IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2019-485-43
[2020] NZHC 3009

UNDER THE	Judicial Review Procedure Act 2016 and the Animal Welfare Act 1999
IN THE MATTER OF	the Code of Welfare: Pigs 2018 and the Animal Welfare (Care and Procedures) Regulations 2018
BETWEEN	THE NEW ZEALAND ANIMAL LAW ASSOCIATION First Applicant
	SAVE THE ANIMALS FROM EXPLOITATION Second Applicant
AND	THE ATTORNEY-GENERAL First Respondent
	THE MINISTER OF AGRICULTURE Second Respondent
	THE NATIONAL ANIMAL WELFARE ADVISORY COMMITTEE Third Respondent

Hearing:	8 and 9 June 2020
Counsel:	G M Coumbe QC, S M Bisley, B H Woodhouse and E L Bennett for the Applicants N T Butler and N G Julian for first and second Respondents R L Roff for third Respondent
Judgment:	13 November 2020

JUDGMENT OF CULL J

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Overview

[1] This is a challenge by way of judicial review under the Animal Welfare Act 1999 (the Act) to the practice and use of farrowing crates and mating stalls for pig sows. The applicants challenge the respondents' decisions to enact regulations 26 and 27 in the Animal Welfare (Care and Procedures) Regulations 2018 (the 2018 Regulations) and minimum standards 10 and 11 in the Code of Welfare: Pigs (2018) (the 2018 Code). Regulation 26 and minimum standard 10 regulate the use of farrowing crates, and reg 27 and minimum standard 11 regulate the use of mating stalls.

[2] To understand the terminology in this judgment, the following definitions may assist. A farrowing crate is a crate in which sows are confined individually before, during, and after "farrowing", which is giving birth. There are minimum size requirements for farrowing crates, time limits on their use, and hygiene and nesting requirements that must be complied with.

[3] A stall is an enclosure in which a pig is kept individually. The size of a stall allows a pig to stand in its natural stance and lie down, but the pig cannot turn around. There are minimum size requirements for stalls. Currently in New Zealand, a stall can only be used for mating purposes for no longer than a week. Otherwise stalls are prohibited.

[4] Previously, the practices of using farrowing crates and dry sow stalls, which were accepted as being non-compliant with the Act, were permitted under an "exceptional circumstances" exemption in the former s 73(3) and (4) of the Act. In 2015, Parliament signalled its intention to phase out non-compliant practices by

repealing the "exceptional circumstances" exemption and enacting regulation-making powers that prescribe time frames for transitioning from current non-compliant practices to practices that fully meet the obligations of the Act.[1] Section 183A(2) was introduced for this purpose.

[5] In 2018, following the decisions and recommendations of the National Animal Welfare Advisory Committee (NAWAC), the Minister of Agriculture recommended to the Governor-General that regs 26 and 27 and amendments to minimum standards 10 and 11 be made under s 183A(1) of the Act, which does not require a transition time frame. It allows the practices to continue indefinitely.

[6] At the same time, the Minister revoked the Animal Welfare (Pigs) Code of Welfare 2010 (the 2010 Code) and "reissued" it as the 2018 Code. The minimum standards in the 2018 Code under challenge are essentially the same minimum standards that were contained in the 2010 Code. Under the 2018 Code, without the "exceptional circumstances" exemption, the same minimum standards from the 2010 Code now purportedly satisfy the welfare obligations of owners of animals under the Act, making the practices compliant with the Act.

[7] There were two processes which led to the decision to make regs 26 and 27 and issue the 2018 Code. The first involved the enactment of the Animal Welfare Amendment Act (No 2) 2015 (the 2015 Amendment) which introduced the regulation-making powers into the Act, and the subsequent making of the 2018 Regulations under challenge. The second involved a review of the former 2010 Code, which took place from 2014 to 2016, leading ultimately to the Minister's decision to issue the 2018 Code. The overlap between the two processes is the advice to the Minister by NAWAC in March 2016, following the review of the 2010 Code.[2] This advice formed the basis of the decision to make the 2018 Regulations and issue the 2018 Code.

[8] I have concluded that regs 26 and 27 and minimum standards 10 and 11 circumvent Parliament's intention in enacting the 2015 Amendment, are contrary to the purposes of the Act, and are thereby invalid.

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1 Animal Welfare Amendment Act (No 2) 2015, s 67.
2 NAWAC's role is described at [11] and [23]-[28].

The judgment

[9] This judgment is divided into five parts. Part I explains the background to the proceeding and the legislative framework of the Act, the 2018 Regulations and the codes of welfare. Part II describes the parties' positions and the challenge to the delegated legislation. Part III deals with the first process involving the passing of the 2015 Amendment and the 2018 Regulations made following NAWAC's advice and recommendations. Part IV addresses the second process involving the 2010 Code, the challenge to the 2018 Code, and the minimum standards. Part V deals with relief.

PART I: BACKGROUND TO THE PROCEEDING AND LEGISLATION

Parties

[10] The New Zealand Animal Law Association is a coalition of lawyers working voluntarily to improve the welfare and lives of animals through the legal system.[3] Save Animals From Exploitation (SAFE) is an animal rights organisation which frequently participates as an affected party in consultations under the Act. Together, they are the applicants in this proceeding.

[11] The respondents are the Attorney-General, the Minister of Agriculture, and NAWAC. The Minister is responsible for the administration of the Act, including the issue of codes of welfare. The Governor-General on the recommendation of the Minister may make regulations under ss 183A-183C of the Act. NAWAC is an independent ministerial advisory committee established under the Act to advise the Minister on issues relating to the welfare of animals, develop codes of welfare and make recommendations to the Minister about regulations to be made under ss 183A and 183B of the Act.[4]

[12] The Minister is not bound to accept NAWAC's recommendations. The legislation provides that the Minister *may*, after considering the recommendations and after having regard to other matters, decide to issue a code of welfare.[5] In the case of

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3 It is an incorporated society registered under the Incorporated Societies Act 1908 and a charitable entity registered under the Charities Act 2005.

4 Animal Welfare Act 1999, ss 55(2), 56-61, 73(4) and (5), 183A(10) and 183B(3).

5 Section 75(1).

regulations, the Governor-General may, on the advice of the Minister, make regulations under either s 183A(1), as he did here, or under s 183A(2) with a specified period to enable a transition from current non-compliant practices to new ones.

The Animal Welfare Act

[13] The Act has been described by the Court of Appeal as "the single most important piece of legislation in New Zealand relating to the protection of all kinds of animals under human control."[6] It replaced earlier legislation that had focussed principally on prohibiting cruelty to animals with new provisions derived from internationally accepted principles known as the "Five Freedoms" of animal welfare, namely:[7]

(a) *Freedom from thirst and hunger* – by ready access to fresh water and a diet to maintain full health and vigour.

(b) *Freedom from discomfort* – by providing a suitable environment including shelter and a comfortable resting area.

(c) *Freedom from pain, injury and disease* – by prevention or rapid diagnosis and treatment.

(d) *Freedom to express normal behaviour* – by providing sufficient space, proper facilities and company of the animal's own kind.

(e) *Freedom from fear and distress* – by ensuring conditions which avoid mental suffering.

[14] The Act came into force on 1 January 2000, and its overarching purpose is embodied in its long title. It is an Act –

(a) to reform the law relating to the welfare of animals and the

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6 *Balfour v R* [2013] NZCA 429 at [12]; and *Erickson v Ministry for Primary Industries* [2017] NZCA 271, [2017] NZAR 1015 at [31].

7 *Balfour*, above n 6, at [12], citing Protection of Animals Act 1835 (UK), Cruelty to Animals Act 1878, Animals Protection Act 1960, and Neil Wells and Judith Nicholson "Five Plus Three: Legislating for the Five Freedoms and the Three Rs – Animal Welfare Act 1999 (New Zealand)" (2004) 32 ATLA 417.

prevention of their ill-treat; and, in particular, –

(i) to recognise that animals are sentient:

(ii) to require owners of animals, and persons in charge of animals, to attend properly to the welfare of those animals:

(iii) to specify conduct that is or is not permissible in relation to any animal or class of animals:

(iv) to provide a process for approving the use of animals in research, testing, and teaching:

(v) to establish a National Animal Welfare Advisory Committee and a National Animal Ethics Advisory Committee:

(vi) to provide for the development and issue of codes of welfare and the approval of codes of ethical conduct:

(b) to repeal the Animals Protection Act 1860.

[15] Part 1 of the Act is headed "Care of animals" and its purpose is to ensure that owners and persons in charge of animals attend properly to the welfare of those animals.[8] This is achieved by core obligations set out in pt 1 and, in particular, ss 10 and 11. Section 10 assumes particular significance in these proceedings:

> **10 Obligation in relation to physical, health, and behavioural needs of animals**
>
> The owner of an animal, and every person in charge of an animal, must ensure that the physical, health, and behavioural needs of the animal are met in a manner that is in accordance with both—
>
> (a) good practice; and
>
> (b) scientific knowledge.

Section 11 places obligations on owners of animals that are ill or injured to alleviate any unreasonable or unnecessary pain or distress being suffered by the animal.

[16] The physical, health, and behavioural needs of an animal are defined in s 4. The term includes proper and sufficient food and water, adequate shelter, the opportunity to display normal patterns of behaviour, physical handling in a manner which minimises the likelihood of unreasonable or unnecessary pain or distress, and protection from and rapid diagnosis of any significant injury or disease. The Act

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8 Animal Welfare Act, s 9.

specifies that these are needs that, in each case, are appropriate to the species, environment, and circumstances of the animal.[9]

[17] Failure to comply with ss 10 and/or 11 is a strict liability offence, unless the defendant can prove there was a code of welfare in existence at the time in which the minimum standards were equalled or exceeded.[10]

The Animal Welfare Amendment Act 2015

The "exceptional circumstances" exemption

[18] Of critical importance to this proceeding is the impact of the 2015 Amendment, which came into force on 9 May 2015.[11] The most significant change it brought about was the repeal of the "exceptional circumstances" exemption.

[19] Prior to the 2015 Amendment, the former s 73(3) and (4) had provided for an overriding "exceptional circumstances" exemption for recommending minimum standards for practices that do not fully meet the obligations of ss 10 and 11 of the Act. It provided:[12]

> (3) Despite subsection (1), the National Animal Welfare Advisory Committee may, *in exceptional circumstances*, recommend minimum standards and recommendations for best practice that do not fully meet –
>
> (a) the obligations of section 10 or section 11; or
>
> (b) the obligations that a person would need to observe in the treatment, transport, or killing of animals if that person were to avoid committing an offence…
>
> (4) The National Animal Welfare Advisory Committee must, in making recommendations under subsection (3), have regard to –
>
> (a) the feasibility and practicality of effecting a transition from current practices to new practices and any adverse effects that may result from such a transition:
>
> (b) the requirements of religious practices or cultural practice or both:
>
> (c) the economic effects of any transition from current practices to new practices.

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9 Section 4.
10 Sections 12-13.
11 Though see s 2.
12 Animal Welfare Act, s 73, as at 26 March 2015 (just prior to amendment).

[Emphasis added]

[20] This exemption had permitted NAWAC in "exceptional circumstances" to recommend minimum standards that did not fully meet specified core obligations of welfare under the Act. It was this provision that had been used in the past to permit the use of farrowing crates and dry sow stalls.[13]

[21] The consequence of the repeal of the exemption is that minimum standards in a code of welfare must now fully comply with the obligations in the Act. Any non-compliance with the obligations in the Act can only be authorised by regulations made under s 183A(2), which must contain specific time frames for non-compliant practices to be transitioned or phased out.

[22] The 2015 Amendment also introduced the power to make regulations.[14] Section 183A enabled the enactment of directly enforceable regulations which compliment the existing codes of welfare. The regulation-making powers are considered in more detail in Part III.

The role of NAWAC

[23] Part 4 of the Act relates to the establishment of advisory committees. Section 55 establishes NAWAC. Members are appointed to NAWAC based on their expertise in areas relating to animal welfare and science.[15] Section 55 also sets out NAWAC's statutory functions: NAWAC will advise the Minister on issues relating to the welfare of animals, develop and advise the Minister on codes of welfare, and recommend to the Minister that regulations be made under s 183A prescribing animal welfare standards or requirements.[16]

Regulation recommendations

[24] There are two pathways to the making of regulations. The first is where NAWAC recommends to the Minister the making of regulations under s 183A(1),

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13 2010 Code, cls 5.1 and 5.2.
14 Animal Welfare Act, ss 183A-183C.
15 Section 58.
16 Section 55(2).

either to prescribe standards or requirements for the purposes of giving effect to pts 1 and 2 of the Act[17] or to establish, amend, or replace any minimum standard that is or could be established under pt 5.[18]

[25] Under the second pathway, NAWAC may recommend the making of regulations under s 183A(2), to prescribe standards or requirements that do not fully meet specified welfare obligations. Section 183A(2) replaced the former "exceptional circumstances" exemption. Under this section, which I have termed the second pathway, regulations which prescribe standards that do not meet the Act's welfare obligations *must* prescribe a specified period of time, not exceeding ten years, to enable a transition from or phasing-out of current practices that do not fully meet the obligations of the Act.[19]

Welfare code recommendations

[26] Part 5 of the Act is headed "Codes of welfare". Codes of welfare are issued under the Act by the Minister, on the recommendation of NAWAC. NAWAC is responsible for managing the public consultation process in relation to the issue of codes of welfare and making recommendations to the Minister.[20]

[27] Codes provide guidance to owners of animals and others in charge of animals about the standards they must achieve to meet their obligations under the Act. They establish minimum standards for animal care and management, as well as recommended best practices.[21] Minimum standards provide the details of the specific actions people need to take in order to meet the obligations in the Act. Recommended best practices set out standards of care and conduct above the minimum required to meet the obligations in the Act.

[28] Before deciding whether to recommend to the Minister to issue a new code of welfare, NAWAC must be satisfied that the proposed standards in a draft code are the

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17 Section 183A(1)(a).
18 Section 183A(1)(b). See also pt 5, including s 73(1)(a).
19 See also s 183A(6) and (7), which do not apply in this instance.
20 Sections 71-74.
21 Section 68.

minimum necessary to ensure that the purposes of the Act will be met.[22] The 2015 Amendment also introduced factors that NAWAC may take into account in making such a recommendation, namely practicality and economic impact, if relevant.[23] However, those factors cannot override the welfare considerations under the Act.[24]

The 2018 Regulations

[29] From May 2015 to February 2018, the Ministry for Primary Industries (MPI) consulted with NAWAC on the drafting of the 2018 Regulations.[25] Several months of public consultation took place in mid-2016. In March 2018, a briefing paper was prepared for the Minister on the proposed regulations. Consistent with NAWAC's advice, the paper recommended that regs 26 and 27 be made under s 183A(1).

[30] The 2018 Regulations were then made by the Governor-General.[26] They provided "consequential" amendments to the 2010 Code and to the minimum standards 10 and 11.[27] It appears the 2018 Regulations as a whole were made under ss 183(1)(a) to (i), 183A(1) and (2), and 183B(1), while regs 26 and 27 were made under s 183A(1)(b).

[31] Regulations 26 and 27 came into force on 1 October 2018. Regulation 26 provides:

> **26 Farrowing crate requirements**
>
> (1) The owner of, and every person in charge of, a pig must not keep the pig in a farrowing crate unless the crate allows the pig to avoid all of the following:
>
> (a) touching both sides of the crate simultaneously; and
>
> (b) touching the front and the back of the crate simultaneously; and
>
> (c) touching the top of the crate when standing.

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22 Section 73(1)(a).

23 Section 73(3); introduced by the 2015 Amendment, s 31.

24 Under s 73(1) NAWAC *must* be satisfied the standards are the minimum necessary to meet the welfare obligations of the Act. Compare s 73(3), where NAWAC *may* take into account practicality and economic impact.

25 Pursuant to s 183A(10).

26 The regulations were amended slightly by the Animal Welfare (Care and Procedures) Amendment Regulations in September 2018.

27 The amendments to minimum standards 10(c) and 11(a) are described as "consequential amendments" in sch 2 of the 2018 Regulations, though the actual changes are insignificant for present purposes.

(2) A person who fails to comply with this regulation commits an offence and is liable on conviction, –

(a) in the case of an individual, to a fine not exceeding $3,000; or

(b) in the case of a body corporate, to a fine not exceeding $15,000.

[32] Regulation 27 provides:

27 Prohibition of stalls other than for mating

(1) The owner of, and every person in charge of, a pig must not confine the pig, or allow it to be confined, to a stall unless –

(a) the pig is confined to the stall for the purpose of mating; and

(b) the confinement is for no more than 7 days per reproductive cycle; and

(c) the pig is released from the stall as soon as practicable after mating.

(2) The owner of, and every person in charge of, a pig that is confined to a stall must keep records that document compliance with subclause (1).

(3) A person who fails to comply with subclause (1) commits an offence and is liable on conviction, –

(a) in the case of an individual, to a fine not exceeding $5,000; or

(b) in the case of a body corporate, to a fine not exceeding $25,000.

Regulations 26 and 27 are directly enforceable and are regulatory offences if not complied with.[28]

[33] Because regs 26 and 27 were made under s 183A(1) and not s 183A(2), they must either prescribe standards that give effect to pts 1 and 2 of the Act, which include the welfare provisions of ss 10 and 11,[29] or they must establish minimum standards that could be established under pt 5, including that they must ensure the purposes of the Act are met.[30] Thus, both regs 26 and 27 now deem the use of farrowing crates and mating stalls as compliant with the welfare obligations under the Act, including those under s 10.

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28 2018 Regulations, regs 26(2) and 27(3).
29 Animal Welfare Act, s 183A(1)(a).
30 Sections 183A(1)(b) and 73(1)(a).

The 2018 Code

[34] As noted, the current code of welfare issued under the Act in relation to pigs is the 2018 Code, which came into force on 1 October 2018.

Farrowing crates

[35] Clause 5.1 of the 2018 Code provides for the management of interactions between sows and piglets.[31] It states that sows' behaviour during and after giving birth can be a hazard for their piglets, as they can crush the piglets as they lie down and may also kill and eat the piglets. A farrowing crate is a specialist piece of pig maternity equipment used to house the sow before and during the birth and lactation phase of a sow's reproductive cycle. It confines the sow before, during and after farrowing and provides the piglets with an area where they have ready access to the sow, can maintain body temperature and can avoid being crushed. Farrowing crates can also aid with fostering piglets between sows.[32]

[36] The disadvantages of farrowing crates for the sow include the restriction of movement and a reduced ability to carry out nest building behaviours. The crate itself usually consists of a rectangular metal crate with bowed or finger rails. It usually has a concrete floor, or a fully or partly slatted floor through which the sow's waste falls into drains. The sow is able to lie down or stand but she cannot turn around. The bars of the crate separate the sow from her piglets but allow the piglets to suckle.

[37] The following extract is from the 2018 Code:

> As stated in the 2005 code of welfare, NAWAC wants to see indoor housing systems shift progressively to those in which the lactating sow and piglets have the benefits conferred by farrowing crates while giving the sow increased opportunity to move and express a greater range of behaviours, including nest building. NAWAC strongly encourages the industry to identify and adopt such systems as soon as possible.

About half of New Zealand pig farms use farrowing crates, including most indoor farms.

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31 A sow is defined in sch 1 of the 2018 Code as an adult female pig that has had one or more litters.
32 2018 Code, cl 5.1.

[38] Minimum standard 10 provides the minimum standards in relation to managing interactions between sows and piglets. The subclauses in italics are those challenged in this review:

> (a) Accommodation for farrowing and lactating sows must be of suitable design and sufficient size to allow the sow to lie down at full length and without leg restriction.
>
> (b) Support, such as barriers or sloping walls to lean against, must be provided for the sow as she lies down, and she must be able to rise and stand comfortably without any undue risk of injury to her litter.
>
> (c) *When in a farrowing crate, the sow must be able to avoid all of the following: touching both sides of the crate simultaneously, touching the front and the back of the crate simultaneously, and touching the top of the crate when standing.*
>
> (d) The farrowing system must provide an area to which the piglets can retreat when the sow moves.
>
> (e) *If sows are to be confined in farrowing crates before farrowing, it must be for no more than five days.*
>
> (f) *If sows are to be confined in farrowing crates for lactation, it must be for no more than four weeks after farrowing.*
>
> (g) *Notwithstanding (f), nurse sows may be retained in a farrowing crate for a further week for fostering purposes. This is conditional on no more than 5% of sows in any herd at any one time being retained as nurse sows.*
>
> (h) Sows, in any farrowing system constructed after 3 December 2010, must be provided with material that can be manipulated until farrowing.
>
> [Emphasis added]

[39] The (non-mandatory) Recommended Best Practice in the 2018 Code accepts the use of farrowing crates, but recommends:

> (a) Sows should be introduced into clean farrowing quartiers three to five days before the piglets are due to be born.
>
> (b) Sows should be provided with nest building material e.g. straw from at least 48 hours before farrowing.
>
> (c) Sows should not be kept in farrowing crates for more than 10 days after farrowing.
>
> (d) Sows in farrowing pens should have free access to separate feeding, dunging and lying/nesting areas.

(e) New-born piglets, born in outdoor systems, should be contained to the farrowing ark for the first week after birth.

[40] The 2018 Code notes that the regulations relevant to minimum standard 10 are regs 24 and 26 of the 2018 Regulations.

Mating stalls

[41] Clause 5.2 of the 2018 Code provides for the management of dry sows. Minimum standard 11 provides:[33]

(a) *Pigs must not be confined to stalls unless –*

(i) *the confinement is for the purpose of mating; and*

(ii) *the confinement is for no more than 7 days per reproductive cycle; and*

(iii) *the pigs are released from the stalls as soon as practicable after mating.*

(b) Where sows and gilts are group housed, they must be managed to minimise the effects of aggression.

(c) *Where sows and gilts are housed in stalls for the purpose of mating, they must be able to stand in their natural stance without contact with any side of the stall and be able to lie comfortably on their sides without disturbing neighbouring sows or gilts*.

(d) *Sows and gilts that are in stalls for the purpose of mating must have a dry, smooth, non-slip sleeping area*.

(e) If individually confined in a pen, sows and gilts must have sufficient space so that they can stand up, turn around without touching the walls, and lie down comfortably in a natural position, and must be provided with separate dunging, lying and eating areas.

(f) Individual pigs that are not coping well must be provided with alternative management.

(g) Pigs must not be restrained by tethering.

[Emphasis added]

Again, the subclauses in italics are those challenged in these proceedings.

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[33] A gilt is defined in sch 1 of the 2018 Code as a young female pig, selected for reproductive purposes, before she has had a litter of piglets.

[42] A stall is defined in the 2018 Code as an "enclosure in which a pig is kept individually and that prevents the pig from turning around, but does not include a farrowing crate."[34] The 2018 Code specifically notes that "NAWAC wants to see indoor housing systems shift to those in which the sow is not confined in a stall at all, including for mating. NAWAC strongly encourages the industry to identify and adopt new systems" which eliminate the need for stalls.[35]

[43] The regulations relevant to minimum standard 11 are regs 24 and 27 of the 2018 Regulations.

Enforceability

[44] The minimum standards in a code of welfare are not directly enforceable. However, a person can be charged with an offence for failing to comply with a relevant minimum standard.[36] Section 12 provides for animal welfare offences and s 13 prescribes such offences as strict liability offences. It is a defence in any prosecution if the defendant proves that the minimum standards established by an existing code of welfare were equalled or exceeded.[37]

[45] The best practice recommendations in codes of welfare are neither mandatory nor enforceable. They are guides only.[38]

PART II: THE PARTIES' POSITIONS AND ISSUES

The applicants' position

[46] The applicants have issued judicial review proceedings challenging the validity of regs 26 and 27 and minimum standards 10(c) and (e)-(g) and 11(a), (c) and (d),[39] on the grounds of unlawfulness and/or unreasonableness.[40] For ease of reference, I

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34 Schedule 1.
35 2018 Code, cl 5.2.
36 Animal Welfare Act, s 13(1A).
37 Section 13(2)(c).
38 2018 Code, at 4.
39 There is some confusion as to which subclauses are included in the challenge. In their pleadings, the applicants challenged minimum standard 10(c) and (e)-(g). However, in their submissions they raised 10(c) and (e)-(f) only. Similarly, the applicants challenged 11(a), (c) and (d) in their pleadings but raised 11(a) and (c) in their submissions only. Nothing turns on this ultimately.
40 The third ground of review challenging minimum standard 9 was not pursued by the applicants.

refer to minimum standard 10(c) and (e) to (g) as minimum standard 10 and minimum standard 11(a), (c) and (d) as minimum standard 11, unless otherwise specified.

[47] The applicants claim that the specific regulations and minimum standards are inconsistent with the purposes of the Act and are therefore unlawful. They say the regulations do not "give effect to" the Act[41] and the minimum standards are not the minimum necessary to ensure that the purposes of the Act are met.[42] For the same reasons, the applicants claim that they are unreasonable.

[48] The purposes of the Act and requirements on pig owners under the Act are outlined at ss 9-11 of the Act. As noted, those in charge of animals must take all reasonable steps to ensure that the physical, health, and behavioural needs of the animals are met.[43]

[49] The applicants' submit the regulations and minimum standards relating to farrowing crates are inconsistent with those purposes and requirements based on a number of factual and evidential propositions, including that the confinement of a sow in a farrowing crate does not allow the sow sufficient opportunity to display normal patterns of behaviour, such as movement, mothering, nesting, foraging or exploring and socialising; such confinement causes or increases the likelihood of unnecessary and unreasonable injury; and there are feasible and practical alternative farrowing systems available. The applicants say there has been ample time for NAWAC and the Minister to ban or phase out the use of farrowing crates, but they have not.

[50] In relation to mating stalls, the applicants submit the confinement of a pig in a stall does not allow the pig sufficient opportunity to display normal patterns of behaviour, causes or increases the likelihood of the pig suffering unnecessary and unreasonable psychological and physical injury, pain and distress, and does not constitute adequate shelter. They say there are feasible and practical alternative practices available for the mating of sows and gilts. They say further that although the use of sow stalls after mating was phased out and finally banned from 3 December

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41 Animal Welfare Act, s 183A(1)(a).
42 Sections 183A(1)(b) and 73(1)(a).
43 Section 10.

2015, no steps have yet been taken by NAWAC or the Minister to further restrict, ban or phase out the use of stalls for mating purposes.

[51] Further, the applicants say that NAWAC and the Minister applied the wrong test in adopting the "welfare trade-off" approach in their decisions to recommend regulations based on the minimum standards.

[52] Finally, it is submitted the 2018 Code was wrongly issued by the Minister, because NAWAC failed to observe the procedures and requirements in ss 70 to 74 of the Act. This included not notifying the public of a draft code and the Minister did not have regard to matters specified in s 73 of the Act, as required.

The Crown response

[53] Ms Butler for the first and second respondents (the Crown) opposes the application for review and submits that the content of and process for the minimum standards and regulations was lawful and within the scope of the Act. While the Crown accepts that the use of farrowing crates and mating stalls is an area of contention, Ms Butler submits their limited and prescribed use in the context of the specific minimum standards and regulations meets the purposes of the Act, including the obligation in s 10, so that the physical, health and behavioural needs of both sows and piglets can be met.

[54] The Crown submits the Minister relied on the expert advice from NAWAC, which acknowledged that confining sows in farrowing crates does not provide for every behavioural need of the sows. Their use, the Crown says, continues to provide the best welfare outcome for the welfare needs of piglets and sows together, based on currently available farrowing practices and scientific knowledge. The Crown submits the minimum size requirements and timing requirements in both the regulations and minimum standards in the 2018 Code relating to farrowing crates are not unreasonable and are consistent with pts 1 and 2 of the Act, based on advice from NAWAC.

[55] In respect of mating stalls, the Crown acknowledges that mating stalls limit sows' ability to express some types of normal patterns of behaviours. However, Ms Butler submits that based on expert advice from NAWAC, mating stalls for a

limited time are necessary to manage the wellbeing of sows during this time and is not unreasonable nor inconsistent with the purposes of the Act.

[56] In relation to the issue of the 2018 Code, the Crown says the amendments to the minimum standards were lawfully made by way of regulation in March 2018 under s 183A(1)(b), and, to reflect those minor changes, amendments to the Code itself were lawfully made in September 2018 under s 76(1)(b). The 2010 Code was then "reissued" or republished by the Minister as the 2018 Code to bring together in one place the separate changes, and the 2010 Code was revoked under s 76(1)(a). Ms Butler submits the Minister did not "issue" a new code under pt 5 of the Act and so the process under ss 71 to 75 was not required to be followed.

NAWAC's response

[57] Ms Roff for NAWAC submits that this review engages a question of statutory interpretation and is not an opportunity for the Court to inquire into the desirability of the use of farrowing crates and/or mating stalls.[44]

[58] NAWAC says the use of farrowing crates prescribed in the minimum standards in the 2018 Code and the 2018 Regulations continues to be the minimum standard necessary to meet the purposes of the Act. Ms Roff submits the minimum standards balance the overall welfare needs of both sows and piglets and are consistent with the obligations under ss 10 and 11 of the Act. NAWAC accepts that farrowing crates restrict the movement of sows and reduce their ability to carry out nest building behaviours and other normal behaviours. However, it says this must be balanced with the advantages of farrowing crates, which, scientific research shows, reduce mortality in piglets from crushing by sows compared to alternative systems, including outdoor systems. The crates also provide the ability for fostering of piglets. For these reasons, NAWAC submits minimum standard 10 and reg 26 concerning farrowing crates are both lawful and valid.

[59] In respect of the use of mating stalls, NAWAC says the relevant minimum standards and regulations fall within the scope of the Act and are consistent with the

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[44] Relying on *Commercial Fisheries Whanau Inc v Attorney-General* [2019] NZHC 1204 at [17].

obligations under ss 10 and 11 of the Act. NAWAC explains that mating stalls are used for welfare reasons and to facilitate mating using artificial insemination. While the use of mating stalls restricts a sow's movement, NAWAC considers the use of them for the limited period of one week for the express purpose of mating is the minimum necessary to meet the purposes of the Act. It therefore submits that minimum standard 11 and reg 27 are both lawful and valid.

[60] In relation to the "reissue" of the 2018 Code, Ms Roff agrees with the Crown's interpretation and submits there was no error. The 2018 amendments to the 2010 Code aligned the 2010 Code with the 2018 Regulations. NAWAC says the amended 2010 Code was then reissued or reprinted as the 2018 Code for convenience and ease of reference. Because it was not a new code it did not need to be issued under s 75, and nor was the Minister or NAWAC required to follow the processes under ss 71-75 of the Act.

The issues for determination

[61] The applicants' challenge to the specific regulations, the issue of the 2018 Code and the specific minimum standards involves an assessment of validity and consistency with the Act's purposes. The issues for determination can be summarised as follows:

(a) Are regs 26 and/or 27 in the 2018 Regulations invalid, unlawful or unreasonable?

(b) Was the 2018 Code lawfully issued?

(c) Are minimum standards 10 and/or 11 of the 2018 Code invalid, unlawful or unreasonable?

[62] The first issue is addressed in Part III, and the second and third issues are addressed in Part IV. First, I consider the legal principles to be applied to subordinate or delegated legislation.

Review of subordinate legislation

[63] The 2018 Regulations and the 2018 Code are forms of subordinate or delegated legislation made under the empowering provisions of the Act.[45] Under s 79 of the Act, codes of welfare issued under s 75 and any notices amending or revoking codes of welfare are "disallowable instruments" under the Legislation Act 2012.[46] This means that they are instruments made under an enactment, or are defined as disallowable (i.e. amendable), and/or have significant legislative effect.[47] Although they are not legislative instruments under the Legislation Act, they are treated as "legislative instruments" for the purposes of disallowance[48] and must be presented to the House of Representatives.[49] Such subordinate legislation comes within the definition of "statutory power" in s 5 of the Judicial Review Procedure Act 2016,[50] which means that decisions in relation to making such subordinate legislation are amenable to judicial review in the same way as any other decision by a public body.[51]

[64] The primary question is whether the impugned instrument comes within Parliament's purpose. Subordinate legislation may be challenged on the basis of *ultra vires*, repugnancy to the enabling Act, unreasonableness, uncertainty and procedural invalidity.[52] With subordinate legislation, processes are presumed to have been done regularly and lawfully and courts will only interfere in clear cases.[53]

[65] The Court of Appeal in *Harness Racing New Zealand v Kotzikas* has provided an overview of the law relating to delegated legislation under judicial review.[54] As

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45 Animal Welfare Act, s 79; and *Auckland Hebrew Congregation Trust Board v Minister of Agriculture* HC Wellington CIV-2010-485-1423, 25 November 2010 at [15].

46 Legislation Act 2012, s 38.

47 Ross Carter *Burrows & Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 14-15, which describes disallowable instruments as follows: "Subordinate legislation is mostly delegated legislation: that is, legislation made by some body or person under powers conferred by Act of Parliament. The most common type is instruments called regulations, made by the Governor-General by Order in Council. They are … disallowable or amendable by the House of Representatives, under the Legislation Act 2012."

48 Animal Welfare Act, s 79.

49 Legislation Act, s 41.

50 Judicial Review Procedure Act 2016, s 5(2)(a).

51 *New Zealand Māori Counsel v Attorney-General* [1996] 3 NZLR 140 (CA) at 164.

52 Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers Ltd, Wellington, 2014) at [26.5].

53 *Harness Racing New Zealand v Kotzikas* [2005] NZAR 268 (CA) at [62], citing *Edwards v Onehunga High School Board* [1974] 2 NZLR 238 (CA).

54 *Harness Racing New Zealand*, above n 53.

noted, the starting point is whether the rules sought to be impugned lie within the "four corners" of the enabling legislation:[55]

> The principles upon which the Court determines the validity of regulations made by Order in Council are well settled … [the Courts] merely construe the Act under which the regulation purports to be made giving the statute … such fair, large, and liberal interpretation as will best attain its objects. Then they look at the regulation complained of. If it is within the objects and intention of the Act, it is valid. If not, however reasonable it may appear, or however necessary it may be considered, it is *ultra vires* and void … the objects and intention of the Act can, of course, be gathered only from the words used …

[66] The essential task of the Court is first to ascertain the true scope of the empowering legislation. The particular words used take colour from their context and must be considered in light of the scheme of the relevant legislation.[56] The Court must then ascertain the meaning of the subordinate legislation itself, and whether the subordinate legislation complies with the Act.[57] Unless permitted by the empowering statute, subordinate legislation that overrides or is inconsistent with its empowering statute is *ultra vires*.[58] Of relevance to this case is the Court of Appeal's caution about the nature of the empowering statute: where the empowering statute is broad and general the regulator is left to fill in the details, but the regulation power will be narrower where the enabling legislation is more detailed and specific.[59]

[67] Finally, in reviewing regulations, the courts have said that they are not concerned with the "wisdom or otherwise" of the challenged regulation.[60] The question is not whether the regulation is unreasonable, but whether Parliament authorised it. As the Supreme Court has cautioned, the Court's focus on review is on the legal limits of the power rather than the merits of its use.[61]

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55 At [57]-[58], citing *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560 (CA) and *Carroll v The Attorney-General* [1933] NZLR 1461 (CA) at 1478.

56 At [59].

57 *Edwards*, above n 53, at 242.

58 *Taylor v Manager of Auckland Prison* [2012] NZHC 3591.

59 *Harness Racing New Zealand*, above n 53, at [60]-[61].

60 *New Zealand Driver's Association v New Zealand Road Carriers* [1982] 1 NZLR 374 (CA) at 388; and *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [54].

61 *Unison Networks Ltd*, above n 60, at [54].

PART III: ARE REGULATIONS 26 AND 27 VALID?

[68] I propose to deal with the review of the challenged regulations by considering:

(a) the empowering legislation;

(b) Parliament's intention in 2015;

(c) the farrowing crates challenge: NAWAC's change of position;

(d) the mating stalls challenge; and

(e) whether the regulations are consistent with the Act's purposes.

The empowering legislation

[69] The starting point in an assessment of regs 26 and 27 is the scheme of the relevant legislation and whether the specific regulations in the 2018 Regulations, as subordinate legislation, comply with the Act and the regulation-making powers.

[70] The purpose and objects of the Act have been described in full at [13]-[16] above. In summary, the Act's purposes that are relevant to this proceeding are to recognise that animals are sentient; to require owners of animals to attend properly to the welfare of those animals; and to specify conduct that is or is not permissible in relation to any animal. Sections 10 and 11 place specific obligations on owners and those in charge of animals to ensure that the physical, health, and behavioural needs of the animal are met.

[71] As described at [18]-[22], the 2015 Amendment made significant changes. In addition to repealing the "exceptional circumstances" exemption, the 2015 Amendment introduced the regulation-making powers under ss 183A-183C in pt 9 of the Act. Relevant to this proceeding, s 183A provides two distinct pathways for regulations to be made, under s 183A(1) and s 183A(2).

Section 183A(1) regulations – the first pathway

[72] The first pathway is under s 183A(1), where the Governor-General may, on the recommendation of the Minister, make regulations prescribing standards or requirements for the purposes of giving effect to pts 1 and 2 of the Act, including ss 10 and 11, or establishing any minimum standard that could be established under pt 5 of the Act. For a minimum standard to be established under pt 5, NAWAC must be satisfied that the standard is the minimum necessary to ensure that the purposes of the Act are met, again including the obligations in ss 10 and 11.[62]

[73] Section 183A(1) provides:

> (1) The Governor-General may, on the recommendation of the Minister, by Order in Council, make regulations for all or any of the following purposes:
>
> (a) prescribing standards or requirements for the purposes of giving effect to Parts 1 and 2 (other than sections 30A to 30E), including—
>
> (i) animal welfare standards or requirements relating to the care of animals by owners or persons in charge of animals:
>
> (ii) animal welfare standards or requirements relating to the conduct of those persons towards animals owned by them or in their charge:
>
> (iii) the prohibition of specified things or activities:
>
> (b) establishing any minimum standard that could be established under Part 5, or amending, revoking, or replacing any minimum standard or any part of a minimum standard established under Part 5.

[74] In prescribing standards for the purposes of giving effect to pts 1 and 2 of the Act and establishing minimum standards that could be established under pt 5, regulations made under this pathway must enforce the purpose of the Act and give effect to the welfare obligations at ss 10 and 11 of the Act.

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62 Animal Welfare Act, s 73(1)(a).

[75] Regulations 26 and 27 were made under the first pathway.[63]

Section 183A(2) regulations – the second pathway

[76] Where industry practice does not fully meet the obligations in the Act, such as the obligations in s 10 relating to the physical, health and behavioural needs of animals, then the practice may only be permitted by regulations enacted under the second pathway, s 183A(2).

[77] Section 183A(2) provides:

> (2) Without limiting the generality of subsection (1), *regulations made under this section may prescribe standards or requirements that do not fully meet—*
>
> (a) *the obligations of section 10* or 11; or
>
> (b) the obligations that a person would need to observe in the treatment, transport, or killing of animals if that person were to avoid committing an offence against section 12(c), 21(b), 22(2), 23(1), 23(2), or 29(a).
>
> (3) *The Minister must not recommend the making of regulations* in reliance on *subsection (2) unless he or she is satisfied that* either or both of the following apply:
>
> (a) any adverse effects of a change from current practices to new practices have been considered and *there are no feasible or practical alternatives currently available*:
>
> (b) not to do so would result in an unreasonable impact on a particular industry sector within New Zealand, a sector of the public, or New Zealand's wider economy.
>
> (4) In deciding whether any impact is unreasonable under subsection (3)(b), the Minister must have regard to the welfare of any affected animals.
>
> (5) *Any regulations made in reliance on subsection (2)* in accordance with the considerations in subsection (3) *must provide for the regulations to be in force for a period of time* specified in the regulations (*the specified period*) that—
>
> (a) *is reasonably necessary to enable a transition from current practice to a practice that fully meets the obligations* specified in subsection (2)(a) and (b); *and*

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[63] Section 184 of the Act requires the Minister to consult with persons whose representative interests are likely to be substantially affected by proposed regulations. This occurred, and no challenge is raised about that process.

(b) *does not exceed 10 years* (which period may, however, be extended once under subsection (6)).

(6) *The specified period may be extended once only by up to 5 years* by regulations made under this subsection on the recommendation of the Minister if he or she is satisfied that the majority of participants in the sector concerned—

(a) have made significant progress towards implementing compliant practice; and

(b) cannot reasonably be expected to become compliant before the close of the specified period, taking into account the steps that still need to be completed for implementation of compliant practice; and

(c) will become compliant within the extended period.

(7) Despite subsections (3) to (6), if the Minister considers that requiring a practice to fully meet the obligations specified in subsection (2)(a) and (b) would impose an unjustifiable limitation on the requirements of a religious or cultural practice, the Minister may recommend the making of regulations in reliance on subsection (2) for an indefinite period subject to review at 10-yearly intervals or shorter intervals specified in the regulations.

(8) In reaching a decision not to recommend the making of regulations in reliance on subsection (2), the Minister may consider any factor that the Minister thinks would make such regulations contrary to New Zealand's overall interests (including, without limitation, health, social, economic, international, or environmental interests).

(9) Nothing in this section obliges the Minister to recommend the making of regulations in reliance on subsection (2).

(10) The Minister must consult the National Animal Welfare Advisory Committee before recommending the making of any regulations under this section (other than regulations already proposed by the Committee), but nothing in sections 71 to 75 applies in relation to the making of regulations under subsection (1)(b).

(11) If a person does or omits to do anything in reliance on regulations made under subsection (2) that would otherwise be a contravention of, or failure to comply with, any provision of Part 1 or 2, the person has a defence to a prosecution for an offence under this Act in respect of the act or omission if the court is satisfied that the act or omission was authorised by the regulations.

[Emphasis added]

[78] Welfare standards enacted under this pathway apply for a specified time period, when the non-compliant practices are to be transitioned to practices that fully meet the Act's obligations. Unless they relate to a religious or cultural practice, such exceptions

can only be implemented as *transitions*, not *exemptions*, as they were previously termed. If one of the prerequisites in s 183A(3) is met and regulations are made under s 183A(2), they must contain a "specified period", being a specified period of time that is reasonably necessary for a transition to occur from current practice to a practice that fully meets the obligations of the Act. Relevantly, this means the obligations of ss 10 or 11. The "specified period" must not exceed 10 years, but it may be extended once only, by up to five years.

Parliament's intention in 2015

[79] The removal of the "exceptional circumstances" exemption and the introduction of the regulation-making powers signified a shift in tolerance for non-compliant welfare obligations under the Act and signalled Parliament's intention in implementing the Act's changes. The significance of this shift can be understood from the context of the introduction and passage of the Animal Welfare Amendment Bill 2015 (107-3) (the Bill), which resulted in the 2015 Amendment, through its three readings in Parliament.

[80] On 8 May 2013, the Minister of Agriculture introduced the Bill, which contained three new reforms:

(a) it elevated standards into regulations to enforce them as mandatory standards;

(b) it introduced transparency about developing minimum standards and codes of welfare to ensure that economics and commercial operatives are to be considered to ensure that minimum standards are realistic and achievable, yet would not be able to override animal welfare considerations; and critically

(c) it repealed the s 73 "exceptional circumstances" exemption with a regulation-making provision to phase out practices that do not meet the welfare obligations of the Act.

[81] At the first reading the Minister said:[64]

> The bill also makes it explicit that the National Animal Welfare Advisory Committee may consider the practicality and economic impact when developing minimum standards and codes of welfare. These factors will not be able to override animal welfare considerations, but making them explicit in the Act will ensure that minimum standards are realistic and achievable.

[82] During the debate, specific reference was made to the use of farrowing crates and the use of dry sow stalls, which were to be phased out over the ensuing year. Describing farrowing crates as "perhaps the most egregious example of a breach of the Act's own welfare obligations that is currently allowed to continue indefinitely", the Opposition strongly argued that the exemption clause enabling the practice to continue must not continue *ad infinitum*.[65]

[83] On the introduction of the Bill, the explanatory note describes that substantial parts of the policy objectives of the Bill will be implemented through regulations to be developed following the passing of the Bill.[66] It stated that the regulations are to be subject to further public consultation once they are drafted.[67] In addition to bringing in enforceable standards for compliance, the explanatory note states that regulations will enforce the relevant standards already in the codes.[68]

[84] Of particular significance to this case, the two examples of ongoing non-compliant practices singled out in the Bill's commentary were hens' battery cages and farrowing crates for pigs. Under the heading "Transparency", the explanatory note specifically explains that the Bill replaces the former s 73 "exceptional circumstances" provisions with transitions and exemptions as follows:

> The exceptional circumstances provisions currently enable NAWAC to recommend minimum standards and codes of welfare that do not fully meet the obligations in the Act. These provisions have been used, for example, to permit the use of battery cages until a certain date is reached and *to permit the ongoing use of farrowing crates for pigs with no final date.* The new provisions will enable NAWAC to recommend regulations permitting practices that do not fully meet the obligations in the Act –

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64 (27 August 2013) 693 NZPD 13054.
65 At 13066.
66 Animal Welfare Amendment Bill 2016 (107-1) (explanatory note) at 1-2.
67 At 2.
68 At 2.

- during a transition to a new practice where there is defined expiry date [referring to s 183A(2)]:

- for an indefinite period where there is a need for an exemption [referring to s 183A(7)].

> The Bill establishes criteria that would need to be satisfied before a transition or exemption is recommended, and an exemption would only be available if a transition were not feasible. Exemptions would need to be reviewed within 10 years, or earlier if the regulations so specify.
>
> [Emphasis added]

[85] At its second reading, the Minister expressly referred to the transitional regulations. Importantly, he said:[69]

> The presumption will be that industries must become compliant within 10 years. It will be only in very limited circumstances that an extension could be given.

As the Minister explained, the Bill gives farmers "the time they need to make the changes" and provides that regulations may allow the old practices that no longer meet the requirements of the legislation to continue during a transitional period.[70]

[86] Following the examination of the Bill by the Primary Production Committee and a report from the Regulations Review Committee, significant amendments were proposed for the third reading of the Bill on 30 April 2015. The proposed amendments tightened the transitional period to phase out non-compliant practices and reinforced that the Minister must have regard to the welfare of affected animals in assessing whether the impact of change is unreasonable on a particular industry sector.[71] These changes appear as s 183A(4), (5) and (6) of the Act.

[87] On the tightening of the transitional phase out period, the Select Committee said:[72]

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69 (26 November 2014) 702 NZPD 899.

70 At 899.

71 By Supplementary Order Paper 2015 (46) Animal Welfare Amendment Bill 2015 (107-1) (explanatory note) at 1, dated 12 February 2015, an amendment was made to the current s 183A(4) to remove the words "on a particular sector" in relation to the words "deciding whether any impact is unreasonable on a particular sector." The amendment clarified that the Minister must have regard to the welfare of animals when considering any impact under the current s 183A(3)(b), including an impact on New Zealand's wider economy.

72 Animal Welfare Amendment Bill 2015 (107-2) (select committee report) at 3-4.

> *The bill as introduced would allow the making of regulations to prescribe standards and requirements relating to animal care during transition periods, which might be up to 10 years. We are concerned that this could allow a Minister to extend this period by further regulation, thus allowing non-compliant practices to continue for* ***an unreasonably long time****.* We recommend inserting into clause 56 new section 183A(4C) limiting the ability to extend transitional regulations to once only, for up to an additional five years, and only if the industry as a whole has demonstrated commitment to the transition, and the Minister is satisfied that most producers have made significant progress towards becoming compliant, and will do so within the extended period.
>
> [Emphasis added]

[88] This recommendation was enacted as s 183A(6) in the Act. It is plain that Parliament's intention in passing the Bill into legislation was to ensure that non-compliant practices were to be time limited up to 10 years and ultimately phased out. Any extension of that time was to be limited to up to five years once only.

[89] I turn then to the applicants' challenge to farrowing crates.

Farrowing crates challenge

[90] At the heart of the applicants' challenge to reg 26 (and minimum standard 10) is NAWAC's change of position on farrowing crates in 2016. During the course of the applicants' submissions, Ms Coumbe QC canvassed the documentary evidence from November 2003 to October 2018 to demonstrate the applicants' submission that NAWAC changed its mind about the use of farrowing crates in 2016, after the "exceptional circumstances" exemption for non-compliant practices was repealed by Parliament in 2015. It is relevant, therefore, to place the sequence of events in context.

[91] In summary, NAWAC has consistently viewed the use of farrowing crates for extended periods of time as contrary to the welfare obligations under the Act. Even with reduced periods of time for the use of farrowing crates, NAWAC viewed the practice as not meeting the obligations under the Act. For that reason, the continued use of farrowing crates, even for the minimum time of five weeks per reproductive cycle, was permitted in the 2010 Code only under the "exceptional circumstances" exemption in s 73(3) of the Act. After the exemption was repealed in 2015, however, NAWAC changed its position and its advice to the Minister. In 2016, NAWAC advised

the Minister that the minimum standards in the 2010 Code, if complied with, *met* the welfare obligations under the Act.

[92] I cover NAWAC's advice and reports in more detail both before and after the 2015 Amendment to highlight this change of position.

Background to the codes of welfare

[93] To highlight NAWAC's change of position in relation to farrowing crates, it is necessary to canvass the background to the 2018 Code in some detail, as this is relevant to the challenge to both the regulations and the minimum standards relating to farrowing crates.

[94] The first code of welfare issued under the Act in relation to pigs was the Animal Welfare (Pigs) Code of Welfare 2005 (the 2005 Code). This came into force on 1 January 2005.

[95] The 2005 Code was the first non-voluntary code of welfare for pigs. Its major changes introduced a reduction in the use of dry sow stalls, a phase out of stalls for boars, a reduction of maximum confinement in farrowing crates to six weeks, and a prohibition on the tethering of pigs. In terms of farrowing crates, the 2005 Code allowed for their limited use for a maximum confinement period of up to six weeks in any one reproductive cycle. This was the first time that time limits had been placed on the period that sows could be confined in a farrowing crate (or a sow stall).

[96] In 2003, when NAWAC reported to the Minister on the proposed 2005 Code, it said that the use of farrowing crates for extended periods did not fully meet the obligations of the Act. For that reason, NAWAC recommended that their use be an "exceptional circumstance" under s 73(3) of the Act. Consequently, the 2005 Code provided for the use of farrowing crates as "exceptional circumstances" and, importantly, noted that it would like to see farrowing crate use "phased out altogether" after further review.

[97] In 2010, NAWAC conducted a review of the 2005 Code to examine issues such as farrowing crates and dry sow stalls. It recommended to the Minister that farrowing

crates for extended periods should be continued to be used as an "exceptional circumstance" under s 73(3) of the Act and recorded its view that "confining sows in farrowing crates for extended periods does not fully meet the obligations of the Act, but there are currently no alternatives that meet both animal welfare and commercial outcomes."

[98] On the recommendation of NAWAC, the 2005 Code was revoked and replaced by the 2010 Code, which came into force on 3 December 2010. Minimum standard 10 in the 2010 Code required a reduction in the maximum time sows could spend in farrowing crates from six weeks to no more than four weeks (post-farrowing) and five days (pre-farrowing), the continued phase out of dry sow stalls, and a requirement that sows in new farrowing systems would be provided with material that could be manipulated for nesting before farrowing. By 3 December 2015, dry sow stalls, that is the use of stalls for non-mating purposes, were to be banned.[73]

[99] A similar phase out transition for farrowing crates was not introduced. On 20 October 2010, however, NAWAC wrote to the Minister recommending that the use of farrowing crates should be phased out eventually. The letter said:

> NAWAC re-affirms the view it stated in the 2005 Code that the use of farrowing crates should be phased out eventually. However, we do not believe there are alternative viable systems at the present time that meet the physical, health and behavioural needs of both the sows and piglets. NAWAC does consider that the confining of sows in farrowing crates for extended periods does not fully meet the obligations of the Act, and has included three separate minimum standards outlining the time that farrowing crates can be used pre-farrowing, during farrowing and lactation.

[100] In both the 2005 and 2010 Codes, the practice of farrowing crates for specified periods relied on the "exceptional circumstances" exemption to continue their use as non-compliant practices under the Act. This was an acknowledgement that the minimum standards did not fully meet the Act's requirements to ensure that all animals' physical, health and behavioural needs were met. In particular, NAWAC has acknowledged that farrowing crate use for extended periods of time create welfare

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[73] As noted above at [41], dry sow stalls are still able to be used for mating for up to seven days per reproductive cycle.

issues for sows as they are unable to turn around and are restricted in their ability to express normal maternal behaviours, such as nest building.

[101] On 26 March 2014, MPI wrote to the chairperson of the Primary Production Select Committee advising that:

> NAWAC has determined that the use of farrowing crates by the pork industry does not meet the requirements of the Act. The 2010 Pigs Code of Welfare allows farmers to continue using farrowing crates under an "exceptional circumstances" exemption under s 73(3). The exemption does not have a time limit, as NAWAC was unable to recommend a compliant practice for farmers to move to.

The Regulation Review Committee had highlighted the improper use of the practices under the s 73(3) exceptional circumstances exemption and recommended the time for transition from non-compliant practices be limited to 10 years.

[102] On 18 August 2014, the Minister again sought NAWAC's advice on farrowing crates and whether the 2010 Code needed amending. As noted above at [7], the Minister's request for advice in 2014 and NAWAC's response in 2016 after its 2010 Code review overlapped with the legislative process, with Parliament enacting the 2015 Amendment on 9 May 2015.

Post-2015 Amendment – NAWAC's 2016 advice

[103] In March 2016, NAWAC reported to the Minister on its review of the use of farrowing crates.[74] It recommended to the Minister that because NAWAC's preliminary research showed no significant change in science, technology or good practice since the 2010 Code was issued, NAWAC considered that no formal review of the Code was necessary. No mention was made of the 2015 Amendment having come into force, removing the "exceptional circumstances" exemption under which the minimum standards relating to the use of farrowing crates were enacted.

[104] NAWAC advised the Minister that it considered that the use of farrowing crates for the limited period of five days prior to farrowing and four weeks afterwards should

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74 National Animal Welfare Advisory Committee "NAWAC review of the use of Farrowing Crates for Pigs in New Zealand" (Ministry for Primary Industries, 14 March 2016).

be retained. Although NAWAC accepted that the confining of sows in farrowing crates for this length of time did not provide for every behavioural need of sows, it considered their use provided the best welfare outcome for the welfare needs of piglets and the best total welfare of piglets and sows, based on currently available farrowing practices and scientific knowledge. NAWAC therefore advised the Minster that minimum standard 10 in the 2010 Code was the minimum necessary to ensure that the purposes of the Act were met. NAWAC did not consider that there was any practical alternative system that provided comparable levels of piglet welfare while better meeting the welfare needs of sows.

NAWAC's change of position on farrowing crates

[105] I accept the applicants' submission that NAWAC's position has therefore changed. After 11 years of advising that the use of farrowing crates for extended periods was non-compliant with the Act and their use should be phased out eventually, NAWAC's advice in 2016 was that the use of farrowing crates as provided in the 2010 Code is the minimum necessary to ensure that the purposes of the Act are met. That is, the practice is now considered compliant.

[106] The applicants' assertion as to NAWAC's change of position was not contested by Counsel for NAWAC. Ms Roff for NAWAC accepted that in 2016, NAWAC decided that the use of farrowing crates met the purposes of the Act. Ms Roff referred to the former s 73(3) exemption and submitted that the issue of non-compliance for NAWAC and hence the reliance on s 73(3) had always been the use of farrowing crates for *extended periods*. Farrowing crates are no longer able to be used for extended periods, she submitted, and so the practice is now deemed compliant with the Act and no exemption or transition period is required.

[107] However, the period for which farrowing crates could be used was already restricted in the 2010 Code. There were no further time restrictions imposed on the use of farrowing crates between the 2010 and 2018 Codes. Yet it was accepted in the 2010 Code that the practice, with the same restrictions, did not meet the purposes of the Act in 2010. The exemption under s 73(3) was required in 2010 to permit the use

of farrowing crates, even with the same time restrictions as appear now in the 2018 Code.

[108] When questioned why the same minimum standards in the 2018 Code now met the purposes of the Act, Ms Roff accepted that this was a change in NAWAC's position. She explained that NAWAC took steps to satisfy itself in the 2016 review that farrowing crate use in accordance with the minimum standards, that is, the restricted use of up to five weeks, now met the purposes of the Act. The Chairperson of NAWAC, Dr Verkerk, explained in her affidavit evidence that the subcommittee undertaking the review of farrowing crates on behalf of NAWAC visited a number of farms, reviewed the scientific literature, took advice from veterinary surgeons and attended a presentation by a PhD student who had undertaken substantial research into pigs in New Zealand. NAWAC determined that there had been no significant change in science, technology or good practice since the 2010 Code and therefore the use of farrowing crates, as restricted in the 2010 Code, should be retained. After conducting this substantial review, Ms Roff says that NAWAC decided that the restricted use of farrowing crates was now compliant with the Act.

[109] Ms Roff also emphasised that the "exceptional circumstances" exemption was used in the 2005 and 2010 Codes for minimum standard 10(e) to (g) only. These are the subclauses in the standard relating to the specific confinement periods for which farrowing crates may be used. The thrust of Ms Roff's submission is that NAWAC's change of position that this standard is now compliant with the Act relates only to the time periods in minimum standard 10(e) to (g), that is, the period of confinement and not minimum standard 10 as a whole.

[110] However, I am unable to accept NAWAC's submission. I consider this submission minimises the wider effect of NAWAC's change of position, which impacted the practice of farrowing crates as a whole and minimum standard 10 in its entirety. Prior to the 2015 Amendment, the use of farrowing crates in the manner specified in minimum standard 10(a) through to (h) was considered to be non-compliant with the Act, when used for the prescribed periods in 10(e) to (g) in the 2010 Code. That required the "exceptional circumstances" exemption to permit the practice to continue. Importantly, no change was made to the time periods in the

minimum standards in the 2018 Code, yet NAWAC now considers those same practices, for the same confinement periods, compliant and the practice can continue indefinitely. I therefore view NAWAC's change of position as affecting the practice of farrowing crates and its compliance with the Act as a whole. It is not just confined to the confinement periods in minimum standard 10(e) through to (g).

[111] Finally, Ms Coumbe drew my attention to NAWAC's submissions to the Primary Production Committee in 2018, in response to SAFE's Parliamentary petition to end the use of farrowing crates. In a further twist of its position, NAWAC told the Committee it considered the current approach, in which farrowing crates are used for up to four weeks post-farrowing, *do not meet animal welfare obligations* in that sows have their activity restricted for a longer period than is necessary. Importantly, NAWAC said further:

> Previous trade-offs of long term sow freedom against piglet survival can no longer be used as current perceptions are that the requirements of each individual in the system should be provided for if possible.

[112] Clearly, NAWAC's submission to the Committee in 2018 is contrary to its 2016 advice to the Minister, which in turn was contrary to its advice prior to the 2015 Amendment. I turn now to the advice and recommendation to the Minister about the need for regulations.

The 2018 Cabinet paper

[113] Following MPI's consultation with NAWAC, MPI prepared a Cabinet paper on the animal welfare regulations for the Minister.[75] The Cabinet paper contained NAWAC's recommendations for a number of regulations across the animal welfare codes and highlighted the statutory requirements to be considered by the Minister prior to recommending the regulations. Before achieving the Minister's approval, and before the Minister could recommend any regulations to the Governor-General, the paper highlighted that the Minister must be satisfied of his "legal obligations in relation to regulations that do not fully met the obligations in the Act". Specifically,

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[75] Cabinet Paper "Animal Welfare Regulations for Submission to Cabinet" (5 March 2018) Sub 17-0064.

it addressed the difference in the two regulatory pathways under s 183A.[76] The paper contained an express acknowledgement clause that the Minister understood the respective obligations under ss 183A(1) and (2), the first and second regulation-making pathways.

[114] All but one of NAWAC's recommendations to the Minister were to make regulations under s 183A(1), the first pathway. The only recommendation to make regulations under the second pathway for practices that did not fully meet the obligations of the Act was reg 21, which contained a "stepwise transition away from the use of conventional cages for layer hens with them completely phased out by 2022".[77] As noted, this was one of the examples highlighted in the explanatory note to the Bill requiring a transition period. The other example was pig farrowing crates, but the only commentary on reg 26 in the Cabinet paper related to sows being provided with sufficient space:

> Placing the standard into an enforceable regulation will provide a level playing field for all pork producers. It will also provide stronger assurances about how New Zealand's pigs are treated in farrowing crate systems.

There is no reference to a phase out period or the fact that three years before, Parliament had signalled that the use of farrowing crates along with the use of hens' cages were to be phased out in the explanatory note to the Bill.

[115] Instead, the Cabinet paper contained NAWAC's recommendation that the Minister make regs 26 and 27 under s 183A(1). There was no explanation given to the Minister as to why s 183A(1) was the option chosen by NAWAC.[78] The paper further advised that during the development of the regulations, the consultation process identified only six proposals where stakeholders differed significantly in their views.[79] None of those proposals related to pigs.

[116] In making the recommendation for regs 26 and 27 under s 183A(1), NAWAC approved the practices of farrowing crates and mating stalls to continue indefinitely.

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76 See [30] and [71]-[78].
77 At Appendix 3.
78 The only two contentious regulations highlighted in the Cabinet paper related to the prohibition on docking dogs' tails and restrictions on the removal of dogs' dew claws.
79 At [31].

The regulation-making decision

[117] The Minister followed NAWAC's recommendation, recommending to the Governor-General that regs 26 and 27 be made under the first pathway in respect of pigs' farrowing crates and mating stalls. Conversely, the Minister recommended regulations be made under the second pathway for the purpose of phasing out hens' cages. Thus, minimum standard 10 from the 2010 Code was included in the 2018 Code, without substantial change, and was enacted into regulation with no transition or phase out period for the use of farrowing crates.

[118] NAWAC's change of view that minimum standard 10 now met the obligations under the Act was not expressly brought to the attention of the Minister in its letter of March 2016, after its review of the 2010 Code. Nor did NAWAC raise or recommend to the Minister in 2018 the option of making regulations under s 183A(2), as it did for phasing out hen cages.[80] Despite Parliament expressly removing the "exceptional circumstances" exemption, under which the same practices under the minimum standards were permitted because they did not meet the objects of the Act, there is no reference in the Cabinet paper or in NAWAC's advice to the Minister of the second pathway to regulate transitional time periods to phase out such practices.

Mating stalls challenge

[119] Dry sow stalls initially were used to confine sows for the duration of the sows four-month pregnancy. Importantly, dry sow stalls were phased out with an express minimum standard in the 2005 Code, which provided that after 10 years, namely from 1 January 2015, dry sow stalls could not be used for more than four weeks after mating. This was the first time that time limits had been placed on the period that sows could be confined in dry sow stalls. It is also the first example of a transition to phase out a pig industry practice.

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[80] It seems clear from NAWAC's documentation that s 183A(3), which provides for the prerequisites for making a regulation under s 183A(2), was satisfied in this instance, particularly, s 183A(3)(a), because there were no feasible or practical alternatives currently available to farrowing crates.

NAWAC's position on mating stalls

[120] NAWAC's position in relation to dry sow stalls was made explicit in the 2005 Code. The introductory comments from NAWAC said:[81]

> Sows and mated gilts are often housed in stalls to minimise aggression, embryonic losses and to manage nutrition, health, hygiene and stress in early pregnancy. Alternative systems are available for managing these problems.
>
> The decision on whether to discontinue the use of dry sow stalls during the first four weeks after mating is a complex one …
>
> NAWAC therefore wishes to see further research conducted into alternative housing systems, their impact on the welfare of sows in the first four weeks after mating, and ways and means that negative aspects can be managed.

[121] It is evident from those comments that NAWAC wished to see alternative housing systems being developed for confining sows in their pregnancy. Two relevant factors emerge from the 2005 Code on the use of dry sow stalls.

[122] The first has already been canvassed: a transition or phase out period was imposed in the relevant minimum standard in the 2005 Code. The 2005 minimum standard contained a transition period of 10 years to restrict the confinement of sows in stalls to no more than the first four weeks after mating.[82]

[123] The second factor was the use of the "exceptional circumstances" exemption. Dry sow stalls were permitted only as a non-compliant practice under s 73(3) of the Act, by way of the exemption. In recording that such practices were permitted under the exemption, NAWAC specifically stated that it:

> … considers that the use of dry sow stalls for extended periods does not fully meet the obligations of the Act. Minimum Standard 10 allows for a transition period for the phasing out of dry sow stall use beyond 4 weeks after mating.

NAWAC further stated that it would ideally like to see dry sow stall use completely phased out, if viable systems were available, to maintain the overall welfare of the sow. NAWAC noted, however, that any decision to completely phase out dry sow stall use will be left to such time as the 2005 Code is reviewed.

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81 2005 Code, cl 5.1.4.
82 Minimum Standard 10.

[124] The 2005 Code was reviewed and the 2010 Code was issued five years later. In the 2010 Code, dry sow stalls were banned from 3 December 2015. Minimum standard 11(e) and (f) provided that between 3 December 2012 and 3 December 2015, mated sows and gilts must not be confined in dry sow stalls for more than four weeks after mating and after 3 December 2015, they must not be confined in dry sow stalls after mating. In the commentary accompanying the minimum standard, it records that NAWAC does not believe there are sufficient scientifically supported animal welfare benefits of dry sow stalls: "[t]herefore, NAWAC has decided that the use of dry sow stalls must be discontinued."[83] As with the 2005 Code, the use of dry sow stalls in this interim period was permitted by way of the "exceptional circumstances" exemption. Again, there was a repetition of NAWAC's review that the use of dry sow stalls did not fully meet the obligations of the Act.

[125] Minimum standard 11(a) in the 2010 Code further provided that "[s]ows may only be confined in mating stalls for service for no longer than one week." Mating stalls were permitted to be used for up to seven days per reproductive cycle. The new reg 27, enacting minimum standard 11 in the 2018 Code, continues to permit the use of stalls for mating for seven days per reproductive cycle.

[126] Although the applicants submit that the reference to mating stalls in the 2010 Code was dry sow stalls renamed, I note that in the 2010 Code there are separate references to mating stalls and dry sow stalls. In the 2018 Code the reference is to stalls for the purpose of mating. The distinction now is irrelevant, in my view, as dry sow stalls have been prohibited and mating stalls are permitted with restrictions.

[127] What is highly relevant however, is NAWAC's stated position in the "General Information" section of both the 2010 and 2018 Codes. NAWAC made it plain that it wished to eliminate the use of stalls altogether. The following extract is found in both Codes:[84]

> NAWAC wants to see indoor housing systems shift to those in which the sow is not confined in a stall at all, including for mating. NAWAC strongly encourages the industry to identify and adopt new systems … *thus eliminating*

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83 2010 Code, cl 5.2.

84 2010 Code, cl 5.2; and 2018 Code, cl 5.2.

> *the need for stalls during mating and hence eventually adopt a system in which stalls would not be required for management at all*.
>
> [Emphasis added]

[128] NAWAC had a consistently stated position in the 2005 and 2010 Codes. The use of dry sow stalls, including for mating, was to be ultimately phased out. Although it took 10 years, the use of dry sow stalls was phased out in 2015. However, the confinement of sows for mating purposes was permitted for seven days in 2010 and the same minimum standard was repeated in the 2018 Code.

[129] It is not clear to me, from the wording of the 2010 Code, whether the use of mating stalls for seven days per reproductive cycle, like dry sow stalls, was permitted only as an "exceptional circumstance", or whether mating stalls for up to seven days per reproductive cycle were considered fully compliant with the Act. What is clear from the commentaries in the 2010 and 2018 Codes, both before and after the 2015 Amendment, is that NAWAC considered that the practice of using stalls, even for mating, should stop. The words in the 2010 and 2018 Codes could not be clearer:

> NAWAC wants to see indoor housing systems *shift to those in which the sow is not confined in a stall at all, including for mating*.
>
> [Emphasis added]

[130] In the 2018 Code, NAWAC advises that the welfare of breeding pigs can be enhanced:

> …through development of systems that allow individual management of feed and health, and a greater freedom of movement, while improving opportunities to express normal behaviour and minimise aggressive behaviour.

[131] By 2018, however, the practice is permitted without any transitional phase out period, despite NAWAC's consistent view that sows should not be confined in stalls at all, including for mating. As with the advice of farrowing crates, this anomaly appears to have gone unnoticed and was not addressed by NAWAC in its advice to, or in the Cabinet paper for, the Minister.

Are the regulations consistent with the Act?

The flaw in reasoning on farrowing crates

[132] At the risk of repetition, the following summary of the sequence of events is critical to my conclusion. The reason for NAWAC's change in position over farrowing crates is that there was no change in science to provide an alternative option to farrowing crates for the restricted periods. However, the lack of a viable alternative was the same response that was reflected in NAWAC's advice to the Minister in 2010 and 2015. It was the continuation of that advice, and the continuing lack of viable alternatives, that lead Parliament to signal clearly that the practice of farrowing crates, in particular, must be transitioned out.

[133] Parliament made its intention clear that where there are no viable alternatives to non-compliant practices, the practices must be phased out over a specified time. This was a legislated prerequisite for making regulations under the second pathway.[85] Despite this, with the exemption under the former s 73 no longer available in 2016 and faced with no scientifically based alternative, NAWAC advised the Minister that minimum standard 10 in the 2010 Code now met the Act's purposes and should be enacted into regulation under the first pathway.

[134] If, as the respondents contend, there had been no change in scientific research by 2016 and there was no change to the minimum standards in the 2010 Code, there is no logical basis for NAWAC's change of position. I consider this is a fundamental flaw in NAWAC's process and reasoning, which has critically affected its advice to the Minister. It can be simplified as follows:

(a) before the 2015 Amendment, the use of farrowing crates and dry sow stalls were not compliant with the Act;

(b) the practice, with restricted time periods, was permitted by virtue of the s 73(3) "exceptional circumstances" exemption;

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[85] Animal Welfare Act, s 183A(3)(a).

(c) the 2015 Amendment repealed the exemption and required non-compliant practices to be time limited, that is, no more exemptions. In doing so, Parliament intended non-compliant practices to be phased out;

(d) after 2015, there has been *no change* to the standards or science behind the practice of farrowing crates or its compliance with the Act. Logically, therefore, the same practice which was non-compliant in 2010 must still be non-compliant in 2018, despite NAWAC's change of position.

Thus, for a non-compliant practice to continue after the 2015 Amendment, Parliament intended that regulations be made under s 183A(2), the second pathway, with a specified time period for transition.

[135] I note there is no mandatory requirement on the Minister *to make* regulations under s 183A(2), when standards do not fully meet the welfare obligations under the Act and under s 183A(9), nothing obliges the Minister to recommend regulations be made under s 183A(2). The mandatory requirement on the Minister is *not to make regulations* under s 183A(2), *unless satisfied* that there are no feasible or practical alternatives currently available or that there would be an unreasonable impact on New Zealand's economy if he did not.[86] Here, the first prerequisite of no feasible alternative was met and Parliament's intention was clear.

[136] The overarching purpose of s 183A(1) is that regulations made under the first pathway must either "give effect" to pts 1 and 2 of the Act under s 183A(1)(a), or be the minimum necessary to ensure "the purposes of the Act" are met under ss 183A(1)(b) and 73(1). The first pathway is not appropriate, therefore, when the regulations govern non-compliant practices that, by definition, do not give effect to pts 1 and 2 of the Act and most importantly, to s 10 relating to the welfare obligations on animal owners and are therefore not the minimum necessary to ensure the purposes of the Act are met.

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86 Animal Welfare Act, s 183A(3).

The inconsistency on mating stalls

[137] As I have noted, it is not clear whether the use of mating stalls for seven days per reproductive cycle was, like dry sow stalls, permitted only as an "exceptional circumstance", or whether the practice was considered fully compliant with the Act in the 2010 Code.[87] If the exemption was not required for the use of mating stalls for up to seven days and the practice was considered compliant with the Act in 2010, there is not the same "flaw" in NAWAC's reasoning.

[138] Nonetheless, it is plain that since 2010 NAWAC had a consistent view that sows should not be confined in a stall at all, including for mating. Despite this, NAWAC did not recommend the second regulatory pathway to the Minister with a transition period to phase out the practice of mating stalls.

The purpose of the regulations

[139] During the course of argument, the applicants' refined their argument to the ground of review of improper purpose, which is commonly relied upon to challenge the validity of subordinate legislation.[88] Improper purpose is determined objectively and is not based on the subjective intention of the decision maker. In the early authority of *F E Jackson & Collector of Customs*, the then Supreme Court, citing earlier authority, emphasised the duty of the Court in assessing the validity of regulations:[89]

> A Court is not entitled to disallow regulations which appear to be within the intention of Parliament merely because the Court thinks them unreasonable, nor has it any power to allow regulations which are not within the intention of Parliament merely because the Court thinks them reasonable. *The duty of the Court is to search for the intention of Parliament and to support regulations that keep within that intention, and to disallow such as do not. The intention of the Legislature as revealed by its enactments is the controlling factor.*

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87 The wording of the 2010 Code is unclear. After referring to the s 73(3) exemption, NAWAC stated that the use of dry sow stalls did not meet the obligations of the Act. This was in the same section as the information relating to the use of mating stalls. The applicants submit mating stalls were permitted under the "exceptional circumstances" exemption in the 2010 Code, being a recognition that mating stalls were non-compliant with the Act. The respondents submit that while dry sow stalls were non-compliant with the Act and required the exemption, mating stalls did not.

88 Joseph, above n 52, at [26.5.4]; and Ross Carter, Jason McHerron and Ryan Malone *Subordinate Legislation in New Zealand* (LexisNexis, Wellington, 2013) at 261-263.

89 *FE Jackson & Co Ltd v Collector of Customs* [1939] NZLR 682 (SC) at 720-721 citing *Carroll v Attorney-General* [1933] NZLR 1461 (CA) at 1478.

[Emphasis added]

[140] The regulations must be capable of serving the purpose of the empowering provision of the Act, as articulated clearly by the Court of Appeal in *New Zealand Drivers' Association v New Zealand Road Carriers*:[90]

> The Court is concerned with whether, on the true interpretation of the parent Act, regulations are within the powers conferred by Parliament. *They will be invalid if they are shown to be not reasonably capable of being regarded as serving the purpose for which the Act authorises regulations.*
>
> [Emphasis added]

[141] It is plain from the legislative history of the 2015 Amendment to the Act that Parliament's intention was that non-compliant practices be phased out within a specified time. In this case, the phasing out of farrowing crates and hens' cages was expressly identified.[91] It is also clear from the statutory wording of s 183A that, under the first pathway, the regulations are to "give effect" to the welfare obligations under the Act or they must be the minimum necessary to meet the purposes of the Act. The second pathway was enacted to prescribe time limits on practices that are not compliant with the welfare obligations under the Act.

[142] Regulation 26 was made under s 183A(1) for a practice which had never been compliant and, with no change to the practice or the science behind it, nothing had changed to justify NAWAC's position. Similarly, reg 27 was made under s 183A(1) for a practice which NAWAC had always said ought to be eliminated.

[143] It is a well-accepted principle that a decision maker must not use powers to circumvent or undermine the purpose of a statute, but must exercise that power to promote the statutory purpose.[92] As the courts have emphasised, where regulations "cannot truly have been made for [the] purpose" of the empowering legislation, the makers of such regulations may have misconceived the scope of their powers.[93]

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90 *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374 (CA) at 388.

91 See [84] above.

92 *Waikato Regional Airport Ltd v Comptroller of Customs* [2011] NZAR 43 (HC) at [7]; and *Unison Networks Ltd*, above n 60, at [53].

93 *New Zealand Drivers' Association*, above n 60, at 388.

[144] In this case, I consider the Minister and NAWAC erred by overlooking Parliament's intention in passing the 2015 Amendment, after more than 11 years of advice from NAWAC to the respective Ministers that the farrowing crate practice, even with restricted time periods, was non-compliant with the Act, required an exemption and must be discontinued ultimately. With the repeal of the "exceptional circumstances" exemption in 2015, NAWAC and the Minister needed to examine the scope of the powers in the enactment that replaced the exemption, namely s 183A(2). The power contained in s 183A(2) to phase out this practice by regulation was disregarded.

[145] Further, both NAWAC and the Minister failed to recognise that with no feasible or practical alternatives currently available, a prerequisite for s 183A(2) regulations had been met.[94] Parliament enacted s 183A(3)(a) for that reason. This enabled the Minister to prescribe the "specified period" for the transition to occur, just as he did in recommending regulation 21 to phase-out layer hens caging.

[146] Similarly, NAWAC's stated position in relation to mating stalls, with its wish for the industry to stop using stalls for mating, meant that the advice from NAWAC and the recommendation by the Minister that reg 27 should be made under the first pathway, with no transition period specified, was contrary to Parliament's intention. In 2018, NAWAC still considered that the use of stalls for mating should be eliminated. The power contained in s 183A(2) to phase out this practice, however, was again overlooked.

Conclusion

[147] Applying the principles in *New Zealand Drivers' Association*, I find that on the interpretation of the empowering provision and Parliament's intention in enacting s 183A of the Act, regs 26 and 27 are not reasonably capable of being regarded as serving the purpose for which the Act authorised regulations in these circumstances.[95] Without a time period in which the use of farrowing crates and mating stalls are to be

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94 Animal Welfare Act, s 183A(3)(a).
95 *New Zealand Drivers' Association*, above n 90.

phased out, regs 26 and 27 enable the two practices to continue indefinitely, thereby circumventing the intention of Parliament when it enacted s 183A(2) of the Act.

[148] I find therefore that regs 26 and 27 circumvent Parliament's intention in enacting the 2015 Amendment, are contrary to the purposes of the Act, and are thereby unlawful and invalid.

Unreasonableness

[149] In light of my findings on the regulations' invalidity, the applicants' further ground of unreasonableness in respect of the regulations needs no further consideration.[96] For present purposes, I note that it is neither appropriate nor relevant for the Court to resolve a factual and scientific dispute on the considerable evidence filed by the parties in this judicial review proceeding. This is particularly so, where the grounds of review have been framed in respect of each regulation and are focussed on validity, which does not require a merits-based approach on contested evidence.

PART IV: IS THE 2018 CODE AND/OR MINIMUM STANDARDS 10 AND 11 VALID?

[150] The applicants challenge the lawfulness of the 2018 Code. They say first that it was issued in error and second that minimum standards 10 and 11 are unlawful. The applicants seek a declaration that the 2018 Code was issued in error in its entirety, not just the minimum standards within it.

[151] The same legal reasoning underpinning my findings under Part III that the regulations are invalid applies equally to the minimum standards in the 2018 Code. In the same way, the minimum standards in the Code do not serve the Act's purpose in phasing out non-compliant welfare practices and those that were always intended to be transitioned out.

[152] The challenge, however, is to both the 2018 Code itself as well as the minimum standards within it. I canvass those arguments in summary under the following headings:

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[96] I deal with this further under Part IV of this judgment at [187] to [196].

(a) the empowering legislation;

(b) review for the 2018 Code;

(c) whether the 2018 Code was lawfully issued; and

(d) whether minimum standards 10 and 11 are valid.

The empowering legislation

[153] As noted, codes of welfare are issued by the Minister on the recommendation of NAWAC.[97] NAWAC is responsible for managing the public consultation process for the codes and making recommendations to the Minister.

[154] The process that must be followed by NAWAC before it makes a recommendation to issue a code of welfare is as follows:

(a) There must be public notification of the draft code of welfare. This includes requesting submissions.[98]

(b) NAWAC may consult with submitters or other persons.[99]

(c) NAWAC must be satisfied that the proposed standards are the minimum necessary to ensure that the Act will be met, and that the recommendations for best practice, if any, are appropriate.[100] In doing so, NAWAC must have regard to any submissions made and consultation undertaken, good practice and scientific knowledge, available technology, and any other matters it considers relevant.

[155] NAWAC must then decide whether to recommend to the Minister to issue the code. Such recommendations must be accompanied by a report setting out NAWAC's reasons and any matters that NAWAC considers should be dealt with by regulations,

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97 See [26]-[28] of this judgment.
98 Animal Welfare Act, s 71.
99 Section 72.
100 Section 73.

among other things.[101] The Minister may then decide to *issue* the code of welfare by notice in the Gazette, after considering NAWAC's recommendation and after making any changes she/he considers appropriate, may refer the code back to NAWAC for reconsideration, or decline to issue the code.[102]

[156] Section 76 of the Act also provides the Minister with the power, after consultation with NAWAC, to revoke a code of welfare in force, or any part of it, or make minor amendments to a code of welfare:

> **76 Amendment or revocation of code of welfare**
>
> (1) The Minister may from time to time, by notice in the *Gazette,* —
>
> (a) revoke a code of welfare or any part of a code of welfare; or
>
> (b) make amendments of a minor nature to a code of welfare (being minor amendments that would not materially affect the purposes of the code).
>
> (2) The Minister must, before publishing a notice under subsection (1), consult with the National Animal Welfare Advisory Committee about the proposed revocation or amendments.

It is under s 76(1)(b) that the Minister "reissued" the 2018 Code.

[157] Section 78 provides that NAWAC may at any time review the whole or any part of a code of welfare. NAWAC advises that a review of the 2018 Code "is pending".

The review for the 2018 Code

[158] The background to the 2005 and 2010 Codes is canvassed at [93]-[102]. On 18 August 2014, the Minister again sought NAWAC's advice on farrowing crates. Specifically, the Minister sought advice on whether there needed to be an amendment to the 2010 Code, whether there were suitable options or alternatives to the use of farrowing crates, and whether transitional dates should be set for banning farrowing crates. He specifically referred to the goal in the 2010 Code that farrowing crates be phased out:

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101 Section 74.
102 Section 75(1).

> In 2010, the Code sent a *strong signal that alternatives to farrowing crates needed to be found and adopted in the near future*. Now that four years have passed since the Code was developed, I am seeking NAWAC's advice on whether or not there are suitable options and alternatives available.
>
> [Emphasis added]

[159] The next day, NAWAC provided an interim response to the Minister's letter, stating that a subcommittee had been deputed to provide recommendations the following year about the future use of farrowing crates. After considerable research, the subcommittee recorded its views in an issues paper for NAWAC to consider. As described at [103]-[104], NAWAC concluded that the 2010 Code did not need to be amended. In summary, NAWAC reported to the Minister in a letter dated 14 March 2016 that:

> (a) there had been no significant change in science, technology or good practice from 2010 and no formal review of the Code is necessary;
>
> (b) there were no feasible and practical alternatives to the use of farrowing crates for indoor pig farms "that provide the same welfare benefits to piglets and maintain the same levels of productivity";
>
> (c) although the confining of sows in farrowing crates for five days prior and four weeks after farrowing does not provide for every behavioural need of sows, their use provides the best welfare outcome for the welfare needs of piglets and the total welfare of piglets and sows; and
>
> (d) the existing minimum standard in the 2010 Code permitting the use of farrowing crates for four weeks and five days was the minimum necessary to ensure the purposes of the Act are met.

[160] In conducting its review and preparing the 2016 advice, NAWAC undertook consultation with farmers and New Zealand Pork. SAFE was not consulted and there was no public consultation on the Code.[103]

[161] Although NAWAC found that the 2010 Code did not need any substantial amendments, at the same time as the review was taking place, the Act was amended by the 2015 Amendment, repealing the "exceptional circumstances" exemption and establishing the regulation-making power. As noted, the 2018 Regulations made "consequential" amendments to minimum standards 10 and 11 of the 2010 Code,[104]

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[103] There is no specific requirement in the Act for public consultation for a review of an existing code.
[104] Under the Animal Welfare Act, s 183A(1)(b).

and further "minor and technical" drafting amendments were made under the Act.[105] In order to bring those changes together in one place, the Minister revoked the 2010 Code and "reissued" it as the 2018 Code with the minor amendments.

Was the 2018 Code lawfully issued?

[162] The 2018 Code came into force on 1 October 2018. It states:[106]

> REVOCATION
>
> This Code of Welfare *revokes* and *replaces* the Animal Welfare (Pigs) Code of Welfare 2010, dated 3 December 2010.
>
> ISSUING AUTHORITY
>
> This Code of Welfare is *issued* by the Minister of Agriculture, by a notice published in the Gazette, under section 75 and 76 of the Animal Welfare Act 1999, after having complied with the matters specified in section 75(1) and 76(2).
>
> [Emphasis added]

[163] There is a contest among the parties on whether the 2018 Code is a new code or a "reissued" one. The applicants submit the 2018 Code was issued as a new code under s 75 of the Act and the 2010 Code was replaced under s 76(1)(a) of the Act. The applicants therefore submit that as neither NAWAC nor the Minister observed the mandatory processes of public notification, consultation, reporting and recommendation under ss 71 to 74 of the Act before the 2018 Code was issued, the Code was issued as a new code in error.

[164] In reply, the respondents say that the 2018 Code was not an "issue" of a new code under s 75, triggering the mandatory processes from ss 71 to 74. Instead, they say, the 2018 Code was simply a "reissue" of the 2010 Code. They say the amendments to the minimum standards in the 2010 Code were lawfully made by way of regulation under s 183A(1)(b) of the Act and then by amendment to the actual Code itself under s 76(1)(b). The process at ss 71-75 therefore, they submit, was not required to be followed. The respondents position is that the separate amendments were brought together in one place with a title noting the date the amendments were

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105 Section 76(1)(b)
106 2018 Code, at 2.

made, the 2018 Code was then "reissued", and the 2010 Code was revoked under s 76(1)(a).

[165] The respondents accept that the reference to "reissue" in the 2018 Gazette notice is unclear and should have more clearly distinguished this process from those that occurred in 2005 and 2010, where the codes were "issued" under s 75. However, they submit this does not make the process unlawful. They say the Act allows for the amendments to the minimum standards through ss 183A(1)(b) and 76(1)(b) and for the revocation of the 2010 Code through s 76(1)(a).

[166] In a briefing to the Minister on 15 August 2018, MPI on behalf of NAWAC described the changes to be made to the 2010 Code as follows:

> 11. Schedule 2 of the [2018] Regulations made consequential amendments to definitions and minimum standards in the Codes to align them with the Regulations. These amendments take effect at the same time as the Regulations (1 October 2018).
>
> 12. Further minor and technical amendments are required to the Codes to ensure they are consistent with the Regulations. These amendments will ensure recommended best practice and wider information sections in the Codes are consistent with the intent of the Regulations.
>
> 13. The risk of not reissuing the Codes is that stakeholders could refer to outdated publications, resulting in unclear expectations around their obligations and potentially undermining MPI's enforcement action under the standards.
>
> 14. MPI is satisfied the minor and technical amendments proposed to the Codes will not materially affect the purposes of the Codes and that therefore fall within the scope of an amendment under section 76 of the Act. Section 76 allows you to make amendments of a minor nature.
>
> 15. NAWAC has been consulted and recommends you reissue the above Codes. NAWAC has written to you confirming this.

[167] On this basis, the Minister was not asked to accept or decline the recommendation of NAWAC, because he was informed that nothing substantial had changed since the 2010 Code. The Code was then issued under ss 75 and 76 of the Act as the 2018 Code.

The procedural irregularity

[168] Although the respondents submit the 2018 Code was a reissue of the 2010 Code, the Act does not provide for a "reissue" of a Code. Section 75 deals with the *issue* of a code, and it is clear from ss 71 to 75 that this is intended to address the situation where a code is drafted anew.[107] Section 75 then provides that the Minister may decide to issue the code after considering the recommendation made to him/her under s 74, having regard to the matters in s 73.

[169] The legislative provisions clearly envisage the creation and subsequent issue of a code that is not already in force. The legislation does not provide for the "reissue" of a code that has been through the notification and consultation requirements and is already in force. If the 2010 Code needed minor amendments to keep it up to date with the 2018 Regulations, the Minister had the power to make such amendments under s 76(1)(b), without issuing a new Code. There was therefore no need to revoke the 2010 Code and reissue it as the 2018 Code.

[170] On this basis, I consider there is an inherent illogicality in the respondents' position on the issue of the 2018 Code. Section 76 does not authorise the Minister to revoke a code *and* make amendments to it, as Ms Butler submits occurred. It provides for the amendment *or* the revocation of a code. In order to fulfil the Act's requirements, the Minister was required to either revoke the 2010 Code and draft an entirely new code in accordance with ss 70 to 74 of the Act and issue it under s 75, or simply amend the 2010 Code under s 76(1)(b). The Minister here attempted to use all three powers at once, that is, he amended the 2010 Code under s 76(1)(b), revoked it under s 76(1)(a), and then reissued it as the 2018 Code under s 75(1).

[171] I accept the applicants' submission that on the revocation of the 2010 Code, the 2018 Code was a new code. In the event of such a finding, the respondents submit that despite NAWAC not complying strictly with the ss 71-79 pathway, nothing turned on it. They say the notification and consultation process in the making of the 2018

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[107] Section 70 prescribes who may prepare a draft code, ss 71 and 72 address public notification of the draft and consultation, and s 73 details what the content of the draft must contain and the matters NAWAC must consider to its satisfaction before recommending such a draft to the Minister.

Regulations was sufficient to bring to public attention the minimum standards in the 2018 Code. Because it was those Regulations that enacted the changes to the minimum standards in the 2010 Code, and there is no dispute among the parties that there was adequate consultation and notification for the 2018 Regulations, they say there was adequate consultation and notification for the 2018 Code.

[172] I accept therefore there was extensive public notification and consultation in the making of the 2018 Regulations, and likewise in respect of the amendments to the 2018 Code. In that sense, the Minister's failure to properly issue the Code had no substantive effect on its own.

[173] In any event, my finding that the 2018 Code was a new code and that its "issue" did not comply with the procedural requirements of the Act does not warrant a declaration that the entire Code is invalid. Ms Roff for NAWAC submitted that if there were any errors relating to the way in which the 2018 Code was reissued, it was a minor defect or technical irregularity only, not a reviewable error that would warrant granting relief on its own and revoke the whole Code. I accept that position.[108] While I have found that the "issue" of the 2018 Code did not comply with the procedural steps or requirements under the Act, I consider that in the context of these proceedings, this procedural point alone does not amount to a substantive irregularity warranting relief for invalidity of the entire Code, which is beyond the scope of the proceedings before me.

Are minimum standards 10 and 11 valid?

Minimum standard 10 – farrowing crates

[174] In relation to minimum standard 10, there is one further aspect of the change between the minimum standards in the 2010 Code and the 2018 Code that deserves mention. For ease of reference, I set out minimum standard 10 in both the 2010 and 2018 Codes below.

[175] The 2010 Code provides:

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[108] Relying on the Judicial Review Procedure Act 2016, s 19(1).

Minimum Standard No 10 – Managing Interactions between Sows and Piglets

(a) Accommodation for farrowing and lactating sows must be of suitable design and sufficient size to allow the sow to lie down at full length and without leg restriction.

(b) Support, such as barriers or sloping walls to lean against, must be provided for the sow as she lies down, and she must be able to rise and stand comfortably without undue risk of injury to her litter.

(c) When standing in a farrowing crate the sow must not touch both sides of the crate simultaneously, and her back must not touch any bars along the top.

(d) The farrowing system must provide an area to which the piglets can retreat when the sow moves.

(e) If sows are to be confined in farrowing crates before farrowing, it must be for no more than five days.

(f) If sows are to be confined in farrowing crates for lactation, it must be for no more than four weeks after farrowing.

(g) Notwithstanding (f), nurse sows may be retained in a farrowing crate for a further week for fostering purposes. This is conditional on no more than 5% of sows in any herd at any one time being retained as nurse sows.

(h) Sows, in any farrowing system constructed after 3 December 2010, must be provided with material that can be manipulated until farrowing.

Note:
Section 73(3) of the Animal Welfare Act 1999 provides that the National Animal Welfare Advisory Committee (NAWAC) may, in exceptional circumstances, recommend minimum standards that do not fully meet the obligations to ensure that the physical, health and behavioural needs of the animal are met. In making this recommendation NAWAC must have regard to, among other things, the feasibility and practicality of effecting a transition from current practices and any adverse effects that may result from such a transition, and the economic effects of any transition from current practices to new practices.
NAWAC considers that the confining of sows in farrowing crates for extended periods does not fully meet the obligations of the Act. Minimum Standards 10(e) and (f) restrict the time sows are confined in farrowing crates to a maximum of five weeks in any reproductive cycle.

[176] All parties accepted that the "exceptional circumstances" exemption under s 73(3) of the Act was used in the 2010 Code to allow farrowing crates to be used for the periods of time outlined in minimum standard 10(e) to (g). It was accepted that the use of farrowing crates in this way was non-compliant with the Act.

[177] The 2018 Code then provides:

Minimum Standard No 10 – Managing Interactions between Sows and Piglets

(a) Accommodation for farrowing and lactating sows must be of suitable design and sufficient size to allow the sow to lie down at full length and without leg restriction.

(b) Support, such as barriers or sloping walls to lean against, must be provided for the sow as she lies down, and she must be able to rise and stand comfortably without undue risk of injury to her litter.

(c) When in a farrowing crate, the sow must be able to avoid all of the following: touching both sides of the crate simultaneously, touching the front and the back of the crate simultaneously, and touching the top of the crate when standing.

(d) The farrowing system must provide an area to which the piglets can retreat when the sow moves.

(e) If sows are to be confined in farrowing crates before farrowing, it must be for no more than five days.

(f) If sows are to be confined in farrowing crates for lactation, it must be for no more than four weeks after farrowing.

(g) Notwithstanding (f), nurse sows may be retained in a farrowing crate for a further week for fostering purposes. This is conditional on no more than 5% of sows in any herd at any one time being retained as nurse sows.

(h) Sows, in any farrowing system constructed after 3 December 2010, must be provided with material that can be manipulated until farrowing.

Note: <u>Before the Animal Welfare Act was amended in 2015</u>, Section 73(3) of the Animal Welfare Act 1999 provided that the National Animal Welfare Advisory Committee (NAWAC) may, in exceptional circumstances, recommend minimum standards that do not fully meet the obligations to ensure that the physical, health and behavioural needs of the animal are met. In making this recommendation NAWAC must have regard to, among other things, the feasibility and practicality of effecting a transition from current practices and any adverse effects that may result from such a transition, and the economic effects of any transition from current practices to new practices.
NAWAC considers that the confining of sows in farrowing crates for extended periods does not fully meet the obligations of the Act. Minimum Standards 10(e) and (f) restrict the time sows are confined in farrowing crates to a maximum of five weeks in any reproductive cycle.

[Underline emphasis added]

[178] The only change to the standard itself is to minimum standard 10(c), which all parties accept is inconsequential. The change clarifies the dimensions of a farrowing crate, but it does not alter the dimensions contained in the 2010 Code. The effect is the same, and NAWAC do not rely on that change to justify its change of position.

[179] However, there is another, more subtle change. The underlined words in the 2018 Code emphasised at [177] above, "Before the Animal Welfare Act was amended in 2015", have been added to the 2018 Code. This subtle change signals NAWAC's change of position in 2016.[109]

[180] In the 2010 Code, NAWAC relied on the "exceptional circumstances" exemption in the former s 73(3) for minimum standard 10(e) to (g), and said so. In 2018, the following words are added "*Before the Animal Welfare Act was amended in 2015*, Section 73(3)… provided that… [NAWAC] may, in exceptional circumstances, recommend minimum standards that do not fully meet the obligations" of the Act. This explains what NAWAC has done in the past. Yet the remainder of the paragraph in the 2018 Code, which is exactly the same as that in the 2010 Code, is to be read as though minimum standard 10(e) to (g) now makes the practice of farrowing crates compliant with the welfare obligations under the Act. But it is the same minimum standard that was viewed in 2010 as requiring the "exceptional circumstances" exemption, because it was accepted as non-compliant with the Act. In my view, this underpins the fundamental flaw in NAWAC's reasoning when it made its recommendation to the Minister on the 2018 Code and gave its advice on the 2018 Regulation.

Minimum standard 11 – mating stalls

[181] The same can be said for minimum standard 11. The 2018 Code permits mating stalls for up to seven days per reproductive cycle,[110] but NAWAC's position since 2010 has been that it "wants to see indoor housing systems shift to those in which the sow is not confined in a stall at all, including for mating."

[182] The problem with NAWAC's position is that it wants to eliminate the use of stalls, even for mating, yet minimum standard 11 is silent on when mating stalls are to be phased out. The same practice under the same standard is now deemed compliant with the Act and there is no transition date specified. Without a time specified for transition, this practice can continue indefinitely.

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109 See [105]-[112] of this judgment.
110 Minimum Standard 11(a).

[183] As I have identified in Part III, this circumvents Parliament's intention in enacting the 2015 Amendment; is contrary to the purpose of the Act; and is inconsistent with NAWAC's approach to these issues for the preceding 11 years. The real gravamen of the inconsistency is not the minimum standards themselves, but their insertion in the 2018 Code without transition periods, which now makes the use of the practices compliant with the Act indefinitely.

Conclusion

[184] NAWAC has always considered farrowing crates to be a non-compliant practice, even with time restrictions on their use. With no change in science making them compliant and the removal of the s 73(3) exemption, minimum standard 10, without a phase out period, does not further Parliament's intention or the Act's purpose.

[185] In relating to the use of stalls, NAWAC has consistently said the practice of managing sows in stalls should stop. Dry sow stalls were phased out in 2015 and NAWAC wants to eliminate the use of stalls for confinement of sows, including for mating. Minimum standard 11, without a phase out period, is also contrary to Parliament's intention and the Act's purposes.

[186] I find therefore that minimum standards 10 and 11 in the 2018 Code, without a time restriction for a transition to phase out the use of farrowing crates and mating stalls, are unlawful and invalid. They purport to validate the indefinite continuation of such practices, which circumvents Parliament's intention in enacting the 2015 Amendment and is contrary to the Act's purposes.

Unreasonableness and the evidence

[187] I have found that minimum standards 10 and 11 are invalid. Nevertheless, I deal briefly with the applicants' ground of unreasonableness and/or irrationality, as the substance of the applicants' argument and the considerable evidence filed focusses on the non-compliance of the minimum standards with the core obligations under the Act in ss 10 and 29(1)(a).

[188] The challenge is that neither NAWAC nor the Minister had regard to the welfare purposes in s 73(1) to ensure that they are satisfied the proposed minimum standards are the minimum necessary to ensure that the purposes of the Act are met.[111] They say the Minister and NAWAC allowed practicality and/or economic impact to override the welfare obligations, contrary to the obligations under the Act.

[189] The applicants' submissions focus on each of the requirements under s 10, namely, to ensure that the physical, health, and behavioural needs of the animal are met in accordance with "good practice" and "scientific knowledge". They refer to expert evidence, including that of Dr Baxter, an English pig science specialist who provided affidavit evidence for the applicants. Although Dr Baxter was one of the three experts NAWAC consulted in its 2014-2016 review, Dr Baxter's evidence prepared for the purposes of this judicial review hearing was not available to NAWAC through the 2016 review or at the time of its recommendation to the Minister. Relying on Dr Baxter's conclusion that overall, farrowing crates do not provide "for any behavioural needs of sows beyond basic maintenance needs of eating and drinking", the applicants' submit that there was no basis for NAWAC or the Minister to be satisfied under s 73(1) of the Act that minimum standard 10 was the minimum necessary to meet the welfare obligations under the Act.

[190] Similarly, in relation to minimum standard 11, the applicants submit that although the Minister had stated that "dry sow stalls" were banned, mating stalls are essentially dry sow stalls by another name and used for a shorter period. Again, in support of their submission the applicants referred to the affidavits filed, not only by Dr Baxter but also Dr Verkerk, the Chairperson of NAWAC, and invite the Court to prefer the evidence of Dr Baxter over Dr Verkerk and find that the real reasons for using mating stalls are likely to be economic, rather than welfare ones.

[191] The respondents oppose the applicants' substantive challenge to minimum standards 10 and 11, submitting that the minimum standards are not unreasonable and were made lawfully. More particularly, both the Crown and NAWAC submit that where a decision-maker involved in the making of subordinate legislation has

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111 Animal Welfare Act, s 73(1)(a).

specialised knowledge or expertise and there is no question of bad faith, the courts are generally slow to interfere with the exercise of wide powers to make subordinate legislation.[112] The respondents point to NAWAC's expert advice as to the effect of both regs 26 and 27 and minimum standards 10 and 11, and they submit the range and scope of expert scientific matters considered by NAWAC and its advice to the Minister make it inappropriate for the Court to substitute its own view on the merits of farrowing crates and/or mating stalls for that of NAWAC.

[192] The courts have consistently expressed particular reluctance to become involved in scientific disputes where the court is not in a position to definitively adjudicate on scientific opinions. As Venning J observed in *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd*:[113]

> Unless the decision maker has followed a clearly improper process, the Court will be reluctant to adjudicate on matters of science and substitute its own inexpert view of the science if there is a tenable expert opinion.

[193] Similarly, the Court of Appeal in *Hawkins v Minister of Justice* declined to substitute its decision for the expertise of the Securities Commission, where the issues for statutory management under the Companies Special Investigations Act 1958 called for "expert appraisal".[114] The same challenge on the review grounds of *Wednesbury* unreasonableness was raised in *Hawkins* as it is here.

[194] For the same reasons outlined at [149], I decline to resolve the factual, scientific, and literature disputes among the experts whose affidavit evidence has been placed before the Court. None of the parties sought to cross-examine the respective deponents. Of particular concern is Dr Baxter's evidence, which is before the Court but was not available to NAWAC in this form at the time of its 2014-2016 review.

[195] It is also unnecessary to delve into the substantive issue of unreasonableness in light of my findings on invalidity. As *R (Law Society) v Lord Chancellor* recently

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112 *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [36].

113 *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* [2012] NZHC 2297, [2013] 1 NZLR 75 at [47].

114 *Hawkins v Minister of Justice* [1991] 2 NZLR 530 (CA) at 540.

reaffirmed, expert evidence is seldom reasonably required in judicial review determinations:[115]

> It follows from the very nature of a claim for judicial review that expert evidence is seldom reasonably required in order to resolve it. That is because it is not the function of the court in deciding the claim to assess the merits of the decision of which judicial review is sought. The basic constitutional theory on which the jurisdiction rests confines the court to determining whether the decision was a lawful exercise of the relevant public function. To answer that question, it is seldom necessary or appropriate to consider any evidence which goes beyond the material which was before the decision-maker and evidence of the process by which the decision was taken – let alone any expert evidence.

[196] In line with the authorities above, I consider it is inappropriate for the Court in these circumstances to adjudicate on these welfare and scientific differences of opinion in the context of this judicial review proceeding. In any event, a determination of the conflicts in the experts' evidence by the Court is unnecessary here. For the reasons already addressed, I have reached the conclusion that minimum standards 10 and 11 in the 2018 Code, without containing any specified time period for transition, are contrary to the intention of Parliament and do not meet the purposes of the Act. I take the applicants' submissions on unreasonableness no further.

PART V: RELIEF AND RESULT

Relief

[197] Having found that the challenged regulations 26 and 27 and minimum standards 10 and 11 are unlawful and invalid, I make these declarations below.

[198] The applicants also sought an order that the 2018 Code be declared invalid if their challenge was successful. I consider a declaration that the 2018 Code is invalid would be a disproportionate and inappropriate response in this case. I have focussed on two minimum standards in the 2018 Code and found they do not fulfil the Act's purpose. Clearly, minimum standards 10 and 11 are protective provisions for the practice of farrowing crates and mating stalls. The invalidity arises because there is no transition or phasing out of such practices as Parliament intended. For that reason, I find that minimum standards 10 and 11, in their entirety, are invalid.

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115 *R (Law Society) v Lord Chancellor* [2018] EWHC 2094, [2019] 1 WLR 1649 at [36].

[199] I accept the respondents' submissions that relief should be proportionate to the matters before the Court and the challenged minimum standards should be severed from the remainder of the Code.[116] I have not considered the other standards in the 2018 Code and whether they fulfil the Act's purposes. My decision concerns minimum standards 10 and 11 only. I therefore decline to order that the 2018 Code is invalid and focus on the specific challenges to minimum standards 10 and 11 only.

Result

[200] The applicants' judicial review application is granted in part.

[201] I make the following declarations:

(a) regulations 26 and 27 are unlawful and invalid; and

(b) minimum standards 10 and 11 are unlawful and invalid.

[202] In all other aspects, the review is dismissed.

[203] In light of the matters addressed in this judgment, I direct the Minister to:

(a) consider recommending new regulations phasing out the use of farrowing crates and mating stalls under s 183A(2) of the Act; and

(b) consider making such changes as are necessary to minimum standards 10 and 11 in the 2018 Code accordingly.

[204] Leave is reserved to the parties to raise any matters which may arise from this judgment on three days' notice.

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116 *Potts v Invercargill City Council* [1985] 1 NZLR 609 (CA) at 620.

Costs

[205] The applicant is entitled to costs. If Counsel are unable to agree, submissions of no more than 10 pages are to be filed by the applicants within 30 days of the date of this judgment. The respondents are to reply within a further 14 days.

Cull J

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