is likely to have minimal impact because the transportation of calves across the strait has not taken place for several years.¹³² Similarly, although the requirement that calves not be transported for more than twelve hours is a new standard, according to the MPI, most journeys are less than eight hours.¹³³ The prohibition on killing calves by blunt force trauma to the head also represents a minimal change, as this practice was already prohibited by the 2014 version of the Code of Welfare: Dairy Cattle.¹³⁴

Nevertheless, the regulations and supporting educational efforts have had a positive impact on bobby calf mortality rates.¹³⁵ Following the implementation of the first four regulations in August 2016, the calf mortality rate was reduced by more than 50%, dropping from 0.25% in 2015 to 0.12% in 2016.¹³⁶ Furthermore, once the full set of regulations was implemented, the mortality rate dropped further, with a rate of 0.06% recorded in 2017—the lowest rate ever recorded.¹³⁷ However, as the MPI itself has acknowledged, mortality rates in young calves represent a limited proxy for overall calf welfare.¹³⁸ Although the MPI has claimed that the regulations have led to improvements in “the general condition and welfare of calves destined for slaughter,” it has not yet adopted any formal or scientific method of measuring this impact.¹³⁹

not comply with these standards. *See id.* at 14–15 (discussing changes from the status quo).

¹³¹ *Id.*

¹³² *Id.* at 14.

¹³³ *Id.*; *see also* MINISTRY FOR PRIMARY INDUS., *supra* note 54, at 16 (stating the average journey for transporting calves is a little more than five hours, but some journeys are up to sixteen hours.).

¹³⁴ MINISTRY FOR PRIMARY INDUS., *supra* note 47, at 14, 20.

¹³⁵ MINISTRY FOR PRIMARY INDUS., *supra* note 54, at 20. The mortality rate is defined by the MPI as “[t]he number of calves, as recorded by MPI Verification Services veterinarians that died or were condemned due to injury or welfare issues during transport or lairage.” *Id.* at 4.

¹³⁶ *Id.* at 6.

¹³⁷ MINISTRY FOR PRIMARY INDUS., *supra* note 111, at 2. It does not appear that any figures have been released by the MPI for the 2018 year.

¹³⁸ *Id.* at 3. Reflecting this concern, the MPI commissioned animal welfare scientists at Massey University of New Zealand to produce a report on potential welfare indicators other than mortality rates. *See* ALANA BOULTON ET AL., MASSEY UNIV. OF N.Z., BOBBY CALF WELFARE ACROSS THE SUPPLY CHAIN - FINAL REPORT FOR YEAR 1 1 (July 2018) (listing a first-year objective of the program as determining “the prevalence of other potential indicators of calf welfare . . . at the processing plant,” beyond just mortality). This report is discussed further below.

¹³⁹ MINISTRY FOR PRIMARY INDUS., *supra* note 111, at 10. It is also worth noting that in October 2016, just under one year after the initial undercover investigation released by Farmwatch, and a few months after the implementation of the first four regulations, additional undercover footage emerged of cruelty on New Zealand dairy farms. Gerald Piddock, *Farmwatch Releases More Video of Abused NZ Cows*, STUFF (Oct. 26, 2016,

The MPI commissioned a study by Massey University of New Zealand examining potential welfare indicators other than mortality rate, which had concerning findings.¹⁴⁰ The university's scientists conducted a literature review of welfare indicators and applied these indicators to an observational study of bobby calves in lairage, which encompassed twelve different meat processing plants over an eighteen-week period, from June to October 2016.¹⁴¹ The observational study found that “dehydration, faecal soiling, increased respiratory rate and ocular and/or nasal discharge were highly prevalent among the bobby calves observed.”¹⁴² Yet four of the new bobby calf regulations took effect on August 1, 2016, in the middle of the research period.¹⁴³

Ultimately, the effectiveness of the new regulations—and the extent to which they genuinely further the purpose of the Animal Welfare Act 1999—will depend on the extent to which they are enforced. Currently, it appears unlikely that the majority or even a significant portion of mistreatment of bobby calves will be detected because enforcement is grossly under-resourced. The MPI has only twenty-two animal welfare inspectors responsible for investigating the welfare of the country's more than 150 million farm animals—including the five million cows spread across the country's 11,372 dairy herds.¹⁴⁴ This equates to more than six million animals for each full-time animal welfare inspector.¹⁴⁵ Although the Royal New Zealand Society for the Pre-

15:28), <https://www.stuff.co.nz/business/farming/85719701/more-safe-footage-emerges-of-abused-calves> [<https://perma.cc/ZD79-VHCJ>] (accessed May 26, 2020). The video footage, filmed at ten different dairy farms in Waikato and Taranaki, showed young calves being thrown roughly into trucks. *Id.* The footage also showed a farm worker dragging a bobby calf by one hind leg along a field as the calf's mother followed the calf and tried to nuzzle him. *Id.* Farmwatch claimed that the treatment of bobby calves had not changed. *Id.* However, this footage was filmed before the regulation requiring unloading and loading facilities took effect. *See id.* (showing the release of new farm footage preceded the promulgation of the 2016 calf welfare regulations by almost two months).

¹⁴⁰ *See generally* BOULTON ET AL., *supra* note 138 (describing “research to identify reasons for mortality and morbidity in dairy calves for slaughter” and identifying “new welfare indicators”).

¹⁴¹ *Id.* at 99.

¹⁴² *Id.* at 121.

¹⁴³ *Id.* at 57.

¹⁴⁴ *Dairy Sector Quickfacts: Farms, Economic, Markets*, N.Z. DAIRYING, <https://www.dairynznewslink.co.nz/wp-content/uploads/2020/01/Dairy-sector-quick-facts-2019-newslink-1-2.pdf> [<https://perma.cc/YMV7-SPDA>] (accessed May 26, 2020); MARCELO RODRIGUEZ FERRERE, MIKE KING & LEVI MROS LARSEN, ANIMAL WELFARE IN N.Z.: OVERSIGHT, COMPLIANCE AND ENFORCEMENT 11 (2019). As the authors note, there are also 200 veterinarians who provide verification services for market access and are cross-warranted as animal welfare inspectors to oversee welfare after transportation and at slaughter. *Id.* However, they are not out and about proactively responding to animal welfare complaints or indeed responsible for doing so; this is the role of the MPI's animal welfare inspectors. *Id.*

¹⁴⁵ *Id.* The authors observe that there are 150,000,000 farm animals in New Zealand and only twenty-two full-time inspectors. A calculation based on these figures suggests that each full-time inspector is responsible for more than six million animals.

vention of Cruelty to Animals (RNZSPCA) is also charged with enforcing the Act, its enforcement role is focused primarily on companion animals.¹⁴⁶ As Marcelo Rodriguez Ferrere, Mike King, and Levi Mros Larsen observe, “[U]nder-resourcing of the animal welfare enforcement system in New Zealand is a major constraint on realizing the legal potential of the Act. Both MPI and RNZSPCA are insufficiently resourced, and this results in overly selective enforcement, under-prosecution, insufficient proactive enforcement, and inadequate self-regulation.”¹⁴⁷

Indeed, while the MPI claimed that there was a high level of compliance with the requirement for shelter and loading facilities—which came into force in August 2017—the claim appears to be based on an inspection of only 248 out of the 11,372 dairy herds in the country—just over 2% of all farms.¹⁴⁸ Similarly, although DairyNZ chief executive Tim Mackle claimed in 2016 that “anecdotally” he had heard that calves were arriving at slaughterhouses in an improved condition, he conceded that DairyNZ had only conducted in-depth animal welfare risk assessments of 500 farms.¹⁴⁹

Finally, it is worth noting that one aspect of the 2015 undercover investigation that shocked the public represented an *inherent* feature of dairy farming: the separating of bobby calves from their mothers. This point was emphasized by Federated Farmers dairy industry chair Andrew Hoddard, who noted that this practice “happens in every single dairy industry, everywhere in the world.”¹⁵⁰ The regulations do not, of course, eliminate or alter this standard procedure.

V. WHAT DROVE THE GOVERNMENT’S RESPONSE TO THE UNDERCOVER INVESTIGATIONS?

Despite the limits on the likely impact of the new regulations, the Ministry for Primary Industries’ (MPI) response to the undercover investigations was nevertheless unparalleled. The government responded to previous high-profile undercover investigations conducted by animal rights activists with legislative reforms, most notably in 2010 when it announced a ban on gestation crates following public out-

¹⁴⁶ *Id.* at 2.

¹⁴⁷ *Id.* at 3.

¹⁴⁸ Gerald Piddock, *MPI Inspections Reveal High Levels of Compliance Among Dairy Farmers Around Calf Facilities*, STUFF (Sept. 7, 2017, 11:22 AM), <https://www.stuff.co.nz/business/farming/96569924/mpi-inspections-reveal-high-levels-of-compliance-among-dairy-farmers-around-calf-facilities> [https://perma.cc/5GUV-Z3AS] (accessed May 26, 2020).

¹⁴⁹ RADIO N.Z., *Dairy NZ Responds to New Video of Bobby Calf Treatment*, YOUTUBE (Oct. 24, 2016), https://www.youtube.com/watch?time_continue=1&v=2Z-HVzf-bQM&feature=emb_logo [https://perma.cc/ZE9H-C3X5] (accessed May 26, 2020).

¹⁵⁰ Joel Maxwell, *New Zealand Dairy Cruelty’ Claims Target UK Consumer in Guardian Ad Campaign*, STUFF (Dec. 6, 2015, 16:24), <https://www.stuff.co.nz/business/farming/74783076/New-Zealand-dairy-cruelty-claims-target-UK-consumer-in-Guardian-ad-campaign> [https://perma.cc/Q6H2-VH4T] (accessed May 26, 2020).

cry at footage highlighting the acute suffering of mother sows on New Zealand pig farms.¹⁵¹ Yet this ban did not come close to the broad scale of the regulatory response adopted in relation to bobby calves.

This discrepancy might be attributed to timing. Because the footage of bobby calf cruelty emerged in late 2015, only a number of months after the passing of the Animal Welfare Amendment Act (No 2) 2015 (Amendment Act 2015), which enabled the government to promulgate regulations under the Animal Welfare Act,¹⁵² this was the first opportunity the MPI had to respond in this comprehensive fashion. Yet the availability of this new legislative tool cannot in itself explain the MPI's response. Firstly, many aspects of the response (namely the prosecutions and the educational initiatives) were tools that the MPI had always had at its disposal. Secondly, although the power to develop new regulations only became available in May 2015—following the passing of the Amendment Act 2015—prior to this development, the MPI still had the ability to recommend amendments to standards in codes of welfare and to add new standards, as it deemed appropriate.¹⁵³ Thirdly, despite widespread opposition to the treatment of layer hens in colony cages and to the use of calves and bulls in rodeos, the MPI did not use the tools of the Amendment Act 2015 to respond in the same comprehensive fashion with which it responded to the bobby calf investigations, for example by promulgating new regulations banning these controversial practices.¹⁵⁴ Accordingly, the reasons for the character of its response warrant scrutiny.

¹⁵¹ *New Zealand: New Code of Welfare for Pigs Released*, PIG PROGRESS (Dec. 2, 2010), <https://www.pigprogress.net/Growing-Finishing/Environment/2010/12/New-Zealand-New-code-of-welfare-for-pigs-released-PP004815W/> [<https://perma.cc/79UU-PVDW>] (accessed May 26, 2020). See *Pig Farmers Hope Ban on Sow Stalls Will Buy Loyalty*, NZ HERALD (Dec. 1, 2010, 9:18 PM), https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10691420 [<https://perma.cc/4DWW-67HD>] (accessed July 7, 2020) (“Announcing the new Animal Welfare (Pigs) Code, which comes into effect tomorrow, Agriculture Minister David Carter said the public backlash over mistreatment of pigs had played a significant role in the decision to ban sow stalls in pig farming by December 2015. Media coverage of pigs in stalls so small that they cannot turn around and relentless lobbying from animal welfare groups saw about 18,000 public submissions for the code.”).

¹⁵² Animal Welfare Amendment Act (No. 2) 2015, s 67 (N.Z.).

¹⁵³ Animal Welfare Act 1999, s 76 (N.Z.).

¹⁵⁴ See Mike Mather *Protesters Cage Themselves in Show of Empathy for Overcrowded Chooks*, STUFF (Apr. 16, 2016, 15:00), <https://www.stuff.co.nz/national/78976764/protesters-cage-themselves-in-show-of-empathy-for-overcrowded-chooks> [<https://perma.cc/ZT7H-EXTU>] (accessed May 26, 2020) (highlighting public protests against enriched or colony cages). These cages are due to replace battery cages when they become illegal in 2023. See Code of Welfare: Layer Hens 2018, pts 4, 6, 12 (N.Z.); see also *Activists Picket Waikato Rodeo, Call for Ban*, RADIO N.Z. (Feb. 18, 2018), <https://www.rnz.co.nz/news/national/350648/activists-picket-waikato-rodeo-call-for-ban> [<https://perma.cc/UU6W-75RS>] (accessed July 2, 2020) (highlighting public opposition to rodeo); Katie Doyle, *Minister Rejects Rodeo Ban, but ‘Open’ to New Evidence*, RADIO N.Z. (Mar. 22, 2018), <https://www.rnz.co.nz/news/political/353133/minister-rejects-rodeo-ban-but-open-to-new-evidence> [<https://perma.cc/VW54-YQ6C>] (accessed May 26, 2020) (reporting that the New Zealand Minister responsible for animal welfare at the time, Meka

Animal rights activists in New Zealand often allege that animal welfare reforms are primarily driven by concerns about protecting New Zealand's international reputation as a responsible producer of agricultural goods, as opposed to protecting the animals themselves.¹⁵⁵ Indeed, Save Animals From Exploitation (SAFE) expressly cited this as a reason for taking the controversial step to publish the advertisements in *The Guardian*, with its ambassador, Hans Kriek, claiming, "We needed to do it. Otherwise all we would get is lip service with no action, and we need action for those calves."¹⁵⁶

A. Regulatory Impact Statement

In New Zealand, regulatory impact statements must be prepared by a government agency when it proposes new regulations.¹⁵⁷ The statements summarize an agency's best advice to its Minister and Cabinet regarding possible solutions to an identified regulatory problem.¹⁵⁸ As will be discussed in more detail below, the MPI's regulatory impact statement addressing the young calf proposals consistently emphasized the importance of New Zealand's reputation.¹⁵⁹

First, the MPI's concern with protecting New Zealand's reputation was apparent in the underlying assumptions made in relation to the regulatory proposals. The MPI commented at the outset that a quantitative assessment of the net economic impact of any change in practice was not possible, due to the tight timeframe for putting new measures in place before the 2016 calving season.¹⁶⁰ However, it went on to explain that, in these circumstances, it had "made some assumptions that the advertising campaign undertaken in the United Kingdom, regarding serious ill treatment of young calves in New Zealand, hurt our international reputation."¹⁶¹

This preoccupation with reputation was further apparent in the discussion of the criteria used for assessing the success of an interven-

Whaitiri, then the Associate Minister of Agriculture, stated that the government was not considering a ban on rodeo). See generally Code of Welfare: Rodeos 2018 (N.Z.) (highlighting that rodeos remain legal).

¹⁵⁵ See Maxwell, *supra* note 150 ("Obviously now they realize their international reputation could be damaged there's a lot of willingness to make improvements.").

¹⁵⁶ Mitchell, *supra* note 6.

¹⁵⁷ See *Impact Analysis Requirements for Regulatory Proposals*, N.Z. TREASURY, <https://treasury.govt.nz/information-and-services/regulation/impact-analysis-requirements-regulatory-proposals> [<https://perma.cc/JW7R-RUVC>] (accessed May 26, 2020) ("[T]he requirements focus on the Government expectation that agencies provide robust analysis and advice to Ministers before decisions are taken on regulatory change.").

¹⁵⁸ See *Regulatory Impact Statements*, MINISTRY FOR PRIMARY INDUS. (Dec. 11, 2019), <http://www.mpi.govt.nz/law-and-policy/legal-overviews/regulatory-impact-statements/> [<https://perma.cc/4269-ZHV6>] (accessed Jan. 28, 2020) ("[A Regulatory Impact Statement] is a government agency document which summaries an agency's best advice on the Impact Analysis relating to regulatory proposal.").

¹⁵⁹ MINISTRY FOR PRIMARY INDUS., *supra* note 47, at 1, 4–5, 7, 9, 10, 11, 17.

¹⁶⁰ *Id.* at 1.

¹⁶¹ *Id.*

tion. The MPI stated that it would regard an intervention as successful when “there is a higher level of compliance with animal welfare standards”; when “there are fewer instances where the physical, health and behavioral needs of young calves were not met”; and when “the world leading reputation of New Zealand’s animal welfare regulatory system is maintained and enhanced.”¹⁶²

Similarly, in its analysis of regulatory options, the MPI stressed the relevance of protecting New Zealand’s reputation.¹⁶³ In relation to the exposed mistreatment of calves, it commented:

If this treatment is allowed to continue it is also likely to have negative impacts on New Zealand’s reputation in animal welfare practices both locally and internationally. In 2014, the global charity World Animal Protection ranked New Zealand first equal alongside the United Kingdom, Austria and Denmark for its animal welfare regulatory system. If New Zealand’s reputation is harmed our access to high value markets and new markets is likely to be affected.¹⁶⁴

It then went on to identify a “potential long term cost, if outliers continue to mistreat calves, in terms of lost market access.”¹⁶⁵ It noted that even isolated incidents of poor animal welfare and deliberate animal cruelty could compromise New Zealand’s reputation,¹⁶⁶ thus leaving New Zealand’s reputation vulnerable to a “small minority of farmers, and other operators in the industry, which continue to mistreat their calves.”¹⁶⁷

The MPI stressed that harm to New Zealand’s reputation could affect existing export revenue for animals or animal products and limit the country’s ability to develop new markets.¹⁶⁸ In support of this argument, it underscored that “New Zealand’s well-regarded international reputation is pivotal to its export success in primary sector products and increasing the use of New Zealand’s strong and unique culture and brand.”¹⁶⁹ It noted that in 2015, New Zealand earned \$23 billion in export revenue from animals and animal products, and it observed that even a small reduction to this export revenue could have a significant economic impact.¹⁷⁰ New regulations would provide a potential long-term benefit based on “a strong reputation and therefore good market access.”¹⁷¹

¹⁶² *Id.* at 5.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 4.

¹⁶⁵ *Id.* at 7. The MPI identified this as a potential cost associated with both the “status quo” option and the “increased education/training” option. *Id.*

¹⁶⁶ *Id.* at 11.

¹⁶⁷ *Id.* at 9. The MPI emphasized this further, noting that the status quo option would leave New Zealand’s reputation “vulnerable to those minority of farmers, and other operators in the industry, who are mistreating young calves.” *Id.* at 10.

¹⁶⁸ *Id.* at 9.

¹⁶⁹ *Id.* at 11.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 7.

The MPI concluded that new regulations should be adopted.¹⁷² Notwithstanding the short-term costs associated with implementing them, it stated that “industry stakeholders would benefit from retaining New Zealand’s strong reputation for upholding robust animal welfare practices provided for by the regulations,” as “[a] number of industry representative groups have emphasised.”¹⁷³

B. Media Statements

The MPI’s emphasis on the economic rationale for introducing the young calf regulations, based on protecting the country’s reputation, appeared to echo the concerns of the dairy industry. Dairy cooperative Fonterra reacted to the emergence of the undercover footage in a statement from its supplier relations manager, who stated Fonterra was taking the issue “very, very seriously, because it will have a massive impact on our key customer brands.”¹⁷⁴ Similarly, Waikato Federated Farmers president, Chris Lewis, called for ramped up enforcement of regulations to prevent future calf abuse, warning those in violation would be “ostracized by the farming community.”¹⁷⁵

The New Zealand government also consistently stressed the relevance of reputation to its assessment of the problem. Acting Prime Minister Bill English expressed that “the revelations could embarrass the country’s farming industry and warranted urgent attention.”¹⁷⁶ He called for a thorough investigation into the matter given “the key role the dairy industry played in New Zealand’s international brand.”¹⁷⁷

This overarching concern with reputation became even more apparent in media narratives following SAFE’s publication of the advertisements in *The Guardian*. When questioned on the matter, John Key, New Zealand’s prime minister at the time, described the advertisements as “economic sabotage,”¹⁷⁸ alleging that they “put New Zealand’s reputation at risk.”¹⁷⁹ Similarly, Mike Peterson, New Zealand’s agricultural trade envoy, acknowledged that the advertisement had

¹⁷² *Id.* at 1.

¹⁷³ *Id.* at 10. The MPI further notes that “[e]nsuring sufficient care is taken of these animals not only protects the welfare of the young calves themselves but also the reputation of New Zealand’s primary sector both domestically and internationally.” *Id.* at 17.

¹⁷⁴ *Waikato Dairy Farmers Disgusted at Abusive Behavior*, STUFF (Nov. 30, 2015, 19:13), <https://www.stuff.co.nz/business/farming/74542356/nz-dairy-industry-in-the-spotlight-as-investigation-reveals-violent-abuse> [<https://perma.cc/9NGT-P4HR>] (accessed May 26, 2020).

¹⁷⁵ *Id.*

¹⁷⁶ *Calves ‘Beaten to Death’—Shocking Video Exposes Dairy Industry Cruelty*, *supra* note 5.

¹⁷⁷ *Id.*

¹⁷⁸ *Dairy Ad May Put Off Consumers—Envoy*, RADIO N.Z. (Dec. 7, 2015, 8:32 PM), <http://www.radionz.co.nz/news/national/291461/dairy-ad-may-put-off-consumers-envoy> [<https://perma.cc/7SXG-7L6Z>] (accessed May 26, 2020).

¹⁷⁹ Amelia Langford, *Is There a ‘Dark Side’ to NZ Dairy?*, RADIO N.Z. (Dec. 11, 2015, 12:31 PM), <https://www.radionz.co.nz/news/on-the-inside/291852/is-there-a-dark-side-to-nz-dairy> [<https://perma.cc/W6TN-4RFF>] (accessed Jan. 26, 2020).

the potential to put some consumers off dairy products—not just New Zealand dairy products, but dairy products in general.¹⁸⁰

Accordingly, the rationalization for the regulations given by the MPI and leading government officials suggests that the principal concern driving the regulatory response was a desire to safeguard New Zealand’s reputation as it relates to animal welfare in the eyes of overseas consumers. While the MPI has an interest in preserving the well-being of bobby calves for their own sake, the consistent emphasis on reputation suggests that this was an ancillary concern.

C. Response to a Request Made Under the Official Information Act 1982

The MPI’s overarching concern with protecting New Zealand’s international reputation is also evident in its response to a request made under the Official Information Act in January 2016—the month after SAFE published the controversial advertisements in *The Guardian*.¹⁸¹ Fairfax Media, a news channel, had requested a draft report prepared by the MPI that detailed the death rate of bobby calves during the 2015 season.¹⁸² The MPI refused the request, citing as one of its reasons the need to “avoid prejudice to the substantial economic interest of New Zealand.”¹⁸³ This was an arguably tenuous basis for resisting disclosure of the requested report under the Act. However, the timing of the request—immediately after SAFE’s publication of *The Guardian* advertisements—suggests that the MPI was aware of the potential for this information to be employed by animal rights groups such as SAFE and for this information to compound the perceived harm to New Zealand’s dairy industry.

D. Why Reputation Matters

On one level, the MPI’s preoccupation with its international reputation with respect to animal welfare in the dairy industry might seem curious. As noted above, the main export destinations for New Zealand dairy products are China, Australia, the United States, the United Arab Emirates, and Japan—all of which have comparatively low standards of animal welfare relative to New Zealand.¹⁸⁴

¹⁸⁰ *Dairy Ad May Put Off Consumers—Envoy*, *supra* note 178.

¹⁸¹ Gerard Hutching, *Almost 5,000 Calves Died Last Year while Being Transported*, STUFF (Feb. 4, 2016, 09:48), <https://www.stuff.co.nz/business/farming/76557206/almost-5000-bobby-calves-died-last-year-while-being-transported> [https://perma.cc/TU2R-2KFB] (accessed May 26, 2020).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *About the NZ Dairy Industry*, *supra* note 20. See *Animal Protection Index*, *supra* note 28 (grading and comparing different countries’ animal welfare standards); W.W. Ursinus et al., *General Overview of Animal Welfare in a Global Perspective*, in ANIMAL WELFARE IN A GLOBAL PERSPECTIVE 34–35, 41 (2009) (listing animal welfare protections United Arab Emirates affords to animals in the country).

In this respect, the EU, New Zealand's third-largest trading partner,¹⁸⁵ is particularly relevant. Consumers within the EU are generally regarded as placing high value on animal welfare,¹⁸⁶ and New Zealand is the EU's main supplier of butter.¹⁸⁷ Furthermore, the EU is an important export destination for other New Zealand animal products, namely red meat and wool.¹⁸⁸

Thus, perception by EU-based consumers of animal welfare standards in New Zealand—not just in the dairy industry, but across all animal industries—is particularly important to the New Zealand government. Furthermore, maintaining a perception of high welfare standards is regarded as important even in markets with relatively low animal welfare standards, such as the United States, as it suggests that New Zealand animal products are superior to products produced elsewhere.¹⁸⁹ This point was emphasized by Damien O'Connor, Labour member of Parliament and now the minister of agriculture, during the second reading of the Animal Welfare Amendment Bill (No2) in 2014.¹⁹⁰ He commented:

The use of animals or the management of them or the care of them—all of those things—are at the heart of our economy, our reputation, and our ability to survive into the future. We have, as the Minister for Primary Industries has stated, a good international reputation for animal welfare, and it must continue.¹⁹¹

MPI, in a policy paper obtained pursuant to an Official Information Act 1982 request, illuminated the extent of its concern that negative publicity regarding New Zealand's animal welfare standards could materially harm market access.¹⁹² The paper makes a “business case” for investment in high animal welfare standards on the basis that New Zealand earns around \$20 billion per year by exporting animal prod-

¹⁸⁵ *Europe*, N.Z. MINISTRY FOREIGN AFF. & TRADE, <https://www.mfat.govt.nz/en/countries-and-regions/europe/> [<https://perma.cc/AE46-B7R9>] (accessed May 26, 2020).

¹⁸⁶ *See, e.g.*, N.Z. MINISTRY OF AGRIC. AND FORESTRY, *supra* note 42, at 6 (referencing the EU's 1997 adoption of the Amsterdam Protocol, which recognized animals as sentient beings).

¹⁸⁷ *EU Dairy Imports*, AGRIC. & HORTICULTURE DEV. BOARD (Jan. 23, 2020) <https://dairy.ahdb.org.uk/market-information/processing-trade/imports-exports/eu-dairy-imports/#.Xi-LmBdKi1t> [<https://perma.cc/VFW8-Y33Y>] (accessed May 26, 2020).

¹⁸⁸ BEEF & LAMB N.Z., MEAT INDUS. ASS'N., SUBMISSION ON AN EU FREE TRADE AGREEMENT 2–3, <https://www.mfat.govt.nz/assets/FTAs-in-negotiations/EU-FTA/9.-NZ-Beef-and-Lamb-Meat-Industry-Association.pdf> [<https://perma.cc/UF7A-A43U>] (accessed May 26, 2020).

¹⁸⁹ *See Animal Welfare Amendment Bill—Second Reading*, N.Z. Parliament (Nov. 26, 2014), https://www.parliament.nz/en/pb/hansard-debates/rhr/document/51HansD_2014_1126_00000040/animal-welfare-amendment-bill-second-reading [<https://perma.cc/MRQ8-2ADX>] (accessed May 26, 2020) (arguing for country-of-origin labelling so consumers know that their animal products are from New Zealand, which means they were ethically produced).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² MINISTRY FOR PRIMARY INDUS., PROTECTING ANIMALS—A 21ST CENTURY ANIMAL WELFARE SYSTEM 3–4 (2015); E-mail from Yuuki Smithers to author, *supra* note 45.

ucts, and that “a key contributor to our global reputation as a safe food producer is our ability to ethically produce animals and animal products, within robust animal welfare standards.”¹⁹³ Indeed, the paper notes that in some cases the export earnings are “directly linked to New Zealand’s positive animal welfare programme.”¹⁹⁴

The policy paper goes on to state that consumer expectations, which are critical to market access, place new demands on New Zealand’s animal welfare regime, and “global interconnectedness is increasing consumer scrutiny and accentuating the speed at which reportage of adverse events can travel.”¹⁹⁵ The MPI gives the example of venison exports to Europe, commenting that access to the European market for venison requires strict adherence to velvet removal standards.¹⁹⁶ The MPI states that “any stories or inferences of non-compliance with those standards are likely to be picked up by international media and could have an immediate effect on export earnings.”¹⁹⁷ It explains this as the reason why it administers a program in which velvet removal is audited and non-compliance addressed, emphasizing that the program is “manpower intensive but necessary to maintain market access.”¹⁹⁸

VI. IMPLICATIONS OF FINDINGS

The conclusion formed above—that the Ministry for Primary Industries’ (MPI’s) desire to protect New Zealand’s international reputation drove the bobby calf reforms—has three major implications. First, it helps explain apparent anomalies in New Zealand’s animal welfare regime. Second, it suggests the instrumental approach adopted by the MPI is consistent with the presence of regulatory culture, and that animal welfare activists must therefore put institutional design at the forefront of their focus. Finally, it suggests that the MPI’s sensitivity to New Zealand’s international reputation with respect to animal welfare provides opportunities for animal advocates that have not yet been fully realized. These implications are discussed in further detail below.

¹⁹³ MINISTRY FOR PRIMARY INDUS., *supra* note 192, at 4; E-mail from Yuuki Smithers to author, *supra* note 45.

¹⁹⁴ MINISTRY FOR PRIMARY INDUS., *supra* note 192, at 3; E-mail from Yuuki Smithers to author, *supra* note 45.

¹⁹⁵ MINISTRY FOR PRIMARY INDUS., *supra* note 192, at 5; E-mail from Yuuki Smithers to author, *supra* note 45.

¹⁹⁶ MINISTRY FOR PRIMARY INDUS., *supra* note 192, at 5; E-mail from Yuuki Smithers to author, *supra* note 45.

¹⁹⁷ MINISTRY FOR PRIMARY INDUS., *supra* note 192, at 5; E-mail from Yuuki Smithers to author, *supra* note 45.

¹⁹⁸ MINISTRY FOR PRIMARY INDUS., *supra* note 192, at 5; E-mail from Yuuki Smithers to author, *supra* note 45.

A. *The Findings Explain Inconsistencies in New Zealand's Animal Welfare Regime*

The New Zealand government's policy objective of preserving the country's reputation, as evident from its response to the bobby calf cruelty exposé, is instructive. In particular, it helps explain apparent anomalies in the government's position on other significant animal welfare issues. Consider live exports, for example. Since 2003, there have been extensive restrictions in place in New Zealand on live export for slaughter.¹⁹⁹ These restrictions first took the form of a moratorium introduced in response to a 2003 shipping disaster, during which more than 5,000 sheep died on board the M.V. Cormo Express while traveling from Australia to Saudi Arabia.²⁰⁰ Today, the restrictions—which have effectively meant that no live exports for slaughter have taken place since 2008—are contained in the Animal Welfare (Export of Livestock for Slaughter) Regulations 2016.²⁰¹

However, there are no similar restrictions on the live export of animals for breeding.²⁰² This is an increasingly prevalent practice in New Zealand: MPI statistics show that in 2018, 17,319 live cattle, 2,993 horses, 239 sheep, and 2.8 million one-day-old chicks were exported from New Zealand.²⁰³ Most recently, 5,400 cows were shipped to China in early August 2019, despite public protest and opposition from the New Zealand Green Party.²⁰⁴ Similar shipments have had

¹⁹⁹ Angie Skerrett, *Horror Capsize of Livestock Carrier Renews Calls for NZ to Ban All Live Exports*, NEWSHUB (Nov. 11, 2019), <https://www.newshub.co.nz/home/rural/2019/11/horror-capsize-of-livestock-carrier-renews-calls-for-nz-to-ban-all-live-exports.html> [<https://perma.cc/73F5-RKJ8>] (accessed May 26, 2020).

²⁰⁰ Carole de Fraga, *The Cormo Express: Australia's Latest Live Export Shame*, 53 ANIMAL WELFARE INST. QUARTERLY 7, 7 (Winter 2004), https://awionline.org/sites/default/files/awi_quarterly_issue/digital_magazine/04-Winter-Q.pdf [<https://perma.cc/7XEB-3PQ5>] (accessed May 26, 2020).

²⁰¹ See MINISTRY FOR PRIMARY INDUS., LIVE EXPORT REVIEW 21 (2019), <https://www.mpi.govt.nz/dmsdocument/38036-2019-livestock-review-discussion-paper-for-consultation> [<https://perma.cc/PCR8-HM4A>] (accessed May 26, 2020) (noting that “[t]here have been no exports for slaughter since 2008”); Skerrett, *supra* note 199. These regulations provide that “[a] person must not export livestock for slaughter without the prior approval of the Director-General.” Animal Welfare (Export of Livestock for Slaughter) Regulations 2016, reg 5(1) (N.Z.). The Ministry for Primary Industries states that “[a]pproval may only be granted if the Director-General judges that the risks can be adequately managed.” *Restrictions on Exporting Livestock*, MINISTRY FOR PRIMARY INDUS. (Sept. 1, 2017), <http://mpi.govt.nz/exporting/animals/live-animals/requirements/animal-welfare-export-certificates/restrictions-on-exporting-livestock/> [<https://perma.cc/2MSN-KQCS>] (accessed May 26, 2020). The MPI's guidelines on its website expressly state that it is risks to New Zealand's trade reputation that must be managed. *Id.*

²⁰² Andrea Fox, *Live Animal Export Review Needs a Close Look at Welfare in Destinations: SAFE*, N.Z. HERALD (Apr. 5, 2019, 1:47 PM), https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=12219685 [<https://perma.cc/5YZ7-ANKF>] (accessed May 26, 2020).

²⁰³ *Id.*

²⁰⁴ Esther Taunton, *Green Party Calls for Immediate Halt to Live Exports*, STUFF (July 31, 2019, 17:20), <https://www.stuff.co.nz/business/farming/114654854/green->

disastrous welfare consequences in the past. For example, in 2015, approximately 45,000 sheep and 3,000 cows were exported from New Zealand to Mexico, purportedly for breeding purposes.²⁰⁵ Only one veterinarian was on board the ship during this fifteen-day voyage, and approximately 200 animals died before reaching Mexico.²⁰⁶

From an animal welfare perspective, the distinction that the regulations make between live export for slaughter and live export for breeding makes little sense.²⁰⁷ First, the animals exported for breeding will eventually be slaughtered, so concerns about the inadequacies of the slaughtering requirements in the importing country are just as applicable to animals exported for breeding as they are for animals exported for slaughter.²⁰⁸ For example, the importing countries may not require that the animals be stunned prior to being slaughtered, as New Zealand law requires.²⁰⁹

Second, concerns that the animals' welfare may be compromised during the long journey apply to animals exported for breeding as well as to animals exported for slaughter. The ocean journeys of several weeks cause severe stress for the animals and expose them to injury, distress, and death.²¹⁰ This is evident from the fact that more than 2.6 million sheep died on live export ships from Australia to the Middle East between 1981 and 2010.²¹¹ Finally, in both instances, there are the same concerns regarding the animals' well-being upon arriving in the destination country—indeed, this concern ought to be much greater in relation to animals being exported for breeding, as they will often live much longer lives and be raised in conditions that the New Zealand public would deem unacceptable.²¹² For example, even though dairy calves are generally not intensively confined in New Zealand, and there was public uproar at proposals to build such facilities in

party-calls-for-immediate-halt-to-live-exports [https://perma.cc/8QL7-VJUM] (accessed May 26, 2020).

²⁰⁵ Tim Cronshaw, *Only 191 Sheep and One Heifer Die on Trip, Say Exporters*, STUFF (July 1, 2015, 15:41), <http://www.stuff.co.nz/business/farming/agribusiness/69827891/only-191-sheep-and-one-heifer-die-on-trip-say-exporters> [https://perma.cc/YVE8-RWS3] (accessed May 26, 2020).

²⁰⁶ *Id.*

²⁰⁷ Indeed, one of the central objectives of the Animal Welfare Act 1999 is to prevent the ill-treatment of animals, which is defined in Section 2 as “causing the animal to suffer, by any act or omission, pain or distress that in its kind or degree, or in its object, or in the circumstances in which it is inflicted, is unreasonable or unnecessary.” Animal Welfare Act 1999, s 2 (N.Z.). The ultimate purpose for which the animals are used ought to be irrelevant to this objective.

²⁰⁸ This point was made recently by Hans Kriek in his criticism of New Zealand's live export regime. Fox, *supra* note 202.

²⁰⁹ Code of Welfare: Commercial Slaughter 2018, pts 3.4, 4.2, 5.1.1 (N.Z.).

²¹⁰ *During Transport*, ANIMAL WELFARE INST., <https://awionline.org/content/during-transport> [https://perma.cc/K5PF-C45T] (accessed May 26, 2020).

²¹¹ *Live Export Death Files*, ANIMALS AUSTL. (June 20, 2011), <https://www.animal-saustralia.org/features/live-export-death-files.php> [https://perma.cc/2SK3-TSRL] (accessed May 26, 2020).

²¹² Fox, *supra* note 202.

2009, many cows sent from New Zealand to farms in China are raised on factory farms.²¹³

The internal logic of New Zealand's live export regime makes sense when viewed through the lens of preserving reputation. This underlying concern was perhaps best epitomized by a statement made by Charlie Pederson, president of New Zealand Federated Farmers, who in 2007 highlighted the need to avoid a disaster similar to that of the MV Cormo Express.²¹⁴ Pederson stated:

The last thing we want to do is allow ourselves to drift into a situation and end up with New Zealand's own version of the Cormo Express which has the potential to bring our industry and animal welfare practices into disrepute. Although we don't want to shut down people's opportunities, we do have to think about it from a New Zealand Inc point of view.²¹⁵

This risk to New Zealand's reputation associated with live export for slaughter is perceived to be particularly high because of the importance to New Zealand's economy of animal products from sheep and cows, two animals commonly exported for slaughter.²¹⁶ Here, the EU is again important: as noted above, EU consumers are perceived to value animal welfare, and the EU is a major export destination for New Zealand animal products produced from sheep and cows.²¹⁷

²¹³ *Live Export From New Zealand Should Be Banned*, DAILY BLOG (Oct. 26, 2019), <https://thedailyblog.co.nz/2019/10/26/live-export-from-new-zealand-should-be-banned/> [<https://perma.cc/JZX2-JG6P>] (accessed May 26, 2020). In 2009, proposals were made by three companies to build sixteen new intensive dairy factory farms for housing nearly 18,000 cows. Paul Gorman, *Indoor Cubicles for Cows Planned*, STUFF (Dec. 7, 2009, 07:55), <http://www.stuff.co.nz/business/farming/3131143/Indoor-cubicles-for-cows-planned> [<https://perma.cc/SJ82-Q747>] (accessed May 26, 2020). The proposals were met with widespread public opposition, both on animal welfare and environmental grounds, which led to the government calling in the environmental consents required. *Minister Urged to Call in Mackenzie Basin Consents*, SCOOP MEDIA (Jan. 14, 2010), <http://www.scoop.co.nz/stories/PO1001/S00027.htm> [<https://perma.cc/SJ82-Q747>] (accessed May 26, 2020).

²¹⁴ Owen Hembry, *New Look at the Way We Treat Meat*, N.Z. HERALD (Oct. 28, 2007, 8:13 PM), https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10472592 [<https://perma.cc/Y44T-DKW4>] (accessed May 26, 2020).

²¹⁵ *Id.*

²¹⁶ See, e.g., NZPA, *Livestock Scheme Gets Mixed Reaction*, N.Z. HERALD (Jan. 27, 2010, 8:37 PM), https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10622643 [<https://perma.cc/24T3-4N64>] (accessed May 26, 2020) ("Livestock industries were vitally important to the economy and [the National Animal Identification and Tracking system] would help maintain confidence of export markets in the safety and disease-free status of New Zealand's livestock products, while boosting preparedness for disease outbreaks, Mr. Carter said."); Esther Tauton & Rebecca Black, *Thousands of Cattle Bound for China While Live Export Review Continues*, STUFF (July 26, 2019, 17:39), <https://www.stuff.co.nz/business/farming/114529741/mpi-approves-live-shipment-of-5400-dairy-cattle-to-china> [<https://perma.cc/N992-KBRP>] (accessed May 26, 2020) ("MPI director of animal health and welfare Dr. Chris Rodwell said . . . '[t]he welfare of animals is at the heart of New Zealand's live animal export system and our focus is ensuring the animals are well cared for, before, during and after export.'").

²¹⁷ See *EU and New Zealand Launch Trade Negotiations*, EUR. COMM'N (June 21, 2018), <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1869> [<https://perma.cc/>]

Despite the welfare concerns associated with live exports for breeding, the MPI and animal agricultural industries have long believed that live exports for breeding pose a much lower risk to New Zealand's reputation than live exports for slaughter—thus explaining the seemingly arbitrary distinction made between the two. Much of the perceived reputational risk associated with live exports for slaughter relates to potential exposés of inhumane slaughter practices that may take place once the animals have arrived in their destination country.²¹⁸ When animals are exported for breeding purposes, they are ordinarily slaughtered much later in their lives, and there are few animal welfare activists tracking the sources of the animals when they are eventually slaughtered months or years later.²¹⁹ Consequently, the nexus between any inhumane slaughter practices and 'brand New Zealand' is much weaker, resulting in a greatly weakened perception of reputational risk.

However, following increasing criticism within New Zealand of live exports for breeding,²²⁰ and high-profile footage in Australia exposing cruelty on live export journeys (as opposed to in destination slaughterhouses),²²¹ the New Zealand government has recently announced that it is considering a ban on the live export of cattle alto-

7T3N-VPB9] (accessed May 26, 2020) ("The EU is New Zealand's third biggest trade partner."); PETER STEVENSON, FOOD AND AGRICULTURE ORGANIZATION OF THE U.S., REVIEW OF ANIMAL WELFARE LEGISLATION IN THE BEEF, PORK, AND POULTRY INDUSTRIES 64 (2014), <http://www.fao.org/3/a-i4002e.pdf> [<https://perma.cc/NH88-4X3R>] (accessed May 26, 2020) ("Improvements in animal welfare are being driven in the EU both by legislation and, more recently, by the market, i.e. by consumers who wish to play their part in advancing welfare and by food businesses which recognize that there is a growing demand for higher welfare products.").

²¹⁸ See, e.g., *A Bloody Business—2011*, ABC: FOUR CORNERS (Aug. 8, 2011), <https://www.abc.net.au/4corners/a-bloody-business—2011/2841918> [<https://perma.cc/FN57-6YRA>] (accessed May 26, 2020) (highlighting the cruelty that Australian cattle were being subjected to in Indonesian slaughterhouses).

²¹⁹ Tauton & Black, *supra* note 216 ("The reality is, and MPI knows this, that as soon as those animals have reached their destination we've got no control over their welfare.").

²²⁰ See, e.g., *Hundreds of New Zealand and Australian Cattle Die in Export Deal*, RADIO N.Z. (Apr. 4, 2019, 5:05 PM), <https://www.rnz.co.nz/news/national/386342/hundreds-of-new-zealand-and-australian-cattle-die-in-export-deal> [<https://perma.cc/2D9Q-ZG8R>] (accessed May 26, 2020) ("About 5000 cattle were imported into Sri Lanka as part of the scheme, with 2000 sent from New Zealand in April 2017. . . . But farmers and animal right groups, as well as Sri Lanka's own auditor-general, want the export project stopped because they say it is poorly planned and inhumane, with around 10 percent of the cattle imported so far dying, and many with diseases.").

²²¹ See *Animals Don't Belong Here*, ANIMALS AUSTL. (Apr. 2018), https://secure.animalsaustralia.org/take_action/live-export-shipboard-cruelty/?ua_s=BLE.com [<https://perma.cc/YH3Q-QSBW>] (accessed May 26, 2020) ("On these enormous ships, sheep are packed so tightly that many can't lie down to rest. Nor can they all access food and water. Overcrowded pens make identifying sick and injured animals near impossible. . . . Over the years, more than 3 million Australian animals have died, often horrifically, on these death ships.").

gether.²²² Again, the reason given was reputation: Minister O'Connor explained, "The continued export of cattle may be a risk to New Zealand's brand. The time has come to rethink this area and consider whether it's something that fits within our values as a country."²²³ He went on to explain, "We need to ensure we have the highest level of animal welfare standards. Our economic wellbeing depends on it."²²⁴

B. The MPI's Instrumental Approach to Animal Welfare is Consistent with Regulatory Capture and Necessitates Reform

The Ministry for Primary Industries' (MPI's) response to the dairy calf cruelty investigations suggests a strong ideological alignment with industry interests—with the MPI expressly justifying the regulations on the basis that the bobby calf regulations were in the best interests of the New Zealand dairy industry.²²⁵ Indeed, the MPI even noted in its regulatory impact statement that the industry itself had emphasized that the development of regulations would benefit the New Zealand dairy industry in the long run by enhancing its international reputation.²²⁶

This close ideological alignment of the MPI with industry attitudes and interests necessitates an examination of whether the MPI ought to be considered subject to regulatory capture. Regulatory capture is:

The tendency of regulators to identify with the interest of the industry they are supposed to regulate. This occurs when a public authority [such as a government agency] charged with regulating an industry in the public interest comes to identify the public interest with the interests of the producers in the industry, rather than the interests of its customers, or the general public.²²⁷

Dr. Jed Goodfellow has written extensively on the prevalence of the regulatory capture of animal welfare policy in Australia. Goodfellow has focused his scholarship on exploring how the institutional placement of animal welfare within departments of agriculture, which are responsible for promoting agricultural productivity, has led the departments to adopt an instrumental approach to animal welfare whereby they value animal welfare only to the extent that it improves produc-

²²² Gerard Hutching, *Government May Ban Live Cattle Exports*, STUFF (June 11, 2019, 16:48), <https://www.stuff.co.nz/business/farming/113401249/government-may-ban-live-cattle-exports> [<https://perma.cc/H9LJ-T4FB>] (accessed May 26, 2020) ("The Government is considering banning the trade in live cattle exports, worth \$30 million last year.").

²²³ *Id.*

²²⁴ *Id.*

²²⁵ MINISTRY FOR PRIMARY INDUS., *supra* note 47, at 7.

²²⁶ *Id.* at 10.

²²⁷ *Regulatory Capture*, OXFORD REFERENCE, <https://oxfordreference.com/view/10.1093/oi/authority.20110803100411608> [<https://perma.cc/4JRT-X9QT>] (accessed May 26, 2020).

tivity.²²⁸ Goodfellow argues that this approach is contrary to the purpose of Australia’s farm animal welfare regulatory framework, which is designed to serve a dual public interest: protecting farm animals from cruelty, while also promoting farm animal welfare through incremental improvements in welfare standards.²²⁹ He argues: “If improved welfare contributes to productivity it is embraced and promoted by the Departments. If, however, a proposed welfare measure has a negative correlation with productivity, it is dismissed or severely compromised.”²³⁰

Citing John McInerney, Goodfellow conceptualizes the approach taken by producers—and adopted by regulators—to animal welfare as an externality.²³¹ Because animal welfare “carries no evident price . . . farmers inevitably focus on the animals’ productivity, which does provide commercial reward.”²³² This approach leads to animal welfare falling below the socially desirable norm.²³³

Goodfellow identifies a number of indicators of regulatory failures that suggest that the state and federal departments of agriculture in Australia have “absorbed the norms and perspectives of the livestock industries amounting to a case of cultural capture.”²³⁴ Goodfellow concludes that this situation has led the departments to underperform with respect to their animal welfare responsibilities.²³⁵ As he notes, “The public interests in ensuring farm animals are protected from cruelty, and in improving animal welfare standards over time, has been routinely subordinated to the interests of increasing industry productivity and profitability.”²³⁶

Goodfellow proposes numerous reform options to circumvent regulatory capture of animal welfare policy in Australia.²³⁷ According to Goodfellow:

These [recommendations] include separating the competing responsibilities [of Departments of Agriculture] by transferring animal welfare to a non-conflicted department, or to a new government entity dedicated to

²²⁸ Jed Goodfellow, *Regulatory Capture and the Welfare of Farm Animals in Australia*, in *ANIMAL LAW AND WELFARE – INTERNATIONAL PERSPECTIVES* 195, 215 (Deborah Cao & Steven White eds., 2016).

²²⁹ *Id.*

²³⁰ *Id.* at 198.

²³¹ *Id.* at 214 (citing JOHN McINERNEY, *ANIMAL WELFARE, ECONOMICS, AND POLICY: A REPORT ON A STUDY UNDERTAKEN FOR THE FARM AND ANIMAL HEALTH ECONOMICS DIVISION OF DEFRA 2* (2004), <https://webarchive.nationalarchives.gov.uk/20110318142209/http://www.defra.gov.uk/evidence/economics/foodfarm/reports/documents/animalwelfare.pdf> [<https://perma.cc/FK6F-94S7>] (accessed May 26, 2020)).

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at 198; *see id.* at 208 (describing cultural capture as the process whereby “agencies are more inclined to adopt the norms and values of the industry they are designed to serve in their approach to the relevant conflicting public interest”).

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

animal welfare; establishing a ‘regulatory contrarian’ in the form of an Inspector-General or Ombudsman for animal welfare to monitor . . . the performance of Departments of Agriculture; and creating a tripartite system of regulation by giving animal welfare non-government organisations a more prominent role in regulatory processes.²³⁸

Goodfellow further recommends increasing transparency through reporting and disclosure obligations.²³⁹ Like its Australian counterpart, the New Zealand agency responsible for animal welfare, the MPI, has the dominant purpose of promoting New Zealand’s primary industries.²⁴⁰ A policy document obtained pursuant to an Official Information Act request states that one way in which the government seeks to do this is by “enhancing New Zealand’s reputation in markets where consumers are increasingly demanding ethically produced products.”²⁴¹

Yet, New Zealand’s animal welfare regime differs from Australia’s in material respects. For example, whereas New Zealand has banned or is in the process of phasing out the most intensive confinement systems for farm animals, such as gestation crates for pigs and battery cages for hens, most Australian states still permit these practices.²⁴² Given these disparities, it is not surprising, as discussed in Section II above, that New Zealand has been ranked above Australia, and indeed most other countries, in international animal welfare rankings.²⁴³ Thus, one of the signs of regulatory capture, standards lagging behind the standards of other countries—which Goodfellow concludes is present in Australia—²⁴⁴ is not applicable to New Zealand.

Nevertheless, the analysis in Section V above highlights the instrumental approach to animal welfare that the MPI appears to have taken, whereby it has adopted measures to protect dairy calves from cruelty, and to improve dairy calf welfare, to the extent that it considered the reforms necessary to preserve the industry’s international reputation.²⁴⁵ It appears that the MPI considers this essential to safeguarding New Zealand’s export earnings from animal products. This

²³⁸ *Id.*

²³⁹ *Id.* at 224.

²⁴⁰ See e.g., *Our Strategy*, MINISTRY FOR PRIMARY INDUS. (Aug. 3, 2019), <https://www.mpi.govt.nz/about-mpi/our-strategy/> [<https://perma.cc/7PSM-XEQ4>] (accessed May 26, 2020) (“Our vision is that ‘New Zealand will be the world’s most sustainable provider of high-value food and primary products.’”).

²⁴¹ MINISTRY FOR PRIMARY INDUS., *supra* note 192, at 4; E-mail from Yuuki Smithers to author, *supra* note 45.

²⁴² See *Factory Farming*, VOICELESS (Oct. 2018), <https://www.voiceless.org.au/hot-topics/factory-farming> [<https://perma.cc/688C-GBCP>] (accessed May 26, 2020) (discussing the intensive confinement of animals in Australia). The New Zealand bans are contained in the applicable animal welfare codes. See, e.g., Animal Welfare (Pigs) Code of Welfare 2010, pt 5.2 (N.Z.) (establishing restrictions on the use of sow stalls); Animal Welfare (Layer Hens) Code of Welfare 2012, pt 6 (N.Z.) (explaining that hens must be given the opportunity to express a range of normal behaviors).

²⁴³ *Animal Protection Index*, *supra* note 28.

²⁴⁴ Goodfellow, *supra* note 228, at 203.

²⁴⁵ MINISTRY FOR PRIMARY INDUS., *supra* note 47, at 4–5.

instrumental approach appears at odds with the plain wording and purposes of the Animal Welfare Act 1999, which does not make any express or implied reference to New Zealand's reputation or the economic success of New Zealand's industry, and which clearly reflects a non-instrumental approach to animal welfare.²⁴⁶ While the legislature may have intended economic considerations to have some influence on animal welfare standards,²⁴⁷ the overarching purpose of the Animal Welfare Act is expressly to protect animals. The long title of the Act states that it is an "Act to reform the law relating to the welfare of animals and the prevention of their ill-treatment," and in particular, to "require owners of animals, and persons in charge of animals, to attend properly to the welfare of those animals."²⁴⁸ Further, the bobby calf regulations were expressly made under section 183A(1) of the Animal Welfare Act 1999,²⁴⁹ which allows the minister to prescribe standards for the purpose of giving effect to parts one and two of the Act.²⁵⁰ The purpose of part one of the Act echoes the purpose stipulated in the long title of the Act, to "ensure that owners of animals and persons in charge of animals attend properly to the welfare of those animals."²⁵¹ Similarly, the purpose of part two is to "state conduct that is or is not permissible in relation to a species of animal or animals used for certain purposes."²⁵² These provisions reflect the importance of farm animal welfare to the New Zealand public. In a 2010 survey conducted by the MPI, citizens ranked animal welfare on New Zealand farms as the sixth most important national objective, above reducing unemployment and combating climate change.²⁵³

Whereas Goodfellow has convincingly argued that in Australia, farm animal welfare is valued only to the extent that it does not reduce productivity,²⁵⁴ an analysis of the bobby calf investigations and reforms suggests a similar, but distinct, form of capture in New Zealand. It is apparent that, for the most part, the MPI values farm animal welfare only to the extent that it provides reputational benefits—re-

²⁴⁶ See Animal Welfare Act 1999, s 73 (N.Z.) (omitting economic considerations from the mandatory list of "matters to be considered" by drafters of codes of welfare).

²⁴⁷ See, e.g., Animal Welfare Act 1999, s 73(3) (N.Z.) (allowing the National Animal Welfare Advisory Committee (NAWAC) to take into account practicality and economic impact in drafting codes of welfare).

²⁴⁸ Animal Welfare Act 1999, s 1 (N.Z.). The other purposes of the Act, which are not relevant in this context, are to specify conduct that is or is not permissible in relation to any animal or class of animals; to provide a process for approving the use of animals in research, testing, and teaching; to establish the NAWAC and a National Animal Ethics Advisory Committee; to provide for the development and issue of codes of welfare and the approval of codes of ethical conduct; and to repeal the Animals Protection Act 1960. Animal Welfare Act 1999, s 1 (N.Z.).

²⁴⁹ Animal Welfare Act 1999, s 183(A)(1) (N.Z.).

²⁵⁰ Animal Welfare Act 1999, s 183(A)(1) (N.Z.).

²⁵¹ Animal Welfare Act 1999, s 9(1) (N.Z.).

²⁵² Animal Welfare Act 1999, s 27 (N.Z.).

²⁵³ N.Z. MINISTRY OF AGRIC. AND FORESTRY, WHAT NEW ZEALANDERS REALLY THINK ABOUT ANIMAL WELFARE 48 (Mar. 2011).

²⁵⁴ Goodfellow, *supra* note 228, at 213.

sulting in increased export earnings—which are perceived to outweigh the cost of implementing the animal welfare measures. In this way, New Zealand’s regime is still concerned with productivity, but this is not the dominant policy objective; the efficiency of production is considered less important than differentiating New Zealand’s products from competitor products based on perceived higher ethical standards.²⁵⁵ This unique form of regulatory capture ultimately embodies the same instrumental view of animal welfare that is apparent in the Australian regime. This capture, however, is much less visible than the capture in Australia because it incentivizes the MPI to ensure that minimal welfare standards are legislated for, although such measures (and their enforcement) ultimately fail to adequately fulfill the purpose of the statutory regime, which is to prevent the ill-treatment of all animals.²⁵⁶

In this way, New Zealand’s regime differs from Goodfellow’s construction of animal welfare in Australia as involving an externality problem.²⁵⁷ The MPI’s policy is firmly rooted in the fact that animal welfare *does* provide an “evident price” and “commercial reward” in the form of access to high-value markets.²⁵⁸ The MPI is effectively seeking to market New Zealand’s animal welfare regime in a manner akin to a free-range farmer, whose products are “distinguished precisely on the basis of their higher welfare measures.”²⁵⁹ Yet, just as Goodfellow observed that the free-range pricing approach generally addresses only a limited range of welfare issues and fails to address many other welfare-compromising practices,²⁶⁰ the bobby calf reforms expose similar deficiencies in New Zealand’s analogous pricing approach.

This conclusion that the MPI is subject to regulatory capture has implications for institutional reform. Many of the possible solutions to regulatory capture proposed by Goodfellow should be examined to assess which will work best in New Zealand’s regulatory context.

A full consideration of the best reform options to circumvent the regulatory capture of the MPI is beyond the scope of this Article. However, as Goodfellow has suggested for Australia,²⁶¹ the first step should be to move responsibility for animal welfare from the MPI to another government agency that does not possess a conflicting organi-

²⁵⁵ See MINISTRY FOR PRIMARY INDUS., PROSPERITY, SUSTAINABILITY, PROTECTION: STRATEGIC PLAN 2019 4, 10–11 (2019), <https://www.mpi.govt.nz/dmsdocument/35403/direct> [<https://perma.cc/3NDE-8JYM>] (accessed May 26, 2020) (stating the MPI’s primary purpose is to make New Zealand the “world’s most sustainable provider of high-valued food and primary products.”).

²⁵⁶ Animal Welfare Act 1999, s 1(a) (N.Z.).

²⁵⁷ Goodfellow, *supra* note 228, at 214 (citing McInerney, *supra* note 233, at 2) (framing animal welfare as a “nonmarket good” or “externality”).

²⁵⁸ See MINISTRY FOR PRIMARY INDUS., *supra* note 47, at 4 (warning the continued ill-treatment of bobby calves will result in a poor reputation for New Zealand, resulting in reduced “access to high value markets and new markets.”).

²⁵⁹ Goodfellow, *supra* note 228, at 214.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 225.

zational priority. This is necessary because, as in Australia,²⁶² the MPI's success is measured by economic goals—in particular, the realization of New Zealand's economic objective of increasing export earnings in the animal agricultural sector. As discussed above, this focus has often led to the public interest in farm animal welfare—as embodied in the Animal Welfare Act 1999—being implemented in a minimalist fashion, whereby welfare reforms are provided for only to the extent considered necessary to preserve New Zealand's international reputation.²⁶³

In recent years, many animal activists have called for this reform.²⁶⁴ For example, lawyer Catriona MacLennan highlighted the need to establish an independent animal welfare commissioner, on the basis that the MPI has lower standards for animal welfare than consumers and members of the public.²⁶⁵ Similarly, Farmwatch has emphasized the need for a “separate dedicated body for animal welfare,”²⁶⁶ and Save Animals From Exploitation (SAFE) has made similar demands.²⁶⁷ More recently, academics from the University of Otago have also made this recommendation.²⁶⁸ The above diagnosis of regulatory capture underscores the necessity and urgency of this reform. In order for such an agency to be successful, however, it is critical that the agency receive an adequate level of government funding in order to address the enforcement deficiencies discussed in Section IV above.

C. *Implications for the Future of Animal Welfare Activism in New Zealand: Opportunities to Build on SAFE's Work*

The findings discussed above also have significant implications for the future of animal welfare activism in New Zealand. Until the institutional reforms discussed above have been adopted and the identified regulatory capture has been eliminated, animal activists ought to consider how the MPI's reputation-based policy motives could be better exploited to advance animal welfare in New Zealand.

²⁶² *Id.* at 224.

²⁶³ See *supra* Section IV.C (highlighting the limitations of the bobby calf reforms, particularly with respect to enforcement) and Section VI.A (describing the New Zealand government's apparent sacrifices of animal welfare standards in favor of economically beneficial policies in the context of the live export of animals for breeding).

²⁶⁴ Tao Lin, *Call for Animal Welfare Watchdog After 'Sickening' Comments on Dairy Farming Facebook Page*, STUFF (Nov. 7, 2016, 10:43), <https://www.stuff.co.nz/business/farming/dairy/85731548/sickening-comments-on-dairy-farming-facebook-page> [https://perma.cc/5SXW-9VES] (accessed May 26, 2020).

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ See Simon Wong, *SAFE Slams 'Meaningless' Animal Welfare Reform*, NEWSHUB (Apr. 15, 2016), <https://www.newshub.co.nz/home/new-zealand/2016/04/safe-slams-meaningless-animal-welfare-reform.html> [https://perma.cc/8Q86-YN6U] (accessed May 26, 2020) (“[SAFE] says an independent authority for animals is needed.”).

²⁶⁸ RODRIGUEZ FERRERE ET AL., *supra* note 144, at 4, 35.

Although the advertisements SAFE published in *The Guardian* led to national backlash, the MPI's swift regulatory response also confirmed the efficacy of that approach, even though the underlying capture ultimately limited the extent of the implemented reforms. This point was raised by John Campbell, a leading New Zealand media commentator, during a radio interview he conducted with the chief executive of DairyNZ, Tim Mackle.²⁶⁹ Campbell noted that:

[The Farmwatch activists] . . . were criticized, in fact one of the Farmwatch people we were talking to received death threats, they were accused of economic sabotage, they were accused of essentially undermining the economic infrastructure of New Zealand, yet what you are saying is that you have responded, and as a direct result of that footage, farmers are doing better.²⁷⁰

In this way, the bobby calf controversy highlights the anomalous nature of animal welfare regulatory reform in New Zealand: consumers abroad, particularly those based in important export markets, often have a far greater impact on regulatory reform than consumers, activists, and members of the public in New Zealand.²⁷¹ Although these overseas consumers do not participate in public consultation procedures, they are best placed to catalyze the positive reform of animal welfare standards in New Zealand. Indeed, even alerting international consumers to allegations of cruelty can trigger a significant regulatory response, as evidenced by the bobby calf reforms.

It is notable, however, that despite the regulatory impact of *The Guardian* advertisements, the use of this tactic also isolated support for SAFE, and generated backlash among many citizens who viewed the advertisements as an attack on New Zealand.²⁷² For example, more than 6,000 New Zealanders signed a petition to revoke SAFE's charitable status.²⁷³

Yet there are ways in which SAFE and other animal welfare organizations could more tactfully exploit the MPI's sensitivity to negative international publicity surrounding animal welfare in New Zealand. In

²⁶⁹ Radio N.Z., *Dairy NZ Responds to New Video of Bobby Calf Treatment*, YOUTUBE (Oct. 24, 2016), https://www.youtube.com/watch?time_continue=1&v=2Z-HVzf-bQM&feature=emb_logo [<https://perma.cc/A4TP-PCCP>] (accessed May 26, 2020).

²⁷⁰ *Id.*

²⁷¹ See N.Z. MINISTRY OF AGRIC. AND FORESTRY, *supra* note 42, at 6 (“[B]ecause consumers are becoming increasingly concerned about animal welfare issues, there is mounting international pressure for stronger welfare standards. Some restaurant and supermarket chains in Europe and North America are emerging as drivers behind new and stronger animal welfare standards. If New Zealand fails to meet international market-place expectations, its reputation will be harmed. Conversely, high standards of animal welfare will contribute to New Zealand's reputation as a trusted and sustainable producer of animals and animal products in key overseas markets.”).

²⁷² Maxwell, *supra* note 150.

²⁷³ Gerard Hutching, *Thousands Sign Anti-SAFE Petition to Revoke Charitable Status*, STUFF (Dec. 8, 2015, 17:03), <https://www.stuff.co.nz/business/farming/74882437/thousands-sign-antisafe-petition-to-revoke-charitable-status> [<https://perma.cc/CSH5-SQBR>] (accessed May 26, 2020).

particular, the bobby calf scandal highlighted the need for animal activists in New Zealand to collaborate more with animal advocacy organizations based overseas, especially those in the United Kingdom and Europe. There is strategic value in New Zealand animal advocacy organizations alerting overseas animal protection organizations to the cruelty exposés in New Zealand and inviting them to place the cruelty into the media spotlight when appropriate. By doing so, New Zealand-based advocacy organizations may be able to heighten domestic pressure for regulatory reform without isolating support for their organizations amongst the New Zealand public.

Embracing this bold approach could deliver dividends for animal activists and, more importantly, for the animals with which they are concerned. The significant economic role that the dairy industry plays in New Zealand makes the MPI and the wider government particularly sensitive to cruelty in this industry and thus highly reactive to negative publicity toward it. Further, the ability of activists to exploit this sensitivity is not unique to the dairy industry. In the eyes of the MPI, animal welfare, in general, is a brand that the country must maintain in order to promote the perception that New Zealand animal products are created in an ethically superior way.

Consider the potential opportunities in the area of broiler chicken welfare. The land animals most commonly killed for food in New Zealand are broiler chickens—chickens raised for their meat.²⁷⁴ More than 115 million broiler chickens are slaughtered in the country each year.²⁷⁵ Yet, despite the statistical importance of these animals, historically, little attention has been given to their welfare needs. Unlike many other farmed animals, no legal improvements have been achieved for these animals in recent years.²⁷⁶ Although the Code of Welfare: Meat Chickens 2018 sets out minimum welfare standards, many fall well below what consumers would deem acceptable.²⁷⁷ Gillian Coumbe, QC, a prominent New Zealand lawyer, has commented (in respect to the materially identical earlier version of the code) that it makes for “particularly grim reading.”²⁷⁸ For example, it allows 38kg

²⁷⁴ *New Zealand’s Chicken Meat Industry, Make Change for Chickens*, SAFE, <https://safe.org.nz/take-action/change-for-chickens/> [https://perma.cc/92JG-U92A] (accessed May 26, 2020).

²⁷⁵ Lynley Tulloch, *Opinion: Taking on Meat Industry Big Task, The Country*, N.Z. HERALD (Sept. 18, 2018, 8:00 AM), https://www.nzherald.co.nz/the-country/news/article.cfm?c_id=16&objectid=12126848 [https://perma.cc/5C9R-5XD4] (accessed May 26, 2020).

²⁷⁶ *See Chicken Welfare Standards in NZ – Expert Q&A*, SCI. MEDIA CTR. (Aug. 1, 2018), <https://www.sciencemediacentre.co.nz/2018/08/01/chicken-welfare-standards-in-nz/> [https://perma.cc/6JW8-C6MT] (accessed Jan. 22, 2020) (describing only minimum standards put in place for New Zealand broiler chicken farming in the last eight years).

²⁷⁷ Code of Welfare: Meat Chickens 2018 (N.Z.).

²⁷⁸ Gillian Coumbe, QC, *Beyond Charlotte’s Web—The Blight of Factory Farming, An Argument for Law Reform 5*, Address Before the Auckland Women Lawyers’ Association Seminar: Female of the Species, Women in Animal Law (Mar. 5, 2015), <http://www.gilliancoumbe.co.nz/wp-content/uploads/2015/03/Gillian-Coumbe-QC-paper-Be>

of live bird weight per square meter of floor space, which equates to approximately nineteen birds per square meter²⁷⁹ and does not require that the birds be given access to natural light.²⁸⁰ These weak legal standards have resulted in the vast majority of New Zealand's 115 million broiler chickens living in overcrowded, window-less sheds.²⁸¹ As SAFE notes, under such conditions birds are completely unable to express natural behaviors such as perching, foraging, running, and flying.²⁸² Further, the Code does not prohibit the use of fast-growing breeds,²⁸³ which the National Animal Welfare Advisory Committee (NAWAC) has acknowledged "risks creating chickens that may spend part of their short lives in distress from lameness."²⁸⁴

Although the majority of these chickens are raised for domestic consumption, the Ministry of Business, Innovation and Employment has identified chicken meat as an "emerging export star" based on an evaluation of ten years of product trade growth.²⁸⁵ Currently, chicken meat is exported to Australia, various Pacific nations, Japan, the United Arab Emirates, and other Asian nations.²⁸⁶ The Ministry of Business, Innovation and Employment notes that the exports play to "New Zealand strengths as a safe, reliable meat supplier."²⁸⁷ Accordingly, given the government's desire to grow exports in this area, it is likely to be particularly sensitive to any international media coverage highlighting the poor welfare conditions in which broiler chickens are raised. Indeed, in addition to undermining New Zealand's animal welfare brand, coverage of the overcrowded conditions could serve to un-

yond-Charlottes-Web.-The-Blight-of-Factory-Farming.-An-Argument-for-Reform.pdf [https://perma.cc/WQT7-ZQKU] (accessed May 26, 2020).

²⁷⁹ Animal Welfare (Meat Chickens) Code of Welfare 2012, pt 4.4.5 (N.Z.).

²⁸⁰ See *id.* (showing no such requirement is included in Minimum Standard 10).

²⁸¹ *New Zealand: An Exposé Into the Chicken Meat Business*, WORLD ANIMALS VOICE (May 1, 2019), <https://worldanimalsvoice.com/2019/05/01/new-zealand-an-expose-into-the-chicken-meat-business/> [https://perma.cc/A9PP-RDTK] (accessed May 26, 2020). See *Calls for Tegel to be Prosecuted After 'Putrid, Rotting' Birds*, RADIO N.Z. (Jul. 30, 2018, 5:45 PM), <https://www.rnz.co.nz/national/programmes/checkpoint/audio/2018655866/calls-for-tegel-to-be-prosecuted-after-putrid-rotting-birds> [https://perma.cc/2GEW-C6A3] (showing an undercover investigation from July 2018 highlighting the concerning conditions in which broiler chickens are raised) (accessed May 26, 2020).

²⁸² See *New Zealand's Chicken Meat Industry*, *supra* note 276 (noting cramped living conditions cause chickens soreness and pain in the legs).

²⁸³ See Code of Welfare: Meat Chickens 2018, pt 1.1 (N.Z.) (stating that the Code "does not apply to meat chicken breeder birds" and that the genetic selection of stock is "intended to be covered in a future code of welfare for meat chicken breeders").

²⁸⁴ Code of Welfare: Meat Chickens 2018, pt 7.2 (N.Z.) (highlighting NAWAC's concerns "about the welfare implications of the rapidity of chicken growth that enables harvesting at about five weeks of age and risks creating chickens that may spend part of their short lives in distress from lameness.").

²⁸⁵ MINISTRY OF BUS., INNOVATION AND EMP'T, THE INVESTOR'S GUIDE TO THE NEW ZEALAND MEAT INDUSTRY 48 (2017), <https://www.mbie.govt.nz/assets/8fdeb6c7b/investors-guide-to-the-new-zealand-meat-industry-2017.pdf> [https://perma.cc/36QA-529D] (accessed May 26, 2020).

²⁸⁶ *Id.* at 52.

²⁸⁷ *Id.* at 48.

dermine consumers' perception of New Zealand chicken meat having high standards of food safety, which the government identifies as critical to its export success.²⁸⁸

Consequently, animal activists could consider exploiting this sensitivity by collaborating on broiler chicken welfare issues with animal welfare groups based overseas, perhaps by utilizing connections with overseas groups as a member of the Open Wing Alliance.²⁸⁹ Animal advocacy groups could provide these overseas organizations with the information necessary to produce media stories highlighting cruelty in New Zealand's industry. Of course, it would still be apparent that any footage used was filmed by local groups such as Farmwatch. However, stories narrated by overseas animal welfare groups, reflecting concern that the products from cruelly treated animals are being sold in their jurisdictions, would be less offensive to the average New Zealand citizen than groups like SAFE directly publishing advertisements bearing their own logos.

Another issue ripe for international attention is sheep welfare. As noted above, sheep meat is a significant export earner for New Zealand, and the United Kingdom is its second-largest export destination, after China.²⁹⁰ Although most sheep are farmed outdoors, there are widespread problems with neglect. While some cases of neglect have been prosecuted in recent years,²⁹¹ the lack of enforcement by the MPI makes it likely that only a tiny percentage of the neglect that takes place is detected, and an even smaller percentage is prosecuted. Accordingly, the most important measure to improve the treatment of New Zealand's sheep is likely to be better enforcement. Thus, if activists were to bring footage of the neglect of New Zealand sheep to the attention of international consumers, the New Zealand government might be persuaded to increase funding for this purpose.

²⁸⁸ *Id.*

²⁸⁹ See OPEN WING ALLIANCE, <https://www.openwingalliance.org> [<https://perma.cc/A9BA-9XJ3>] (accessed July 2, 2020) (describing the Open Wing Alliance as a global coalition of organizations working together to end the confinement of layer hens).

²⁹⁰ See Rebecca Osborne, *Fewer Lambs Available to Slaughter in New Zealand for the Rest of the Season*, AHDB BEEF & LAMB (Feb. 28, 2018), <http://beefandlamb.ahdb.org.uk/market-intelligence-news/fewer-lambs-available-slaughter-new-zealand-rest-season/> [<https://perma.cc/6BZ3-CP3X>] (accessed May 26, 2020) (discussing the amount of lambs available for slaughter).

²⁹¹ See, e.g., *Waihi Farmer Convicted on Animal Welfare Charges*, RADIO N.Z. (Oct. 4, 2017), <https://www.radionz.co.nz/news/national/340846/waihi-farmer-convicted-on-animal-welfare-charges> [<https://perma.cc/JL35-D854>] (accessed May 26, 2020) (describing a 2017 incident involving a Waihi farmer who failed to get treatment for her worm-ridden sheep and was fined \$3,000 and banned from owning flocks of more than 100 sheep); Sam Hurley, *Animal Cruelty Case: 'It Will Haunt Me,'* N.Z. HERALD, (May 16, 2014), https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11256240 [<https://perma.cc/6RJQ-PSSK>] (accessed May 26, 2020) (describing a 2014 sheep neglect case in which a sheep farmer was convicted of ill-treatment of animals leading to the death of twenty-nine sheep, which RNZSPCA Chief Executive Ric Odom said exemplified neglect that was "all too typical").

Finally, although beyond the scope of this Article, it is worth considering whether this strategy could be employed outside of New Zealand. That is, it could be worth investigating whether animal activists in other countries that are heavily dependent on access to the EU markets could successfully employ this strategy. Since international trade so often determines how many animals of a particular breed are raised and slaughtered in certain countries, it seems surprising that more international coordination among activists has not been used to exploit global trade as a mechanism for reforming the laws governing how those animals are raised. After all, New Zealand's bobby calf scandal suggests that there is no reason why market values cannot be exploited in the same way that animals are.

VII. CONCLUSION

This Article concludes that Save Animals From Exploitation's (SAFE) tactic of publishing advertisements targeting overseas consumers successfully amplified political pressure and ultimately accelerated the extent and urgency with which the MPI responded to the bobby calf cruelty that Farmwatch and SAFE exposed. Analysis of this response found that MPI's desire to protect New Zealand's international reputation for having strong animal welfare standards drove the regulatory reforms introduced.

The MPI's approach to the reforms was, nevertheless, minimalist in nature. It adopted the most basic reforms it considered necessary to preserve the industry's international reputation, particularly in high-value export markets, as opposed to more comprehensive measures, including improved enforcement, which would more adequately protect vulnerable bobby calves.

This finding indicates a significant level of regulatory capture by the MPI. The regulator has adopted a policy approach that deviates from the statutory purposes, which clearly require appropriate animal welfare reforms to be adopted in accordance with public expectations, even when such measures do not deliver returns in the form of increased export earnings. The MPI is effectively regulating to protect the interests of producers, rather than animals, and is ignoring the public's interest in achieving high standards of farm animal welfare.

These findings both explain inconsistencies in New Zealand's animal welfare policies, and guide future activism and reform. Most importantly, the findings highlight the importance of New Zealand animal activists engaging international markets in discussions about domestic animal welfare standards. The finding also demonstrates the need to thoroughly examine possible reform options to eliminate—or at least mitigate—the regulatory capture of the MPI, which has led to its largely instrumental approach to animal welfare. At a minimum, it is clear that responsibility for animal welfare must be transferred to an independent agency. Reforms of this nature are essential if New Zealand's animal welfare regime is to develop in accordance with the

expectations of the New Zealand public—regardless of how valuable those advances are to New Zealand’s export earnings. To be known for a non-instrumental approach to animal welfare would give New Zealand a reputation of which it could truly be proud.