

THE LEGALITY OF CALF ROPING IN AUSTRALIA: A *FORD V WILEY* PROPORTIONALITY ANALYSIS

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*Public concern for the welfare of animals used in rodeo events is growing. Much of this concern is directed at the event of calf roping, an event that involves chasing, lassoing and throwing a calf to the ground. In all Australian jurisdictions, pain inflicted on animals is subject to a requirement that the pain not be unjustifiable or unnecessary. Typically, pain caused to animals can be justified if it provides human benefit. Legislatures in Australian states and territories have excluded calf roping from this assessment, which to some extent implies that the practice meets the standard. Accordingly, this article utilises the *Ford v Wiley*¹ proportionality test to determine whether the harm inflicted on calves is justified in the light of the purported benefits of the practice. It argues that the harm caused is not proportionate to the benefits and, as a result, that all Australian jurisdictions should explicitly prohibit the practice.*

I INTRODUCTION

The scale of rodeo events in Australia has grown substantially in recent decades.² Having evolved from ‘bushmen’s carnivals’,³ it is now a romanticised, albeit Americanised, celebration of rural life that draws crowds of thousands.⁴ For regional towns, attracting a crowd that rivals the numbers of its own population brings significant value to the community. For instance, the rural town of Mount Isa in Queensland, with a population under 19,000, is host to the largest rodeo event in the Southern Hemisphere.⁵ Just under 40,000 spectators attended the

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¹ (1889) 23 QBD 203 (Queen’s Bench Division (Divisional Court)) (*Ford v Wiley*).

² See, eg, ‘Isa Rodeo Breaks Records for Growing Outback Tourism Industry’, *Tourism & Events Queensland* (Article, 24 October 2019) <<https://teq.queensland.com/news-and-media/latest-news/isa-rodeo-breaks-records-for-growing-outback-tourism-industry>>; ‘Isa Rodeo Ticket Sales Buck the Record’, *Tourism & Events Queensland* (Article, 26 May 2021) <<https://teq.queensland.com/news-and-media/latest-news/isa-rodeo-ticket-sales-buck-the-record>>.

³ Jim Hoy, ‘“Bushmen’s Carnivals” and “Campdrafts”: Rodeo in Australia’ (1994) 8(1) *Antipodes* 55, 55.

⁴ Harriet Tatham, ‘Biggest Rodeo in the Southern Hemisphere Brings Big Crowds to Outback Queensland’, *ABC News* (online, 13 August 2017) <<https://www.abc.net.au/news/2017-08-13/mount-isa-rodeo-biggest-in-southern-hemisphere/8801780>>.

⁵ *Ibid.*

Mount Isa Mines Rotary Rodeo over the four-day event in 2019,⁶ contributing \$12.4 million to the local economy.⁷ Given the typical ‘primary industry-focused economies’ in rural Australia,⁸ the boost from outback tourism provides a diverse contribution to the local economy that has garnered government support. Former Queensland Tourism Minister Kate Jones expressed support for rodeo events, stating they ‘support local jobs and generate a strong return for local businesses’.⁹

There is also a strong sense of cultural connection to Australian rodeo. For instance, Gympie MP Tony Perrett described rodeo as ‘part of the bush fabric of rural and regional Queensland’.¹⁰ This integration of rodeo with rural Australian identity can, in part, be attributed to rodeo’s evolution from the everyday labours of Australian stockmen. Some events featured in modern Australian rodeo have strong links to the skills involved in rural working life. For instance, saddle bronc riding has evolved from the taming or ‘breaking in’ of rough horses, and camp drafting — which involves a rider on horseback separating a steer from the herd and guiding him around a course — was a common husbandry practice on outback cattle stations, and still features in some rodeos.¹¹ An excerpt from an Australian magazine published in 1961 portrays this evolution in claiming that, ‘above all the rodeo is a playing out of a tradition born from the wide outback stations and the long droving tracks; a tradition of men and horses and stock and hot dry days under a sun-burned Australian sky’.¹² There is clearly some romanticisation of Australian rodeo here, which serves to link the event to an identity of rurality and has likely contributed to its deep integration into rural life.

In Australia and globally, however, rodeo has been subject to increasing criticism based on animal welfare concerns.¹³ Animal advocacy group Animals

⁶ The Mount Isa Mines Rotary Rodeo was held as a ‘virtual rodeo’ in 2020 due to the coronavirus pandemic. As such, 2019 is the most recent attendance count.

⁷ ‘Isa Rodeo Breaks Records for Growing Outback Tourism Industry’ (n 2).

⁸ Jeremy Buultjens and Grant Cairncross, ‘Event Tourism in Remote Areas: An Examination of the Birdsville Races’ (2015) 8(1) *Journal of Place Management and Development* 69, 69.

⁹ ‘Isa Rodeo Breaks Records for Growing Outback Tourism Industry’ (n 2).

¹⁰ ‘Animal Liberationists Call on Ag Minister to Ban Calf Roping’, *The Gympie Times* (online, 28 January 2021) <https://www.couriermail.com.au/subscribe/news/1/?sourceCode=CMWEB_WRE170_a_GGL&dest=https%3A%2F%2Fwww.couriermail.com.au%2Fnews%2Fqueensland%2Fgympie%2Fnews-story%2F375497ae8f6231ae20143152e0cb92b7&mementype=anonymous&mode=premium>.

¹¹ Spark, ‘Campdrafting: The Unique Australian Cowboy Sport’ (YouTube, 4 February 2020) <<https://www.youtube.com/watch?v=CoXOhf-ddiU>>; Senate Select Committee on Animal Welfare, Parliament of Australia, *Equine Welfare in Competitive Events Other Than Racing* (Report, August 1991) 3.

¹² ‘Rodeo’ (September 1961) 14(9) *Mimag* 12, 12 <<https://nla.gov.au/nla.obj-305357013/view?sectionId=nla.obj-309666416&partId=nla.obj-305363033#page/n11/mode/1up>>.

¹³ See, eg, ‘Act Now to Protect Animals from Rodeos’, *Animals Australia* (Web Page, 3 December 2021) <https://www.animalsaustralia.org/take_action/ban-rodeo-cruelty/>; Jo Joyce, ‘No Bull? The Great Rodeo Debate’, *ABC Local* (online, 20 October 2011) <<https://www.abc.net.au/local/stories/2011/10/20/3344249.htm>>; Max Towle, ‘Calf-Roping at Rodeos Criticised by Govt

Australia describes rodeos as ‘a cruel spectator sport, condemned by all animal protection organisations’.¹⁴ RSPCA Australia also opposes rodeos on the basis of ‘the potential for significant injury, suffering or distress to the animals involved’.¹⁵ Concern for the welfare of rodeo animals is not new. The 1977 book *Rodeo in Australia* tells,¹⁶ with some disapproval, of opposition to rodeo based on claims of cruelty to animals, and such opposition has been longstanding.¹⁷ There is particular opposition to the common rodeo event of calf roping, also known as the ‘rope and tie’ event. Calf roping involves a contestant on horseback chasing and lassoing a calf. The contestant must throw a rope around the calf’s neck, bringing him to a halt, and dismount the horse to pick the calf up and throw/force him to the ground onto his side. To finish the event, the contestant will cross tie three of the calf’s four legs, and then remount the horse and allow some slack in the catch rope. Calf roping is a timed event, with a judge recording the time once the three-legged tie is complete. Opposition to calf roping is based on the perceived vulnerability of the calves and the potential to cause them harm. For instance, Animal Liberation Queensland’s Gayle D’Arcy describes calf roping as an event that ‘produces fear and torments vulnerable baby animals’.¹⁸ There is also recent scientific evidence supporting the welfare concerns held by animal protection organisations and the community, specifically regarding the stress the practice inflicts on the calves involved. This research is discussed below.

Given the animal welfare concerns relating to calf roping, this article considers the legality of the event under animal welfare legislation in various Australian jurisdictions. While, as discussed, all rodeo events have given rise to animal welfare concerns, calf roping appears to have received the highest level of community opposition when compared to other rodeo events. It has also been the

Officials’, RNZ (online, 23 February 2017) <<https://www.mz.co.nz/news/national/325196/calf-roping-at-rodeos-criticised-by-govt-officials>>; Susan Nance, ‘Rodeo is a Theatre of Violence and Danger — and It’s Not Going Anywhere’, *The Conversation* (online, 31 July 2019) <<https://theconversation.com/rodeo-is-a-theatre-of-violence-and-danger-and-its-not-going-anywhere-121156>>.

¹⁴ ‘Rodeos’, *Animals Australia* (Web Page) <<https://animalsaustralia.org/our-work/rodeos/background/>>.

¹⁵ ‘What are the Animal Welfare Issues with Rodeos?’, RSPCA (Web Page, 31 January 2020) <<https://kb.rspca.org.au/knowledge-base/what-are-the-animal-welfare-issues-with-rodeos/#:~:text=The%20RSPCA%20is%20opposed%20to,'enjoy'%20the%20rodeo%20experience>>.

¹⁶ Peter N Poole, *Rodeo in Australia* (Rigby, 1977).

¹⁷ See, eg, FR Davey, ‘Plea for Animals’, (1940) 2(43) *The ABC Weekly* 54 <<https://nla.gov.au/nla.obj-1219672737/view?sectionId=nla.obj-1309242700&partId=nla.obj-1219708063#page/n53/mode/1up>>; Ron Saw, ‘Outrageous Rex at the Rodeo’ (1981) 101(5285) *The Bulletin* 40 <<https://nla.gov.au/nla.obj-1240806144/view?sectionId=nla.obj-1569563792&partId=nla.obj-1240972783#page/n42/mode/1up>>; J Bradshaw, ‘Rough on Rodeo’ (1982) 102(5303) *The Bulletin* 5 <<https://nla.gov.au/nla.obj-1310465129/view?sectionId=nla.obj-1601739528&partId=nla.obj-1310508928#page/n5/mode/1up>>; ‘Batman’s Melbourne: All the Rich Scents of the Bush Rodeo’ (1969) 91(4635) *The Bulletin* 5 <<https://nla.gov.au/nla.obj-1413139913/view?sectionId=nla.obj-1639627417&partId=nla.obj-1413204397#page/n4/mode/1up>>.

¹⁸ Derek Barry, ‘Push to Ban Calf Roping in Rodeos’, *The North West Star* (online, 6 February 2020) <<https://www.northweststar.com.au/story/6618444/push-to-ban-calf-roping-in-rodeos/>>.

subject of more extensive scientific investigation,¹⁹ and on this basis the welfare concerns associated with the event appear to be more pressing.²⁰ The analysis of the legality of calf roping also entails consideration of the validity of animal welfare concerns, in the light of the contribution of rodeo to the economy and the cultural connection to the sport, particularly in regional areas.

This article contends that the impact on animal welfare is not proportionate to the economic and cultural benefits of the practice. The next part of the article provides a detailed account of calf roping. Part III of the article engages in a comprehensive and comparative overview of the relevant regulatory framework in Australia. In Part IV, the relevant legal test set out in *Ford v Wiley*²¹ — known as the proportionality test — is applied to determine the likely legality of calf roping. Application of this test leads to the conclusion that the beneficial contributions of calf roping do not justify the harm caused to the calves, and that calf roping would therefore likely not be legal if the standard of unnecessary harm applied. Finally, Part V makes recommendations for the reform of laws relating to calf roping and provides some concluding comments.

II REGULATORY FRAMEWORK GOVERNING CALF ROPING

A *Introduction*

Calf roping has been a standard event in Australian rodeos since the 1960s.²² It is one of eight events that must be included in a rodeo if any points awarded are to count towards the Australian championship.²³ As such, calf roping is considered to be a key part of rodeo. Further, because calf roping is mandated as a necessary component of Australian rodeo, it is likely that many supporters of rodeo have witnessed it as a fundamental part of the broader sport. Given this, the feelings of cultural connection to rodeo outlined above are also transferrable to calf roping — if not in an individual capacity, certainly in the way it comprises rodeo generally.

¹⁹ There is a scarcity of scientific research regarding the welfare of animals used in all rodeo events, including the rope and tie event. However, as discussed in Part III, two key pieces of Australian research into the welfare of calves used in the calf-roping event provide much needed scientific support for community concern.

²⁰ Further, an analysis of rodeo as a whole is beyond the scope of this article.

²¹ Despite being decided in 1889, *Ford v Wiley* is still considered good law in the United Kingdom: Meg Lamb, 'Ford v Wiley Proportionality Analysis of the Castration of Domestic Livestock for Meat Production' (2015) 11 *Australian Animal Protection Law Journal* 20; Mike Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (Oxford University Press, 2001) ch 10. Further, it has been applied in a 2008 Australian Magistrates decision: *Department of Local Government and Regional Development v Emanuel Exports Pty Ltd* (Magistrates Court of Western Australia, Magistrate Crawford, 8 February 2008) ('*Emanuel Exports*').

²² Poole (n 16) 49.

²³ Australian Professional Rodeo Association Inc ('APRA'), *By-Laws & Competition Rules* (November 2019) r 18.3 ('*By-Laws & Competition Rules*').

Despite the manner in which calf roping is seen as integral to rodeo, the event has generated some community resistance, and the level of support behind its inclusion in rodeo is unclear. For instance, in Toowoomba, a regional town in Southern Queensland, 82 per cent of voters in a local newspaper supported a ban on calf roping.²⁴ In 2019, a petition to have calf roping banned in Queensland also garnered 60,000 signatures.²⁵ Opposition towards the event from animal advocates is clear, with Animals Australia describing the event as one where ‘terrified animals are provoked, chased and wrestled to the ground’.²⁶ The key aspects driving community concern are the risk of physical injury to the calves during the tightening of the rope around their neck, and the impact on their body as the contestant throws or forces them to the ground, as well as the perceived fear they feel while being chased in the arena — likely akin to that of a prey–predator situation.²⁷

In the light of the growing animal welfare concerns outlined above, this Part will explore the regulatory framework for calf roping in Australia. The existing framework represents efforts made to address the impact of calf roping on calves in a manner that attempts to appease industry, as well as the expectations of the community.²⁸ Legislative responsibility here falls to the Australian states and territories. This is because the *Australian Constitution* does not expressly designate power in the regulation of animal welfare to the Commonwealth.²⁹ A consequence of this is the lack of a consistent, nationwide regulatory framework.³⁰

The Australian Professional Rodeo Association (‘APRA’) is the primary governing body in Australian rodeo competition and sets a series of rules for competitors.³¹ These rules will be outlined briefly in order to provide a comprehensive overview of the entire regulatory space. Within the states and territories, the regulatory space is largely made up of legislative instruments, often supplemented with codes and standards that are limited by wide-ranging defences and exemptions for compliance. The framework in each state and territory differs significantly in regards to rodeo, and thus each jurisdiction will be considered in turn below.

²⁴ ‘Online Poll’, *The Chronicle* (Toowoomba, 3 February 2021) 20.

²⁵ ‘Animal Liberationists Call on Ag Minister to Ban Calf Roping’ (n 10).

²⁶ ‘End Cruel Calf Roping’, *Animals Australia* (Web Page, 30 November 2020) <<https://animalsaustralia.org/latest-news/end-calf-roping/>>.

²⁷ ‘What Are the Animal Welfare Issues with Calf Roping in Rodeos?’, *RSPCA* (Web Page, 6 March 2020) <<https://kb.rspca.org.au/knowledge-base/what-are-the-animal-welfare-issues-with-calf-roping-in-rodeos/>>.

²⁸ In regards to legislation reflecting community values concerning animals, see Geeta Shyam, ‘Is the Classification of Animals as Property Consistent with Modern Community Attitudes?’ (2018) 41(4) *University of New South Wales Law Journal* 1418, 1425.

²⁹ There is no express power as to animal welfare in the *Australian Constitution* s 51. Therefore, it remains the responsibility of states and territories. There are, however, indirect powers that enable the Commonwealth to make laws in certain instances, such as live export. See, eg, Alex Bruce, *Animal Law in Australia: An Integrated Approach* (LexisNexis Butterworths, 2nd ed, 2018) 75.

³⁰ *Ibid.*

³¹ ‘About the APRA’, *APRA* (Web Page) <<http://www.prorodeo.com.au/About-the-APRA-3/>>.

It is relevant to first note that, consistently across all states and territories, the legal classification of animals is as property.³² Animals are the legal property of their owners in the same manner that one may own a bed or television. However, unlike other forms of legal property, animal sentience is recognised either implicitly³³ or explicitly³⁴ through the enactment of laws that protect their interest in avoiding suffering.³⁵ Despite this recognition, the continuing categorisation of animals as legal property facilitates treatment of animals by humans that is reminiscent of the treatment of non-sentient property.

In regards to the APRA competition rules, industry standards require that the calf weigh at least 100 kg. This sets a minimum age of around 12 weeks for all calves used in the event.³⁶ In order to reduce the impact of calf roping on these calves, the rodeo industry has implemented the use of an approved roping device, called the 'Ropersmate'.³⁷ All rope and tie events held by an APRA affiliated rodeo must use this device. The Ropersmate is essentially a pulley device designed to act as a 'shock absorber'.³⁸ It is intended that the pulley operate so as to reduce the force felt by the calf when the lasso catches his neck. The industry's introduction of the Ropersmate device is an effort towards reducing the welfare impact on rodeo calves; however, its impact on the animals requires independent evaluation.³⁹

While rodeo regulation varies widely across Australia, a set of standards developed by the National Consultative Committee on Animal Welfare ('NCCAW') do offer some form of consistency. The NCCAW Standards for the Care and Treatment of Rodeo Livestock ('NCCAW Standards') were developed in 2006 by the now defunct NCCAW — a former advisory body to the Department of Agriculture, Fisheries and Forestry.⁴⁰ Given the NCCAW's status as a consultative

³² For instance, animals are included in the definition of 'goods' within s 4 of the *Competition and Consumer Act 2010* (Cth). See Jane Kotzmann, 'Recognising the Sentience of Animals in Law: A Justification and Framework for Australian States and Territories' (2020) 42(3) *Sydney Law Review* 281, 283.

³³ See *Animal Welfare Act 1993* (Tas); *Animal Welfare Act 1985* (SA); *Animal Welfare Act 1999* (NT); *Animal Welfare Act 2002* (WA); *Prevention of Cruelty to Animals Act 1979* (NSW) ('NSW POCTA'); *Prevention of Cruelty to Animals Act 1986* (Vic); *Animal Care and Protection Act 2001* (Qld). To some extent, the animal welfare legislation within these jurisdictions implicitly recognises sentience by prohibiting certain actions which may cause an animal pain.

³⁴ *Animal Welfare Act 1992* (ACT). The Australian Capital Territory is the only Australian state or territory that explicitly recognises animal sentience within the legislation: see s 4A(1)(a).

³⁵ Kotzmann (n 32).

³⁶ *By-Laws & Competition Rules* (n 23) r 39.7; 'Early Weaning of Beef Calves', *Agriculture Victoria* (Web Page, 25 November 2021) <<https://agriculture.vic.gov.au/livestock-and-animals/beef/health-and-welfare/early-weaning-of-beef-calves>>; Sally Rizzuto et al, 'Exploring the Use of a Qualitative Behavioural Assessment Approach to Assess Emotional State of Calves in Rodeos' (2020) 10(1) *Animals* 113: 1–18, 3.

³⁷ *By-Laws & Competition Rules* (n 23) r 33.21.

³⁸ Rope It Qld, 'Ropersmate Roping Device (Part # 8700544) — Instructions for Use', APRA (Web Page, March 2013) <http://www.prorodeo.com.au/files/uploaded/file/RopersMate%20User%20Instruction%20Manual_final.pdf>.

³⁹ Michelle Sinclair et al, 'Behavioural and Physiological Responses of Calves to Marshalling and Roping in a Simulated Rodeo Event' (2016) 6(5) *Animals* 30: 1–12, 8.

⁴⁰ Bruce (n 29) 83.

body, the rodeo code is not binding or legally enforceable. Rather, the standards are aspirational benchmarks for the development of state and territory regulations.⁴¹ These standards have been utilised by states and territories, particularly in the case of Tasmania and the Northern Territory, where the standards make up a key part of the government sponsored regulation. Relevantly, the purpose of the NCCAW Standards was to set *minimum* welfare requirements for animals used in rodeos;⁴² thus, some states and territories exceed this benchmark.

The NCCAW Standards limit the type of animal used in a rodeo to cattle or horses, and mention ‘roping and tying’ as one of the events that can define a rodeo.⁴³ The standards note that the ‘optimum weight’ for a calf being used in a rope and tie event is 115 kg, and sets a minimum weight of 100 kg.⁴⁴ The standards also require that a calf be ‘fit, healthy and without defects’.⁴⁵ Finally, the standards deem dragging a roped animal, and ‘jerking down’ — which is the act of abruptly pulling an animal onto his back in the action of roping him — as unacceptable.⁴⁶ These standards were developed in consultation with the rodeo industry and make up the entirety of the ‘Livestock Welfare Overview’ section within the APRA website.⁴⁷

B Overview of State and Territory Animal Welfare Regulation

1 Queensland

Given the number of rodeo events hosted in Queensland, it could aptly be dubbed the home of rodeo in Australia. For this reason, its legislative protections are particularly relevant. The *Animal Care and Protection Act 2001* (Qld) (‘ACPA’) is limited in its application to rodeos. The ACPA outlines a number of prohibited events in s 20, including, in s 20(1)(e), ‘an event prescribed under a regulation held for public enjoyment or entertainment, with or without charge to anyone present, at which anyone participating in the event causes an animal pain’.⁴⁸ An example of actions that would cause pain is outlined for the purposes of s 20(1)(e) and includes where ‘someone does, or attempts to, catch, fight or throw the animal’.⁴⁹ Despite the reference to catching and throwing the animal largely capturing the actions of calf roping, this section is not applicable to rodeos, as

⁴¹ Ibid 181.

⁴² National Consultative Committee on Animal Welfare (‘NCCAW’), *Standards for the Care and Treatment of Rodeo Livestock* (Position Statement, 10 June 2006) (‘NCCAW Standards’).

⁴³ Ibid pt 1.

⁴⁴ Ibid pt 5.

⁴⁵ Ibid.

⁴⁶ Ibid pt 7.

⁴⁷ ‘Animal Welfare’, APRA (Web Page) <<http://www.prorodeo.com.au/Livestock-Welfare-Overview-32/>>.

⁴⁸ *Animal Care and Protection Act 2001* (Qld) (‘ACPA’) s 20(1)(e).

⁴⁹ Ibid.

rodeo is not an event prescribed under a regulation.⁵⁰ Further, s 20(2) seems to operate to exclude conduct that would otherwise be prohibited, if that conduct occurs at a rodeo for the purpose of protecting ‘a competitor or other person from an animal being used in the rodeo’.⁵¹

Queensland recently adopted the *Animal Care and Protection (Code of Practice about Rodeos) Amendment Regulation 2021* (Qld) (‘*Qld Rodeo Code*’), meaning it is no longer the only jurisdiction in Australia without specific regulations relating to rodeos. The *Qld Rodeo Code* sets minimum standards for animal welfare at rodeo events and is a mandatory code under the *ACPA*.⁵² The code requires that a calf used in calf roping weigh at least 100 kg and prohibits the use of excessive force when throwing the calf to the ground, as well as dragging the calf more than one metre and throwing the calf onto their spine.⁵³ The regulations relating to calf roping are to be reviewed in five years, because all four animal welfare groups involved in the consultation process did not support a continuation of the practice.⁵⁴

A consequence of the *Qld Rodeo Code* is that it operates to create an exemption from cruelty provisions under the *ACPA*.⁵⁵ For instance, s 18(2)(a), requires that animals be protected from ‘unjustifiable, unnecessary or unreasonable’ pain.⁵⁶ Prior to the introduction of the *Qld Rodeo Code*, rodeo organisers and participants were offered no additional protection from this provision and broader animal welfare requirements in Queensland, aside from the qualification within s 20(2) of the *ACPA*. This exposed calf roping to the question of whether pain felt by the calves — if any — was necessary, justifiable or reasonable.⁵⁷ If the pain was found not to be necessary, justifiable or reasonable, the practice would have been in breach of s 18(2)(a) of the *ACPA*. However, with the introduction of the rodeo code of practice, rodeo organisers and participants are now exempt from the requirement not to cause animals unreasonable pain, so long as they have complied with the relevant code of practice.⁵⁸

⁵⁰ Bruce (n 29) 182.

⁵¹ *ACPA* s 20(2).

⁵² ‘About the Rodeo Code of Practice’, *Business Queensland* (Web Page, 6 December 2021) <<https://www.business.qld.gov.au/industries/farms-fishing-forestry/agriculture/livestock/animal-welfare/codes/rodeo#:~:text=From%201%20January%202022%2C%20the,at%20rodeos%20and%20rodeo%20schools>>.

⁵³ *Animal Care and Protection (Code of Practice about Rodeos) Amendment Regulation 2021* (Qld) ss 50, 52 (‘*Qld Rodeo Code*’).

⁵⁴ Explanatory Notes, *Animal Care and Protection (Code of Practice about Rodeos) Amendment Regulation 2021* (Qld) 4.

⁵⁵ *ACPA* (n 48) s 40(1).

⁵⁶ *Ibid* s 18(2)(a).

⁵⁷ *Ibid*.

⁵⁸ *Ibid* s 40(1).

2 *New South Wales*

New South Wales ('NSW') features a more complex state-sponsored regulatory framework than that of Queensland, beginning with the *Prevention of Cruelty to Animals Act 1979* (NSW) ('NSW POCTA'). In ss 18 and 18A, the NSW POCTA prohibits bull-fighting, baiting an animal or causing an animal to fight.⁵⁹ The *NSW Code of Practice for Animals Used in Rodeo Events* (1988) ('NSW Rodeo Code') — which is the key regulatory instrument for the welfare of rodeo animals in NSW — provides guidance on the interpretation of ss 18 and 18A by outlining that the sections 'also include the use of cattle when part of an exhibition, spectacle or display where they could be cruelly treated or inflicted with pain and suffering'.⁶⁰ Thus it appears that ss 18 and 18A could be applicable to rodeo generally, if the harm caused to animals was not proportionate to the object sought. However, this interpretation is specifically negated by reg 36 of the *Prevention of Cruelty to Animals Regulation 2012* (NSW) ('Cruelty Regulation'), which creates a clear exemption from the operation of ss 18 and 18A for rodeos in a manner similar to the framework in Queensland.

This exemption is limited by reg 36(3) of the *Cruelty Regulation*, which sets out that organisers and participants must conduct a rodeo in accordance with the *NSW Rodeo Code* in order to benefit from the exemption.⁶¹ As such, the *Cruelty Regulation* acts to exclude cattle and horses used in rodeo practices from any protection that is not laid out in the *NSW Rodeo Code*, effectively protecting rodeos from prosecution under the welfare legislation. Thus, while failing to adhere to the *NSW Rodeo Code* is not an offence in itself, it may open the relevant person up to prosecution under the NSW POCTA.⁶² In terms of calf roping, the *NSW Rodeo Code* sets a minimum weight requirement of 100 kg, which is in line with the industry standard.⁶³ Flipping a calf onto their back when roping, known as 'jerking down', is also prohibited by the code.⁶⁴

3 *South Australia*

Unlike Queensland and NSW, South Australia ('SA') does not have a dedicated code of practice regulating rodeos. Rather, the *Animal Welfare Act 1985* (SA) ('SA AWA') and the *Animal Welfare Regulations 2012* (SA) form the entirety of the state-sponsored regulatory framework. The SA AWA requires organisers to acquire a

⁵⁹ NSW POCTA (n 33) s 18.

⁶⁰ Animal Welfare Advisory Council, Department of Primary Industries (NSW), *NSW Code of Practice for Animals Used in Rodeo Events* (30 April 1988) introduction ('NSW Rodeo Code'); NSW POCTA (n 33) s 2(d).

⁶¹ *Ibid* reg 36(3).

⁶² *Ibid*.

⁶³ *NSW Rodeo Code* (n 60) r 2.7; *By-Laws & Competition Rules* (n 23) r 33.3.

⁶⁴ *NSW Rodeo Code* (n 60) r 4.21.

permit to conduct a rodeo.⁶⁵ Part 4 of the *Animal Welfare Regulations* supplements this legislation, providing all other protections for animals used in rodeos within South Australia. Relevantly, the South Australian regulations set a minimum weight of 200 kg for the animals used in all rodeo events, including calf roping.⁶⁶ As noted, calves used in rope and tie events must weigh a minimum of 100 kg in accord with industry standard.⁶⁷ In terms of the upper weight range, Australia's primary industry body, APRA, indicates within its regulations that a steer weighing 200 kg will be used in steer-roping as opposed to calf-roping events.⁶⁸ For the purposes of the rope and tie event, this appears to classify an eligible calf as one weighing between 100 kg and 200 kg. Thus, by setting a minimum weight of 200 kg for the rope and tie, the South Australian regulations effectively prohibit the event.

4 Tasmania

The starting point of regulation in Tasmania is the *Animal Welfare Act 1993* (Tas) ('Tas AWA'). Section 11A(1) of the Tas AWA requires that a rodeo be conducted in accordance with a prescribed code of practice.⁶⁹ The *Animal Welfare (General) Regulations 2013* (Tas) outlines that the prescribed code of practice for the purposes of s 11A(1) of the Tas AWA is the *NCCAW Standards*.⁷⁰ While not explicit, s 11A of the Tas AWA essentially operates to create an exemption from prosecution under the Act for compliance with the *NCCAW Standards*. Thus, the protection awarded to rodeo animals in Tasmania is largely limited to the *NCCAW Standards* outlined above. This sets a minimum weight of 100kg for calves used in the rope and tie event, which is the industry standard.⁷¹

5 Victoria

Victoria has developed one of the strongest state-sponsored regulatory frameworks for rodeos within Australia, contained entirely within the *Prevention of Cruelty to Animals Act 1986* (Vic) ('Vic POCTA') and the *Prevention of Cruelty to Animals Regulations 2019* (Vic) ('Victorian Regulations'). Part 2 Division 2 of the Vic POCTA sets out that it is an offence to conduct a rodeo without a licence or permit.⁷² The *Victorian Regulations* are compulsory and participants, such as competitors or employees, who do not comply can be prosecuted.⁷³ The *Victorian*

⁶⁵ *Animal Welfare Act 1985* (SA) s 34 ('SA AWA').

⁶⁶ *Animal Welfare Regulations 2012* (SA) reg 19(1)(a).

⁶⁷ *By-Laws & Competition Rules* (n 23) r 33.3.

⁶⁸ *Ibid* r 40.13.

⁶⁹ *Animal Welfare Act 1993* (TAS) s 11A(1)(a) ('Tas AWA').

⁷⁰ *Animal Welfare (General) Regulations 2013* (Tas) s 5; *NCCAW Standards* (n 42).

⁷¹ *By-Laws & Competition Rules* (n 23) r 33.33

⁷² *Prevention of Cruelty to Animals Act 1986* (Vic) pt 2 div 2 ('Vic POCTA').

⁷³ *Prevention of Cruelty to Animals Regulations 2019* (Vic) pt 4.

Regulations set a minimum weight of 200 kg for all animals used in rodeo events.⁷⁴ As outlined above, this operates to prohibit the rope and tie event.

6 Western Australia

The state-based regulation of rodeo in Western Australia ('WA') begins with the *Animal Welfare Act 2002* (WA) ('WA AWA'), which permits the making of codes of practice in relation to the welfare of animals.⁷⁵ Accordingly, the *Animal Welfare (General) Regulations 2003* (WA) adopts the *Code of Practice for the Conduct of Rodeos in Western Australia (2003)* ('WA Code').⁷⁶ The WA Code thus contains the extent of protection for animals used in rodeo events. The Code itself is based upon the NCCAW Standards and is therefore in line with the rodeo industry regulations. Notably, no aspect of WA's regulatory framework requires a permit to conduct a rodeo or sets a minimum weight limit.

In terms of the legal status of the code, the WA Code differs from other jurisdictions that have a code of practice proclaimed in the legislation. This is because the WA Code is not mandatory and does not offer a clear exemption for compliance. In fact, the preface of the WA Code outlines that it has been adopted 'in principle'.⁷⁷ Rather, rodeo participants are protected from the full extent of the WA AWA through the operation of a defence. Specifically, s 25 of the WA AWA provides that it is a defence to s 19(1) of the Act if a person 'was acting in accordance with a relevant code of practice'.⁷⁸ Section 19(1) of the WA AWA requires that a person not be cruel to an animal, and in s 19(3)(j), 'cruelty' is expanded to include causing an animal unnecessary harm.⁷⁹ The defence provided by s 25 of the WA AWA essentially operates in the same manner as an exemption. If an animal is caused unnecessary harm in the process of a rodeo, it will not be in contravention of the WA AWA if the relevant person acted in accordance with the code of practice. This acts to exclude rodeo animals from the protections awarded in the welfare legislation.

7 Australian Capital Territory

The *Animal Welfare Act 1992* (ACT) operates to completely prohibit rodeos. Section 18 of the Act makes it an offence to conduct or take part in a rodeo, with offenders facing a fine, 'imprisonment for 1 year or both' as a maximum penalty.⁸⁰ The Act

⁷⁴ Ibid reg 82.

⁷⁵ *Animal Welfare Act 2002* (WA) s 94(2)(d) ('WA AWA').

⁷⁶ *Animal Welfare (General) Regulations 2003* (WA) sch 1; Department of Local Government and Regional Development (WA), *Code of Practice for the Conduct of Rodeos in Western Australia* (March 2003) ('WA Code').

⁷⁷ WA Code (n 76) preface.

⁷⁸ WA AWA (n 75) s 25.

⁷⁹ Ibid ss 19(1) and 19(3)(j).

⁸⁰ *Animal Welfare Act 1992* (ACT) s 18(1) ('ACT AWA').

defines rodeo as a public exhibition featuring activities such as bareback horse riding and calf roping.⁸¹

8 Northern Territory

Regulation of rodeos in the Northern Territory ('NT') is not captured by the *Animal Welfare Act 1999* (NT) or the *Animal Welfare Regulations 2000* (NT) ('*NT Regulations*').⁸² The *NT Regulations* refer briefly to rodeos in schedule 1, by permitting the use of electric prodders at rodeos to control horses, although this is the extent of the coverage.⁸³ In regards to the adoption of a rodeo code of practice, the NT adopted the *NCCA Standards* in 2007 through a Gazette notice,⁸⁴ rather than by incorporating the standards in the animal welfare regulations.⁸⁵ The effect of this is that the standards are not mandatory or legally enforceable. The incorporation of the *NCCA Standards* in the NT operates in the same manner as the *WA Code*. That is, where an animal is caused unnecessary harm in a rodeo activity, it will be a defence to a charge on animal cruelty grounds if the relevant person acted in accordance with the *NCCA Standards*. However, the status of the standards in the NT is difficult to ascertain given it is not transparent within the legislation. Ultimately, animals used in rodeos are subject to minimal legal protections within the NT.

9 Summary of State and Territory Regulatory Frameworks

In summary, Australian jurisdictions vary widely in their treatment of calf roping. In the Australian Capital Territory, rodeo is banned completely. In Victoria and South Australia, calf roping is the only rodeo event that is prohibited. Conversely, Queensland, NSW, Western Australia, Tasmania, and the Northern Territory regulate calf roping through a complex and, in some cases, ambiguous set of exemptions or defences to animal welfare protections. Relevantly, the standard of unnecessary, unjustifiable or unreasonable harm is the overarching principle protecting animal welfare in all Australian states and territories; however, as outlined, its application to rodeo is excluded in every jurisdiction.

⁸¹ *Ibid* s 18(3).

⁸² The *Animal Welfare Act 1999* (NT) will soon be replaced by the *Animal Protection Act 2018* (NT). The *Animal Protection Act 2018* (NT) also lacks mention of rodeos.

⁸³ *Animal Welfare Regulations 2000* (NT) reg 4 ('*NT Regulations*').

⁸⁴ 'Animal Welfare Act' in Northern Territory, *Northern Territory Government Gazette*, No G23, 6 June 2007, 4.

⁸⁵ In accordance with s 24 of *Animal Welfare Act 1999* (NT).

III THE PROPORTIONALITY TEST

A *Introduction*

The standard of unnecessary or unreasonable harm contained in the state and territory animal welfare legislation indicates that harm to animals can be considered legitimate, and therefore legal, depending on its purpose. Typically, the greater the benefit to humans the more harm to animals is permitted.⁸⁶ For instance, scientific research has potentially the greatest benefit to human beings and thus would allow the greatest amount of animal suffering. Given calf roping — and rodeo as a whole — is excluded from the general cruelty provisions of animal welfare legislation in all Australian jurisdictions, there is arguably an implicit legitimising of the practices involved by the legislature.⁸⁷ That is, by excluding or providing a defence for the practice of calf roping within a rodeo, those jurisdictions may be seen as deeming the harm caused to rodeo animals as reasonable, justifiable, or proportionate in the light of the purpose sought. The effect of this is that the harm caused to animals in calf roping is legitimised by its legality, rather than an objective and considered assessment of the reasonableness of the harm. It could therefore be assumed that the practice of calf roping would not constitute unnecessary harm when assessed against the relevant test.

Against this backdrop, the following sections will consider whether the practice of calf roping meets the relevant standard of reasonableness and therefore justifies its exclusion from the general cruelty provisions. This is particularly important given that Queensland has recently provided rodeo participants with an exemption from general cruelty provisions, despite the increasing controversy surrounding rodeo's impact on animal welfare and the consensus amongst animal welfare organisations that calf roping should be prohibited.

If calf roping was subject to the prohibition against causing an animal unnecessary harm, its legality would likely be determined by reference to the proportionality principle. The proportionality principle was set out in the leading United Kingdom authority of *Ford v Wiley*,⁸⁸ and will be drawn upon here to analyse whether calf roping does amount to unnecessary harm. If the practice causes pain to the calves that would be considered unnecessary under the proportionality test, this will mean that, while calf roping is legal, when assessed against the relevant standard, it should not be.

⁸⁶ *Ford v Wiley* (n 1) 218 (Hawkins J, Lord Coleridge CJ agreeing at 208).

⁸⁷ See also Dinesh Wadiwel, 'The War Against Animals' in Helena Pederson and Vasile Stanescu (eds), *Critical Animal Studies* (Brill, 2015) vol 3, 35–9; Gary L Francione, *Animals, Property, and the Law* (Temple University Press, 1995) pt 2.

⁸⁸ *Ford v Wiley* (n 1).

1 *Relevance of Ford v Wiley*

The proportionality test espoused in *Ford v Wiley* is utilised here as it was fundamental in the development of the meaning of unnecessary harm in the UK and is the test that is likely to be applied if the issue comes before a court in Australia. Thus, the intent in employing this assessment is to bolster critical legal analysis on the use of animals for entertainment in the context of calf roping, and to address concerns that calf roping is illegitimate due to the potential for animal suffering outweighing the purpose of the practice.

As outlined above, the concept of unnecessary or unjustifiable harm is employed heavily within state and territory legislation and, on this basis, it is clearly the intent of the legislature to prohibit animal suffering that is unnecessary. The difficulty, however, is in determining what constitutes ‘unnecessary cruelty’ — especially in the light of the significant exemptions and defences to cruelty within the legislation. This question has also seen little judicial interpretation in Australia.⁸⁹

The question of what constitutes unnecessary harm, however, did come before a Magistrate in WA in the case of *Department of Local Government and Regional Development v Emanuel Exports Pty Ltd* (*Emanuel Exports*).⁹⁰ This case involved the live export of a specific type of sheep to the Middle East.⁹¹ The export took place in November — a month where high temperatures increase the risk of harm to the sheep.⁹² The defendant in this case was ultimately acquitted on the basis of an inconsistency between the WA AWA and the Commonwealth law concerning live export.⁹³ Magistrate Crawford did, however, find that the export of the sheep was in breach of s 19(1) of the WA AWA, in that it caused unnecessary harm.⁹⁴ In reaching this conclusion, Magistrate Crawford applied the *Ford v Wiley* proportionality assessment.⁹⁵ This case did not reach the consideration of a higher court. As such, the question of what constitutes unnecessary or unjustifiable cruelty has yet to be fully explored by the higher courts within Australia. However, the case of *Emanuel Exports* indicates that the *Ford v Wiley* proportionality assessment remains relevant and is applicable to state and territory legislation. Thus, *Ford v Wiley* is discussed below in order to provide a comprehensive

⁸⁹ Dominique Thiriet, ‘Out of the “Too Hard’ Basket” — Traditional Hunting and Animal Welfare’ (2007) 24(1) *Environmental and Planning Law Journal* 59; Katherine E Russell, ‘Lawful Cruelty: Six Ways in Which Australian Animal Welfare Laws Permit Cruelty Towards Nonhuman Animals’ (PhD Thesis, The University of Adelaide 2017) 103.

⁹⁰ *Emanuel Exports* (n 21).

⁹¹ *Ibid* [9]–[10].

⁹² *Ibid* [96].

⁹³ The livestock export industry is a field within the trade and commerce head of power per s 51(i) of the *Australian Constitution*. Therefore, pursuant to s 109 of the *Australian Constitution*, to the extent that the WA AWA is inconsistent with Commonwealth law, the WA AWA is invalid; *Emanuel Exports* (n 21) [203].

⁹⁴ *Emanuel Exports* (n 21) [203].

⁹⁵ *Ibid* [98]–[99].

overview of the proportionality assessment. This assessment is then utilised to determine whether calf roping would be considered legal pursuant to the unnecessary harm standard.

2 Ford v Wiley — *An Overview*

The seminal case of *Ford v Wiley* provides a comprehensive explanation of the assessment undertaken when determining whether harm can be considered legitimate, and therefore legal, in light of its purpose. In that case, a Magistrate found that a cattle farmer had committed cruelty by dehorning his cattle with a saw.⁹⁶ This decision was appealed and Chief Justice Lord Coleridge and Justice Hawkins of the Queen's Bench were required to consider s 2 of the *Cruelty to Animals Act 1849* (UK) ('1849 Act').⁹⁷ Section 2 of the 1849 Act made it an offence to 'cruelly beat, ill-treat, over-drive, abuse, or torture' an animal.⁹⁸ Thus, the appellants had to determine whether the farmer had ill-treated, abused or tortured a number of cattle by causing their horns to be sawn off.

The facts of the case further provide that the horns were sawn off cattle aged two years old by the farmer's employees. The dehorning was undertaken with a common flat saw, as close to the head as the saw would allow. Several expert witnesses provided evidence that the practice caused excruciating pain and prolonged suffering to the animals. That the cattle suffered immeasurable pain was not in dispute. The court accepted that the practice inflicted substantial suffering on the cattle, although it also accepted that the respondent did not inflict the pain with malice or cruel intent. *Mens rea* was not a requirement for the purposes of establishing an offence under s 2 of the 1849 Act,⁹⁹ and thus the finding that the respondent lacked ill-intent was not detrimental to a prosecution on cruelty grounds. Rather, the focus of this case was that the Court interpreted s 2 of the 1849 Act to require more than that the harm be caused in fact.

Coleridge CJ expressed clearly that '[t]he mere infliction of pain, even if extreme pain, is manifestly not by itself sufficient.'¹⁰⁰ The second element necessary to establish 'cruelty' for the purposes of the Act was that this harm be inflicted without necessity or reasonableness. That is, the pain caused to the cattle would be lawful depending on the means and purpose by which it was inflicted. While ultimately this is a question of fact dependent on the circumstances of the case, it is clear that if the means and purpose are deemed to be legitimate, then so too is the harm. This principle was summarised by Lord Hawkins: 'the beneficial or useful ends sought to be attained must be reasonably proportionate to the extent of the suffering caused, and in no case can substantial suffering be

⁹⁶ *Ford v Wiley* (n 1) 204.

⁹⁷ *Cruelty to Animals Act 1849*, 12 & 13 Vict, c 92.

⁹⁸ *Ibid* s 2.

⁹⁹ *Ibid*.

¹⁰⁰ *Ford v Wiley* (n 1) 209.

inflicted, unless necessity for its infliction can reasonably be said to exist'.¹⁰¹ This is essentially the principle of proportionality as espoused in *Ford v Wiley* — the purpose sought must be reasonably proportionate to the harm caused. As Coleridge CJ explained, this is 'a conclusion not of sentimentalism but of good sense'.¹⁰² This principle necessitates consideration of the respondent's reasons for causing the cattle's horns to be sawn off, in the light of alternative means. The respondent's justifications in this case were that it made the cattle more docile and stopped them from goring, allowing the farmer to keep more cattle within the space.¹⁰³ It also caused them to graze better and made them fatten more quickly, all of which contributed to a slightly increased sale price.¹⁰⁴ As to whether this is satisfactory for the purposes of the 1849 Act, Lord Hawkins outlined the key elements involved in determining whether the harm caused was proportionate to the purpose sought. These elements include the level and duration of the pain and the legitimacy of the object sought to be attained.¹⁰⁵ Relevantly, there were also alternative means which stopped cattle from goring. These were 'tipping', which involved taking only the tip off the horn, or 'budding', which involved cutting the core out of a horn of a calf not more than six months old.¹⁰⁶ Both of these practices caused significantly less harm than dehorning and prevented goring.

Against this backdrop, the Court in *Ford v Wiley* upheld the decision of the Magistrate in finding that dehorning the cattle amounted to cruelty in accordance with s 2 of the 1849 Act.¹⁰⁷ This is because the practice caused immense and prolonged suffering, and Coleridge CJ and Lord Hawkins did not accept that the farmer's purpose or means in dehorning the cattle were proportionate to the amount of harm caused to the animals. In so doing, both emphasised that profit to man does not in and of itself justify harm to animals. Coleridge CJ highlighted this in stating:

There is no necessity and it is not necessary to sell beasts for 40s. more than could otherwise be obtained for them; nor to pack away a few more beasts in a farm yard, or a railway truck, than could otherwise be packed; nor to prevent rare and occasional accident from one unruly or mischievous beast injuring others. These things may be convenient or profitable to the owners of cattle, but they cannot with any show of reason be called necessary.¹⁰⁸

¹⁰¹ Ibid 219.

¹⁰² Ibid 215.

¹⁰³ Ibid 208.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid 218.

¹⁰⁶ Ibid 203.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid 209.

3 Critique

The proportionality test has received some criticism, most prominently from Peter Sankoff, due to an apparent lack of neutrality in the way the test is approached.¹⁰⁹ Sankoff argues that the proportionality assessment is tilted towards human interests. According to Sankoff, because of the anthropocentric nature of the test, almost all instances of animal suffering carried out for the benefit of humans will be considered legitimate. Accordingly, Sankoff argues that for harm to be considered illegitimate, there must be no broader societal benefit — such as an act of cruelty carried out sadistically, or neglect because of laziness.¹¹⁰ Sankoff identifies various uses of animals that are ‘legitimate’, such as the use of animals for public entertainment, or mutilation of animals for aesthetic preferences.¹¹¹ He argues that because activities such as these are legitimate, it appears that a practice must simply fall within the ambit of what is ‘normal’ and beneficial to humans to justify any extent of harm to animals. Sankoff expresses particular concern regarding the tendency for economic benefit, of any degree, to justify human harm to animals, particularly in terms of modern farming practices.¹¹²

However, the cases of *Ford v Wiley* and *Emanuel Exports* suggest that economic gain may not always justify harm. As evidenced in the above statement from Coleridge CJ, their Lordships in *Ford v Wiley* emphasised that profit and convenience will not constitute necessity in every set of facts. In *Emanuel Exports*, Magistrate Crawford explained that the sole motivation behind exporting the sheep in November was the pursuit of profit, and found ‘that any harm suffered to fat adult sheep was unnecessary’.¹¹³ Thus, while the proportionality principle may arguably assign more value to human interests in many instances, a proper application of the principle will not always overemphasise economic gain.¹¹⁴ Ultimately, however, due to the lack of consideration given to the standard of unnecessary harm within Australian courts, it is unclear whether Sankoff’s criticisms would be validated if an appropriate case were to come before a court.

More generally, Sankoff’s argument forms a broader critique of animal welfarism as a whole. There is an ideological divide among those who advocate for increased animal protection, with some arguing for improvements to animal welfare and others advocating for animal rights.¹¹⁵ Animal welfarism seeks to

¹⁰⁹ Peter Sankoff, ‘The Welfare Paradigm: Making the World a Better Place for Animals?’ in Peter Sankoff and Steven White (eds), *Animal Law in Australasia: A New Dialogue* (Federation Press, 2009) 21.

¹¹⁰ *Ibid* 23.

¹¹¹ *Ibid*.

¹¹² *Ibid*.

¹¹³ *Emanuel Exports* (n 21) [99].

¹¹⁴ Jed Goodfellow, ‘Animal Welfare Regulation in the Australian Agricultural Sector: A Legitimacy Maximising Analysis’ (PhD Thesis, Macquarie University, 2015) 111.

¹¹⁵ Jane Kotzmann (n 32) 284–5; Jane Kotzmann and Nick Pendergrast, ‘Animal Rights: Time to Start Unpacking What Rights and for Whom’ (2019) 46(1) *Mitchell Hamline Law Review* 158, 161–72.

protect animals in the context of an acceptance of human superiority.¹¹⁶ Welfarism is in fact evident in the standard of unreasonable or unnecessary harm, in that it operates from the assumption that human harm caused to animals can be reasonable depending on the human benefit to be gained. Conversely, animal rights proponents fundamentally disagree with the anthropocentric hierarchy that places humans over animals and the harm this hierarchy permits.¹¹⁷ For animal rights advocates, human harm to animals cannot be made reasonable by some degree of human benefit.

Sankoff's critique of the proportionality assessment is representative of this ideological divide. By weighing the harm caused to animals against the human benefit that harm provides, the proportionality assessment can be described as a welfarist approach.¹¹⁸ As Sankoff argues, any assessment undertaken will therefore be informed by an acceptance of human superiority and will support the legal framework that classifies animals as legal property and humans as legal persons.¹¹⁹ On this basis, an assessment of the legitimacy of human harm to animals is restricted by the confines of the welfarist framework it operates within. It will not prevent the use of animals for human benefit or impact the legal status of animals as property.

Nevertheless, the proportionality assessment achieves a valuable objective by demonstrating that certain treatment of animals is illegitimate even within existing frameworks. This has the potential to influence immediate change,¹²⁰ and is perhaps more damning given that the practice would be considered unreasonable against standards that are tilted towards human interests. Thus, it is relevant to note that the ensuing discussion operates within the confines of a welfarist approach and any determination as to the reasonableness of calf roping is made in the context of a framework that supports the continued legal classification, and treatment, of animals as property.

B Application

1 First Limb

In the light of the *Ford v Wiley* proportionality test, an assessment of the legality of calf roping must begin with a consideration of its purpose and benefit. Given that calf roping has been a long standing and customary inclusion in rodeo, many

¹¹⁶ Jane Kotzmann (n 32) 284–5.

¹¹⁷ See generally Gary L Francione, *Rain Without Thunder: The Ideology of the Animal Rights Movement* (Temple University Press, 1996).

¹¹⁸ Gary L Francione, 'Animals, Property and Legal Welfarism: "Unnecessary" Suffering and the "Humane" Treatment of Animals' (1994) 46(2) *Rutgers Law Review* 721, 731.

¹¹⁹ Sankoff (n 109) 23; Bruce (n 29) 182.

¹²⁰ See generally Jane Kotzmann and Gisela Nip, 'Bringing Animal Protection Legislation into Line with its Purported Purposes: A Proposal for Equality amongst Non-Human Animals' (2020) 37(2) *Pace Environmental Law Review* 247, 286–7.

of the benefits of calf roping are linked to the benefits of rodeo generally. As such, this section will consider broadly the purported benefits of rodeo in general.

(a) Economic Value

First, as was the case in *Ford v Wiley*, a primary justification for calf roping and rodeo generally is the economic benefit it offers. Rodeo has been described as offering a ‘substantial boost to local economies’.¹²¹ This economic contribution is not exclusive to rodeo organisers. The benefit is also felt in industries such as accommodation, restaurants, pubs and fuel retailing. This provides some diversity in economic input for regional towns, which are generally heavily focused on the agriculture and mining industries. Rodeo constitutes part of the sports and recreation services industry,¹²² which is also made up of non-sport activities such as bush walking.¹²³ This industry directly contributed a total of AUD4 billion towards the Australian economy in the 2017–18 financial year.¹²⁴ A study that refined the definition of the sports industry to exclude animal racing activities, as well as amusement and ‘other’ (non-physical) recreation activities,¹²⁵ found that the combined direct and indirect contribution by sport to Australia’s gross domestic product was approximately \$14.4 billion in 2016–17.¹²⁶ However, the actual extent of rodeo’s contribution to this total is unclear. Some insight is available when looking to the financial contribution of Australia’s ‘largest and richest’ rodeo, the Mount Isa Mines Rotary Rodeo.¹²⁷ In 2019, the Mount Isa Rodeo attracted a record number of attendees over its four days — a total of 39,933.¹²⁸ This provided an economic benefit of \$12.24 million to the local community through tourist spending.¹²⁹ A further example is the rural town of Mareeba, with a population of around 11,000 people. The Mareeba rodeo draws a

¹²¹ ‘More Than Just a Rodeo’, *Wellington Times* (online, 28 September 2017) <<https://www.wellingtontimes.com.au/story/4954069/more-than-a-rodeo/>>.

¹²² Australian Bureau of Statistics, *Australian and New Zealand Standard Industrial Classification 2006* (Catalogue No 1292.0, 28 February 2006) div R sub-div 91.

¹²³ *Ibid.*

¹²⁴ ‘State Tourism Satellite Accounts (STSA) 2017–18 Data’, *Tourism Research Australia* (Excel Spreadsheet, 2019) Table 5 <[https://www.tra.gov.au/search.aspx?moduleid=518&multisite=false&keywords=State%20Tourism%20Satellite%20Accounts%20\(STSA\)%202017-18%20Da](https://www.tra.gov.au/search.aspx?moduleid=518&multisite=false&keywords=State%20Tourism%20Satellite%20Accounts%20(STSA)%202017-18%20Da)>.

¹²⁵ Office for Sport, Department of Health, and KPMG Sports Advisory, *Sports Industry Economic Analysis: Exploring the Size and Growth Potential of the Sports Industry in Australia* (Final Report, March 2020) 129 <<https://www.health.gov.au/sites/default/files/documents/2020/05/sports-industry-economic-analysis.pdf>>.

¹²⁶ *Ibid.* 5.

¹²⁷ Stirling Hinchliffe, ‘Isa Rodeo Ticket Sales Buck the Record’ (Media Release, Queensland Department of Tourism, Innovation and Sport, 26 May 2021) <<https://statements.qld.gov.au/statements/92193>>.

¹²⁸ ‘Isa Rodeo Breaks Records for Growing Outback Tourism Industry’ (n 2).

¹²⁹ *Ibid.*

crowd of 14,000 people and '[w]ith around 70 per cent of the visitors who attend the event from out-of-town, the economic flow-on effect is significant'.¹³⁰

While exact figures are not available, rodeo clearly injects economic value into rural Australian towns. However, this value appears relatively low when compared to other events that use animals for entertainment, such as greyhound racing. For instance, an industry-developed report found that the total direct and indirect contribution of greyhound racing to the economy was \$408.6 million in Victoria alone.¹³¹ Further, when considered in the broader context of the sports industry as aforementioned, the economic benefit of rodeo is arguably not substantial. It is important to note, however, that the economic contribution of rodeo in a national context does not adequately capture the significance it holds to a regional town.

It is also worth noting that states which have effectively banned calf roping, including Victoria and SA, still derive economic benefit from rodeo. Again, exact figures are not available, but anecdotal evidence suggests the direct and flow-on economic impact of rodeo was also appreciated by residents of the South Australian town of Streaky Bay. The 2019 rodeo held in Streaky Bay — a town with a recorded population of 1,378 in 2016¹³² — attracted over 2,500 attendees, and a local business owner stated that '[t]he weekend of the rodeo produced one of my largest turnovers for the year ... only second to the Christmas holiday period'.¹³³ Given this, it appears that rodeo as a whole is not dependent on the practice of calf roping to attract spectators and bring economic value. As the profit to be derived from the event is not reliant on calf roping alone, this does serve to detract somewhat from the justification of the practice on the basis of economic benefit.

(b) Regional Identity

The values and belief systems that surround rodeo are a vital layer of the overall picture. Rurality has long been held to be a key part of Australian identity. Keith Stevens explains that '[r]odeo is popular in Australia because it suits our ideas of ourselves. It is rough and tough and we like to think of ourselves that way'.¹³⁴ The notion of 'Aussie battlers' overcoming land and animal with grit has been

¹³⁰ Mareeba Chamber of Commerce, *Economic Snapshot 2019–2020* (2020) 4 <<https://www.mareebachamber.com.au/files/media/original/014/a87/77e/MCOC-Economic-Snapshot-2019-2020.pdf>>.

¹³¹ 'New Report Highlights Greyhound Racing's Economic Contribution to Victoria's Economy', *Greyhound Racing Victoria* (Web Page, 19 June 2019) <[¹³² '2016 Census Quickstats', *Australian Bureau of Statistics* \(Web Page, 23 October 2017\) <\[https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/SC41383\]\(https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/SC41383\)>.](https://www.grv.org.au/vgri/#:~:text=The%20report%20found%20that%20greyhound,spending%20and%20profits%20are%20considered.>>.</p>
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¹³³ 'Streaky Bay Benefits from Rodeo', *Port Lincoln Times* (online, 17 January 2020) <<https://www.portlincolntimes.com.au/story/6584592/streaky-bay-benefits-from-rodeo/>>.

¹³⁴ Keith Stevens, 'Foreword' in Poole (n 16).

perpetuated as part of our cultural identity, and a kind of humble superiority still surrounds the notion of bush living versus city living.¹³⁵ As mentioned above, there is a strong link between the working life of Australian stockmen and some of the events that feature in modern rodeo. Thus, to some extent rodeo represents a romanticisation of country life and an opportunity to connect with a sense of rurality. It acts as a means for a rural community to express a sense of commonality and shared values and also allows the opportunity to share a narrative of rural experience with outsiders. This strong sense of rural identity offers an explanation for the deep integration of rodeo into the lives of those in some regional communities, and thus also provides an understanding of the resistance shown towards altering or prohibiting the practice.

Despite this intertwining of rodeo with rural Australian identity, however, the event is heavily Americanised. In fact, the Americanisation of rodeo is well represented by the calf roping event in and of itself. Calf roping is not a practice that featured heavily in the lives of Australian stockmen.¹³⁶ Rather, its place in early Australian rodeo was as a 'novelty event', likely influenced by the presence of American soldiers in Australia around the time of World War II.¹³⁷ As Jim Hoy outlines, 'Australian rodeo has evolved into a nearly exact copy of the North American version, with such introduced events as bulldogging, calf roping and team roping that were not found in earlier versions of the sport "downunder"'.¹³⁸ Rather, calf roping became a common feature in Australian rodeo essentially by mandate of the Australian Rough-Riders Association ('ARRA') (now known as APRA). According to an ARRA decree, in order for a rodeo to count towards the annual championship circuit, it must have included calf roping as a standard event.¹³⁹ Thus, the notion of calf roping — and rodeo in its current form — as a culturally important representation of rural Australian life, and 'part of the bush fabric' of Australia,¹⁴⁰ is somewhat detached from the reality of its evolution. Despite this, rodeo, of which calf roping is a part, is still regarded as part of Australian identity and is valued by supporters as a cultural connection.

2 *Second Limb*

Having considered the 'beneficial or useful' nature of calf roping in Australia,¹⁴¹ the second limb of the *Ford v Wiley* proportionality assessment necessitates a

¹³⁵ Chris Gibson and Deborah Davidson, 'Tamworth, Australia's "Country Music Capital": Place Marketing, Rurality, and Resident Reactions' (2004) 20(4) *Journal of Rural Studies* 387, 390.

¹³⁶ Hoy, 'Rodeo in Australia' (n 3) 58.

¹³⁷ *Ibid* 55.

¹³⁸ Jim Hoy, 'The Americanisation of the Outback: Cowboys and Stockmen' (2000) 24(66) *Journal of Australian Studies* 205, 208.

¹³⁹ Hoy, 'Rodeo in Australia' (n 3) 58.

¹⁴⁰ 'Animal Liberationists Call On Ag Minister to Ban Calf Roping' (n 10).

¹⁴¹ *Ford v Wiley* (n 1) 219 (Hawkins J).

consideration of the harm caused to the calves in calf roping, and whether that harm is proportionate to the object sought to be attained by the event.

(a) Animal Suffering

The suffering experienced by animals in rodeo has long been a contentious issue. Given calf roping reflects a predator–prey situation and features rough handling of calves, some suffering may be apparent. However, proponents of rodeo argue that rodeo animals are well cared for, bonded with and enjoy their role in the event.¹⁴² A number of factors appear to validate this perspective, including an apparently minimal injury rate.¹⁴³ The most recent data available from APRA indicates that in Australian APRA-affiliated rodeos, there has been only one injury for every 3,471 times an animal was used, and only one severe injury or euthanasia for every 5,571 uses.¹⁴⁴ However, reporting of injuries is not mandatory in most Australian jurisdictions and there is no independent record of injuries suffered by animals in rodeos. Given this, Walkden–Brown states that ‘it is likely that only a small fraction of animal injuries and deaths at rodeos ever become public knowledge’.¹⁴⁵

Looking instead to the available scientific research, it is clear there is harm caused to the calves in calf roping. As a starting point, scientific evidence is clear that calves are capable of experiencing pain.¹⁴⁶ While not specific to calf roping, evidence suggests that ‘[a]natomical, physiological, and behavioral similarities across species demonstrate that animals experience pain and distress [including psychological pain and distress] in ways *similar* or *identical* to humans.’¹⁴⁷ Thus, the likely harm caused to calves in the practice of calf roping can to some extent be observed. In this respect, researchers in Canada were granted access to rodeos in order to gather evidence relating to the welfare of rodeo animals.¹⁴⁸ A similar collation of evidence has not been undertaken in Australia. However, the observations and conclusions drawn in this report remain valuable for the purposes of this proportionality assessment given the event is standardised in both Australia and Canada.

¹⁴² Joyce (n 13).

¹⁴³ Catriona MacLennan, ‘The Legal Status of Rodeo in New Zealand’ (Paper, New Zealand Animal Law Association, March 2018) 83 <<https://nzala.org/w/wp-content/uploads/2020/01/NZALA-Rodeo-Report-2.pdf>>; Rizzuto et al (n 36) 3.

¹⁴⁴ MacLennan (n 143) 83; Rizzuto et al (n 36) 3.

¹⁴⁵ Jackson Walkden–Brown, ‘Animals and Entertainment’ in Peter Sankoff et al (eds), *Animal Law in Australasia: Continuing the Dialogue* (Federation Press, 2nd edition, 2013) 129, 133.

¹⁴⁶ Kevin J Stafford and David J Mellor, ‘Addressing the Pain Associated with Disbudding and Dehorning in Cattle’ (2011) 135(3) *Applied Animal Behaviour Science* 226, 226.

¹⁴⁷ Hope Ferdowsian and Debra Merskin, ‘Parallels in Sources of Trauma, Pain, Distress, and Suffering in Humans and Nonhuman Animals’ (2012) 13(4) *Journal of Trauma and Dissociation* 448, 461 (emphasis added).

¹⁴⁸ Alain Roy, *Report on the Analysis of the Data Collected During the Montréal and St-Tite Rodeos in Québec (August and September 2017)* (Plaintiff’s Report — Part II, February 2018).

First, observers detailed the experience of a calf ‘lifted about one meter then hurled to the ground without support in a violent impact to the side of the thorax’.¹⁴⁹ Another calf was witnessed being thrown to the ground with impact to his spine. The observers outlined that this creates ‘a risk associated with the sudden increase in intrathoracic pressure upon contact with the ground, which can cause damage (alveolar, pulmonary contusions, pneumothorax, rib fractures)’.¹⁵⁰ They also observed calves being halted abruptly by the rope while mid-run, which ‘creates danger of damage to the cervical structures (skin, muscles, larynx, trachea, vertebrae, ligaments, nerves, blood vessels)’.¹⁵¹ These observations are relevant in an Australian context, where similar physical movements can be observed even with use of the specialised roping device, ‘Ropersmate’.¹⁵²

Current scientific evidence also suggests the practice of calf roping is stressful for the animals involved. For instance, a recent study suggests ‘that roping events induce an acute stress response in calves’.¹⁵³ This was based on the observable differences in the emotional states of calves while being chased and while in a ‘recovery phase’ post chase.¹⁵⁴ Participants in this study observed calves in the ‘chase phase’ as ‘more agitated, anxious, confused, energetic, frightened and stressed’.¹⁵⁵ This is likely contributed to by the mimicked predator–prey experience.¹⁵⁶ Conversely, participants observed calves in the ‘recovery phase’ as ‘more calm, contented, exhausted, inquisitive and relieved’.¹⁵⁷ A further study concluded that both the marshalling of naïve calves and the roping of experienced calves were likely ‘aversive’ experiences for the animals.¹⁵⁸ This was suggested by increased blood cortisol, epinephrine and norepinephrine (also known as adrenaline and noradrenaline) in marshalled calves, which are hormones typically associated with stress responses.¹⁵⁹ In the case of roped calves, the stress response was largely shown by behavioural evidence that indicated a ‘flight response to the presence of the pursuing rider’.¹⁶⁰ This study was undertaken after the introduction of the Ropersmate device in rodeo competitions. While more research is required to determine what impact this specialised roping device has on the stress responses of calves, it is clear that the animals are still subject to an acute stress reaction when the Ropersmate is used.

¹⁴⁹ Ibid 29.

¹⁵⁰ Ibid 513.

¹⁵¹ Ibid 29.

¹⁵² Animal Liberation Queensland, ‘2019 APRA Rope & Tie Events with Ropersmate Devices’ (Vimeo, 7 December 2019) <<https://vimeo.com/377947145>>.

¹⁵³ Rizzuto et al (n 36) 14.

¹⁵⁴ Ibid 1.

¹⁵⁵ Ibid 14.

¹⁵⁶ Ibid 14.

¹⁵⁷ Ibid.

¹⁵⁸ Sinclair et al (n 39) 8.

¹⁵⁹ Ibid 9.

¹⁶⁰ Ibid.

C Answer to the Question of Legality

For this suffering to be legitimate it must be proportionate to the purpose sought by calf roping. The objective of calf roping is ultimately one of recreation. As a contributor to the sports industry, it offers some economic value as well as cultural value for those living in rural Australian towns. However, this economic contribution is arguably not significant, especially in the light of other events within the broader sports industry and when compared to similar events that use animals for entertainment. As emphasised in *Ford v Wiley*, profit to man does not in and of itself justify harm to animals. Here, the profit is arguably not such as to designate the practice necessary.

As demonstrated above, the cultural connection to calf roping is also somewhat tenuous given its American origins. Nevertheless, the relationship to calf roping as a broader element of a culture of rurality must in itself be questioned. That is, how much weight should be given to the protection of cultural traditions that result in some harm to animals? It is relevant to note that a number of traditional uses of animals, such as cockfighting or live baiting, are not permitted in Australia¹⁶¹ and thus ‘tradition’ was not seen to justify continuation of these practices. Further, many people in Australia are unlikely to consider practices in foreign jurisdictions, such as bullfighting, dolphin hunting,¹⁶² religious animal sacrifice¹⁶³ and the controversial dog meat festival,¹⁶⁴ to be morally justifiable because of the cultural value they hold to their respective cultures. Thus, while calf roping and rodeo may hold significant cultural value for rural communities, it is clear that culture in and of itself is not a justification for the mistreatment of animals.¹⁶⁵ Culture or tradition cannot excuse practices from scrutiny, nor should it be a sole justification for actions that, in other contexts, would not be permissible under animal welfare legislation.¹⁶⁶

To an extent, the application of the proportionality principle as it relates to the conflict between the interests of animals and the interest of preserving culture

¹⁶¹ Tas AWA (n 68) s 10; SA AWA (n 66) s 5(b); *Animal Welfare Act 1999* (NT) s 21; WA AWA (n 75) s 32; NSW POCTA (n 33) s 21; Vic POCTA (n 71) s 13; ACPA (n 48) ss 20, 30–32; ACT AWA (n 80) s 17.

¹⁶² Justin McCurry, “‘Not Ashamed’: Dolphin Hunters of Taiji Break Silence over Film *The Cove*”, *The Guardian* (online, 11 December 2017) <<https://www.theguardian.com/world/2017/dec/11/not-ashamed-dolphin-hunters-of-taiji-break-silence-over-film-the-cove>>.

¹⁶³ Arun Budhathoki and Hannah Ellis-Petersen, ‘Nepal Animal Sacrifice Festival Pits Devotees against Activists’ *The Guardian* (online, 4 December 2019) <<https://www.theguardian.com/world/2019/dec/03/nepal-animal-sacrifice-festival-pits-devotees-against-activists>>.

¹⁶⁴ VICE, ‘Dining on Dogs in Yulin: VICE Reports’ VICE Reports (YouTube, 22 October 2014) <<https://www.youtube.com/watch?v=YfaZeIxFUM>>.

¹⁶⁵ Kevin Gary Behrens, ‘Tony Yengeni’s Ritual Slaughter: Animal Anti-Cruelty vs Culture’ (Research Report, University of the Witwatersrand, Johannesburg, 2008) <<https://core.ac.uk/download/pdf/39665707.pdf>>.

¹⁶⁶ Jane Kotzmann, ‘Animal Welfare: The Hunt for Clarity’, *Law Institute of Victoria* (Web Page, 1 September 2020) <https://www.liv.asn.au/Web/Law_Institute_Journal_and_News/Web/LIJ/Year/2020/09September/Animal_welfare_The_hunt_for_clarity.aspx>.

can be seen in existing animal welfare laws within Australia.¹⁶⁷ It can be implied, for instance, in the restriction on Indigenous hunting practices within some jurisdictions in Australia. For example, s 79(2) of the *Animal Welfare Act 1999* (NT) provides that '[i]t is not a defence to a prosecution for an offence under this Act that the act or omission constituting the offence, or an element of the offence, was in accordance with cultural, religious or traditional practices.'¹⁶⁸ Laws that protect cultural practices and laws that protect the welfare of animals must interact in a balanced and considered way, and in this instance, the exercise of culture is somewhat restricted to protect the interests of animals in not suffering.¹⁶⁹ However, some traditional hunting practices that may cause animals to suffer, such as the hunting of dugongs or turtles, are permitted in recognition of the importance of preserving Indigenous Australian culture.¹⁷⁰ Thus, culture — while important — is not an all-prevailing justification and can be restricted or protected depending on a myriad of factors, including the value attributed to it. This creates room for further considerations as to the weight to be attributed to culture in a proportionality analysis, with some cultures and associated traditions likely to be more strongly valued than others.

Turning to *Ford v Wiley* for guidance in this respect, it was relevant in that case that there were alternative means available to stop cattle from goring.¹⁷¹ In the context of culture, it would therefore be relevant if the practice could be modified without undue impact on the exercise of the cultural practice, or if the practice itself could be removed with little adverse impact on the broader culture. In terms of calf roping, the latter consideration is particularly pertinent. This is because, as demonstrated above, the practice of calf roping can be removed from rodeo with little adverse consequence to a broader culture of Australian rurality — especially given calf roping has been identified as the practice within rodeo with the most tenuous ties to Australian culture. The broader cultural benefits of rodeo can be maintained without calf roping, and given this, the harm caused to calves by calf roping is unnecessary to achieve this objective. Thus, under a proportionality analysis, culture may not always justify harm caused to an animal, and in the context of calf roping it does not.

It is also relevant that a number of practices within the broader sports industry achieve the goal of community connection and entertainment without the use of animals and bring more economic value.¹⁷² Competitive sport in Australia has long been seen as a part of national character. In 2006, journalist Greg Ansley explained, '[t]he Australian psyche is bound in sports, as a passion

¹⁶⁷ Ibid.

¹⁶⁸ *Animal Welfare Act 1999* (NT) s 79(2).

¹⁶⁹ Kotzmann (n 166).

¹⁷⁰ *Native Title Act 1993* (Cth) s 211; 'Can Turtles and Dugongs Be Killed Humanely Using Traditional Hunting Methods?', RSPCA (Web Page, 1 May 2019) <<https://kb.rspca.org.au/knowledge-base/can-turtles-and-dugongs-be-killed-humanely-using-traditional-hunting-methods/>>.

¹⁷¹ *Ford v Wiley* (n 1) 203.

¹⁷² For instance, Australian Rules Football, Rugby League and Soccer, among many others.

and as an essential component of national identity.¹⁷³ This extends to regional Australia, where participation in sports such as Rugby League or Australian Rules Football contributes to a sense of community, promotes socialisation and offers residents an opportunity to barrack for their hometowns.¹⁷⁴ Competitive sports also provide considerable economic benefit to Australia, with the Australian Football League ('AFL') generating approximately '\$6.80 billion in financial contribution to the Australian economy in 2018'.¹⁷⁵ In terms of national economic contribution, competitive sports such as Australian Rules Football and Rugby League hold more economic value than rodeo and do not involve harm to animals as features of the game.

Further, not all regional towns across Australia host rodeos to achieve the objectives of creating community and attracting the economic benefit of tourism. Rather, they may engage in other pursuits to achieve these objectives, such as ecotourism¹⁷⁶ — including, for instance, bird watching¹⁷⁷ or whale watching¹⁷⁸ — or music festivals.¹⁷⁹ Given this, it is evident that there are many other options available to attract economic benefits to regional towns and create a sense of community — options which do not cause harm to animals.

Against this backdrop, the pain suffered by calves in the practice of calf roping ought to be very low. This is because the degree of legitimacy attributed to the purpose of the practice sets the acceptable range of harm that can be caused — the more legitimate the purpose, the more harm is acceptable.¹⁸⁰ The primary purpose of calf roping is entertainment, and so the level of legitimacy attached to the practice is very low. Accordingly, the degree of harm the practice can justifiably cause is also very low. As outlined, scientific evidence demonstrates that calves can experience pain and distress. When considered in the light of the extensive collation of observational evidence detailing the physical impact of the practice on the calves, as well as evidence demonstrating the acute stress impact, the suffering experienced by the animals arguably exceeds that which would be considered proportionate to obtain calf roping's object of entertainment. This consideration factors in implementation of the Ropersmate device, as this device

¹⁷³ Greg Ansley, 'Aussies — Natural Born Winners', *NZ Herald* (online, 25 March 2006) <<https://www.nzherald.co.nz/sport/aussies-natural-bornwinners/CATTGOAFVJVKJLCEKSJ4HTLDRA/>>.

¹⁷⁴ Greg Blood and Christine May, *Sport in Rural and Regional Australia* (Report, 25 May 2021) <<https://www.clearinghouseforsport.gov.au/kb/sport-in-rural-and-regional-australia>>.

¹⁷⁵ Julian Lorkin, 'Economic Windfall Thanks to AFL', *UNSW Sydney Newsroom* (Web Page, 27 September 2019) <<https://newsroom.unsw.edu.au/news/business-law/economic-windfall-thanks-afl>>.

¹⁷⁶ See, eg, South Australian Tourism Commission, 'Sustainable Tourism Experiences in South Australia', *South Australia* (Blog Post, 26 August 2020) <<https://southaustralia.com/travel-blog/sustainable-tourism-experiences-in-south-australia>>.

¹⁷⁷ See, eg, 'Our Tours', *Gondwana Guides* (Web Page, 2022) <<https://www.gondwanaguides.com.au/birdwatching-tours/>>.

¹⁷⁸ See, eg, 'Your Guide to Whale Watching in Dunsborough', *Whale Watch Western Australia* (Web Page, 2022) <<https://whalewatchwesternaustralia.com/locations/whale-watching-in-dunsborough/>>.

¹⁷⁹ See, eg, 'Spring Festival 2021', *Wintermoon Festival* (Web Page, 2021) <<https://www.wintermoonfestival.com/>>.

¹⁸⁰ *Ford v Wiley* (n 1) 218 (Hawkins J).

was in use throughout one of the studies — with the evidence still demonstrating an acute stress response. Further studies investigating the impact of calf roping on the animals are required, especially in light of the contested injury rate put forward by industry. However, on the basis of the evidence available, it is clear that the impact on animal welfare is not proportionate to the objective sought. The economic benefit and the cultural relationship to the practice are not such as to legitimise or necessitate the harm caused.

IV RECOMMENDATIONS AND CONCLUDING COMMENTS

This article has demonstrated that the regulation of calf roping in Australia is inconsistent and contradictory, and that reform is therefore necessary. The manner in which calves are excluded from the protection of animal welfare law by virtue of their status as rodeo animals does not accord with the standard of unnecessary harm in the light of the increasing research confirming the negative impact on their welfare. Given that the standard of unnecessary or unreasonable harm is central within Australian animal welfare regulation, and that the proportionality principle espoused in *Ford v Wiley* remains relevant in Australia and is applicable to state and territory legislation, any reform should be undertaken with both at the forefront.

It is apparent that the harm caused to calves in the rope-and-tie event outweighs the benefits of the practice. Evidently, reform must therefore aim to reduce the harm caused to calves. This can be considered in the light of the finding that the harm suffered by calves should be very low in view of the benefits of the practice. As mentioned, industry has attempted to achieve a reduction in the harm caused to calves through the introduction of the Ropersmate device. However, as outlined, this device appears to have been ineffective in eliminating the acute stress response in calves,¹⁸¹ and the observable effects of the practice on the animals — including the heavy impact to the side of the calf's body and the abrupt halting of the calf by the rope while mid-run — are still present despite its use.¹⁸² This indicates that attempts to mitigate the level of harm so as to make it proportionate to the benefits of the practice have been futile. It appears that, even with modifications to the practice by industry, the harm caused to calves in the rope-and-tie event cannot be reduced to the very low level required to bring it into proportion with its objects and legitimise the harm.

Reform does appear imminent in some jurisdictions. As mentioned, Queensland recently implemented a code of practice concerning rodeos. The failure to prohibit calf roping may represent a missed opportunity for Queensland to heed the increasing calls for an end to the practice and become a leader in animal welfare matters among Australian jurisdictions. However, the Queensland

¹⁸¹ See above Part IIIB(2)(a); Sinclair et al (n 39) 9.

¹⁸² See Animal Liberation Queensland (n 152). See above Part IIIB(2)(a).

government intends to review the calf-roping provisions in five years, which provides a further opportunity to ensure that the code reflects community expectations concerning the treatment of animals. In New Zealand, the New Zealand Animal Law Association ('NZALA') and SAFE have instituted a challenge to rodeo events by filing proceedings against the Minister of Agriculture and the National Animal Welfare Advisory Committee ('NAWAC').¹⁸³ They claim that rodeo activities are inconsistent with the *Animal Welfare Act 1999* (NZ) ('*NZ Animal Welfare Act*') and the failure of the Minister of Agriculture and NAWAC to ban rodeo events is in violation of that Act. Debra Ashton, the chief executive of SAFE, explained that 'the real issue here ... is that animals should not be put under any unnecessary or unreasonable stress and it is clear that in rodeo this is in fact the case'.¹⁸⁴ Regulation of rodeo in New Zealand takes a similar form to that in Australia, with minimum standards set out in the *Animal Welfare (Rodeos) Code of Welfare* (2018) ('*NZ Code*'). NZALA and SAFE argue that activities such as calf roping, which are permitted by the *NZ Code*, are inconsistent with the *NZ Animal Welfare Act* because they permit the handling of animals in a manner that does not minimise 'the likelihood of unreasonable or unnecessary pain or distress'.¹⁸⁵ Given the apparent similarities to Australia's regulatory framework regarding rodeos, this legal challenge could give rise to similar challenges here.

Further, the prohibition of calf roping in both Victoria and SA implies some recognition by the legislature in those states that the welfare impact of calf roping could not be reduced to the level necessary to legitimise or necessitate the practice. Unfortunately, however, the review of the state and territory regulatory spaces undertaken above made clear that regulation varies widely between jurisdictions. Thus, while the unnecessary or unreasonable harm caused to calves in the rope-and-tie event may be recognised in one jurisdiction, similar reform in another jurisdiction may lag far behind.

This inconsistency is undesirable. Many animal welfare organisations have long advocated for national consistency in animal welfare legislation. For instance, RSPCA Australia states that 'Australia is greatly disadvantaged due to a lack of guidance and oversight on animal welfare at a national level.'¹⁸⁶ The need for consistency was also recognised by a review commissioned by the Commonwealth Government in 2005, which spurred the introduction of the

¹⁸³ Jacqueline So, 'NZ Animal Law Association Challenges Agriculture Minister on Rodeo Ban Inaction' *NZ Lawyer* (News, 20 July 2021) <<https://www.thelawyermag.com/nz/news/general/nz-animal-law-association-challenges-agriculture-minister-on-rodeo-ban-inaction/291799>>.

¹⁸⁴ *The AM Show* (Newshub, 20 July 2021) 0:01:21–0:01:35 <<https://www.newshub.co.nz/home/new-zealand/2021/07/two-animal-welfare-groups-taking-govt-to-court-over-failure-to-ban-rodeo.html>>.

¹⁸⁵ *Animal Welfare Act 1999* (NZ) ss 4(d), 10, 12(a). See So (n 183).

¹⁸⁶ 'Should Australia Have a National Body to Oversee Animal Welfare?', RSPCA (Web Page, 24 February 2021) <<https://kb.rspca.org.au/knowledge-base/should-australia-have-a-national-body-to-oversee-animal-welfare/>>.

Australian Animal Welfare Standards and Guidelines.¹⁸⁷ These Guidelines are set to replace a number of existing codes of practice and aim to provide national consistency in the regulation of animal welfare. While the process has faced numerous delays, the *Australian Animal Welfare Standards and Guidelines for Cattle* ('Cattle Standards') are complete and were agreed upon by states and territories in 2016.¹⁸⁸ However, the status of each state and territory in implementing the *Cattle Standards* is significantly varied. For instance, the *Cattle Standards* have yet to be implemented in the Australian Capital Territory ('ACT'), NT, Tasmania or Victoria.¹⁸⁹ The *Cattle Standards* were implemented in NSW in 2017, however adherence is not mandatory.¹⁹⁰ In WA, the *Cattle Standards* have been adopted as a code of practice but are yet to be implemented as regulations,¹⁹¹ and in SA the *Cattle Standards* have been mandated since 2017.¹⁹² Queensland regulated the standards under the *ACPA* as a code of practice in July 2021, making compliance with the standards mandatory.¹⁹³ Interestingly, the standards outline that 'a person handling cattle must not ... drop cattle except to land and stand on their feet'¹⁹⁴ — a standard clearly inconsistent with the practice of calf roping. As outlined above, SA has effectively banned calf roping, however the impact of mandating the *Cattle Standards* has yet to be seen in states and territories that still permit calf roping, such as Queensland. Thus far, it appears that inconsistency is still a feature of the regulatory space concerning rodeos — a feature that must be addressed with reform.

Against this backdrop, reform should take the form of a ban on calf roping. This is necessary given that the harm caused to calves is not proportionate to the benefits of the practice, and that modifications are unlikely to bring the harm to the proportionate level of 'very low'.¹⁹⁵ In order to ensure a consistent and coherent approach to calf roping, all jurisdictions in Australia should prohibit the practice. A ban on calf roping would bring other jurisdictions to the same standard of welfare as the ACT, Victoria and SA, achieving national consistency in relation to calf roping. However, it is suggested that other jurisdictions should not follow

¹⁸⁷ Geoff Neumann & Associates Pty Ltd, *Review of the Australian Model Codes of Practice for the Welfare of Animals* (Final Report, 9 February 2005).

¹⁸⁸ Animal Health Australia, *Australian Animal Welfare Standards and Guidelines for Cattle* (1st ed, January 2014) <http://www.animalwelfarestandards.net.au/files/2011/01/Cattle-Standards-and-Guidelines-Endorsed-Jan-2016-061017_.pdf>.

¹⁸⁹ 'Cattle', *Australian Animal Welfare Standards and Guidelines* (Web Page, 2 July 2021) <<http://www.animalwelfarestandards.net.au/cattle/>>.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*; Department of Primary Industries and Regional Development (WA), 'Animal Welfare Codes of Practice', *Agriculture and Food* (Web Page, 5 October 2020) <<https://www.agric.wa.gov.au/animalwelfare/animal-welfare-codes-practice>>.

¹⁹² 'Cattle' (n 189).

¹⁹³ *Ibid.*

¹⁹⁴ Animal Health Australia (n 188) S5.2.

¹⁹⁵ It must be noted that the legality of rodeo broadly is not being assessed here. This does not mean its legality is accepted or contested. In order to determine the legality of rodeo generally, it would also need to be assessed through the *Ford v Wiley* proportionality assessment.

Victoria and SA in prohibiting the practice by setting a minimum weight limit of 200 kg. This article advocates for an explicit ban of the practice. This is important because it will provide clarity to industry, signal a clear alignment of the legislation with community expectations, and generate increased public awareness of the issues with calf roping. Thus, all states and territories in Australia — including Victoria and SA — should explicitly prohibit calf roping within their respective animal welfare legislation.