MINUTES OF THE HOUSE COMMITTEE ON AGRICULTURE AND LIVESTOCK

Held in Room 423-S, at the Statehouse at 9:00 a. m. ~~p.m.~~, on February 10, 19 81.

All members were present except:

The next meeting of the Committee will be held at 9:00 a. m. ~~p.m.~~, on February 11, 19 81.

These minutes of the meeting held on February 10, 19 81 were considered, corrected and approved.

Wm M Beezley
Chairman

The conferees appearing before the Committee were:

Raney Gilliland - Research Dept.
Dave Bennett - Kansas Livestock Association
William Deas - Kansas Livestock Marketing Association

The meeting of the House Agriculture and Livestock Committee was called to order by William Beezley, Chairman. Raney Gilliland of the Research Department gave a brief review of House Bill 2200. Vice Chairperson Aylward told of the progress of this bill during the last session when it passed the House but did not get through the Senate. Chairman Beezley introduced Dave Bennett, who in turn introduced the group from the Kansas Livestock Association throughout the state. Mr. Bennett passed out written testimony regarding HB 2200 (see attachment I), and spoke in support of the bill. He made several comments and then answered questions from Committee members.

Mr. William Deas, Kansas Livestock Marketing Association was the next conferee to speak in support of HB 2200. He passed out copies of his statement,(see Attach.2) to Committee members and then spoke at length on the merits of the bill. Several relevant questions were asked and many views and comments were expressed by Committee members. Chairman Beezley thanked the conferees for their appearance before the Committee.

The minutes were approved and the meeting was adjourned.

Maurice Erickson		Eureka
Tracy Kirk		Winona
Daryl McCubbin		Ness City
Darryl D. Bakner		Silver Lake
Brad Pike		Minneola
Craig Dikes		Junction City
Mark E Smith		Fort Scott Kansas Cowley Co.
Harvey Moore Jr.		Burden, Ks. Cowley Co.
James L. Davis		Council Grove Ks Geary Co
Clint Birkenbuehl		Kingman, Ks.
Mark A. Schwarm, DVM		Hutchinson, Ks
Kerry O. Trostle		Le Roy, Ks
Jim Stroda		Frankfort, KS
Monte E Lawrence		Medicine Lodge
Mike Beam		Emporia Ks
Richard W Ks		Topeka
John O. Miller	CKFO	Topeka
Jack Mast	Topeka	KLA
Dee Likes	Topeka	KLA
William Deas	Brunner Opps	Kansas Livestock Marketing
Brad Cooper	Kansas City Mo	Ks Livestock Mkting Assoc.
DAVE BENNETT	TOPEKA	KLA

ATTACHMENT I

Kansas Livestock Association

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Owns and Publishes The Kansas STOCKMAN magazine and KLA News & Market Report newsletter.

KANSAS LIVESTOCK ASSOCIATION

TESTIMONY TO THE

HOUSE AGRICULTURE & LIVESTOCK COMMITTEE

REGARDING

HB 2200

prepared by

Dave Bennett
Executive Secretary, Cow-Calf/Stocker Division

February 10, 1981

Mr. Chairman and members of the committee, the Kansas Livestock Association suppports HB 2200 as written. The bill more clearly defines just exactly where livestock sales stand in regard to implied warranties.

We realize that Kansas has experienced a limited amount of problems with implied warranties compared to some other states. However, the potential for greater problems does exist.

We agree with the Uniform Commercial Code and the Kansas Consumer Protection Act that, to a certain extent, implied warranties may have a place in regard to inanimate goods such as television sets, toasters, microwave ovens, etc. These goods are a, more or less, consistent and predictable product, day after day. The product, however, may be sold to an uninformed consumer who knows little if anything about the mechanics of the product purchased. On the other hand, we have livestock, an animate product which varies in quality from day to day, and even hour to hour, but we have a consumer who is well-informed, knowing he may lose 2% from death loss and may lose 100's, if not 1000's of dollars through veterinary bills, sickness or adverse market conditions. I would make two observations:

1) The U.C.C.'s protection of the uninformed consumer is neither needed or wanted among livestock producers. 2) We cannot absolutely and completely warrant the health and performance of all livestock at a given point in time as can a television or toaster manufacturer.

We must apportion the inherent risk of dealing with an animate product, such as livestock, equitably upon both parties. Implied warranties only shift losses from an innocent buyer to an innocent seller, the only real beneficiary of implied warranties being the legal profession.

The approval of HB 2200 will not affect expressed warranties on one hand, or fraud on the other, but will clear the muddy water inbetween.

ATTACHMENT II

STATEMENT BEFORE THE HOUSE AGRICULTURE AND LIVESTOCK COMMITTEE

Submitted on Behalf of

THE KANSAS LIVESTOCK MARKETING ASSOCIATION

By William B. Deas
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MEMORANDUM

LIVESTOCK SALES WARRANTIES

Purpose

The purpose of this Memorandum is to call attention to a growing problem which has alarmed our client and the livestock industry, to review the applicable Kansas law, and to propose some legislative changes.

Introduction

Consider the following hypothetical situation. A seller of livestock markets an animal from his "clean" herd which is inspected by a veterinarian at the time of sale and found to be free from health defects, but which in fact is carrying a hidden, undetectable disease. Not only does the marketed animal later die from the latent disease, but also some of the buyer's other animals become infected and die. There is no fraud, misrepresentation or undisclosed knowledge involved, and both the buyer and seller are experienced, reputable stockmen who do everything in their power to maintain "clean" herds.

The question is: Who should bear this loss and to what extent? Most experienced stockmen, unfamiliar with the current state of the law, would say that the buyer bears the loss burden as one of the established risks within the livestock industry. Until recently, such an answer would

have gone unchallenged. However, as examples of some recent court decisions, consider the following two quotes. "There may be an implied warranty of reasonable fitness of an animal notwithstanding the seller's lack of knowledge (that it is not fit) and the difficulty of discovering that fact. Good faith and lack of the seller's negligence are no defense." Reed v. Bunger, 255 Iowa 322 (1963). "It seems clear that at least with the advent of the UCC the old rule that there is no implied warranty of soundness in the sale of animals where the unsoundness is hidden, unknown to the seller, and difficult to discover, is no longer in effect where there is an implied warranty of fitness for a particular purpose under the provisions of the UCC." Ruskamp v. Hog Builders, Inc., 192 Neb. 168 (1974).

Background

The Uniform Commercial Code, more commonly referred to as the UCC, is a uniform law which codifies the common law surrounding commercial sales transactions and relationships. It has now been adopted in all or nearly all of the states, and was adopted in Kansas in 1965. The UCC does cover livestock sales transactions.

While the UCC is regarded as a uniform law, it is state law, and therefore subject to interpretation by the various state courts. Recent court interpretations relating to the implied warranty provisions, and applied to livestock purchase and sale transactions, have placed an additional burden on the livestock marketing industry. This court-created increased risk has arisen principally because courts, citing the UCC implied warranty provisions, assess damages against the seller for losses resulting from livestock health conditions which become evident after the sale.

Applicable Law

In Kansas, warranties are governed by the UCC at K.S.A. 84-2-312 through 84-2-318, and the Kansas Consumer Protection Act (KCPA) at K.S.A. 50-639. These sections apply to livestock marketing transactions and are today the primary source of the law on warranties in the sale of "goods" (which include livestock). The UCC sets forth provisions pertaining to warranties with respect to (1) title warranties, (2) express warranties, (3) implied warranties, and (4) disclaimer of warranties. The KCPA makes disclaimers of implied warranties unlawful. The principal concern in the industry is with the implied warranties and the prohibition against their disclaimer.

Implied Warranties

There are two implied warranties, and these are the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. The difference between the two may be made clear by the following example. If you buy a pair of street shoes, you expect them to be reasonably suited for walking; and if you are an inexperienced mountain climber buying your first pair of climbing shoes, and rely on the seller's expertise, you expect them to be particularly suited for climbing.

Two points relating to these two implied warranties should be strongly noted. First, they arise by operation of law. It is not by agreement that they are established, but they are automatically imposed by law. Second, under a specific provision provided by the UCC, they may be excluded or modified by express agreement and express language.

Merchantability and Disclaimer

An implied warranty of merchantability of goods (livestock) arises in a contract for their sale if a seller is a "merchant" with respect to the goods of that kind. A dealer in livestock may or may not be a "merchant" depending on the particular state court and the particular nature of their business. Goods to be merchantable must "at least be" such as: (1) Pass without objection in the trade under the contract description; and (2) In the case of fungible goods (such as wheat or nails), are of a fair average quality within the contract description; and (3) Are fit for the ordinary purposes for which such goods are used; and (4) Run within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved.

The language "at least be" leaves the law open to the interpretation that the health or soundness of an animal is an attribute of that animal's merchantability. The courts are finding that if a disease prior to delivery can be established, then upon delivery the animals were not of a "merchantable" quality. The courts are then finding that if that disease can be determined to have been the "proximate cause" of a loss to the buyer in the way of sickness or death loss and extended related losses, recovery will be allowed the buyer.

Further, the language that the goods must be fit for the underlying ordinary purpose for which such goods are used permits the interpretation that "feeder" livestock must be fit for the ordinary purpose of "feeding" which in turn has been interpreted to mean to be fed out for resale at market weight within a normal length of time. These interpretations mean that animals sold as feeder

livestock will be free of any diseases at the time of the sale and will be healthy and live long enough to be fed out for resale at market weight.

An implied warranty of merchantability can be disclaimed (1) by a written or oral declaration using the word "merchantability" conspicuously, (2) by the use of expressions like "as is" or "with all faults" if it is reasonable to expect the buyer to understand that there are no warranties under the circumstances of the transaction, (3) as to defects which an examination ought to have revealed, by the seller's demand that the buyer examine the livestock, or (4) by a particular course of dealing between the parties or a particular usage of trade within the place, location or industry.

Fitness and Disclaimer

The implied warranty of fitness for a particular purpose is the second implied warranty and arises where the seller (whether a merchant or not) at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill and judgment to select and furnish suitable goods.

It is relatively easy to understand why a court would hold that if the seller of the livestock at the time of contracting has reason to know that the buyer desires breeding stock and the buyer at the time is relying on the seller's skill and judgment to furnish breeding stock, then there is an implied warranty that the stock sold to the buyer will be fit for breeding and will in fact breed. However, recent court interpretations have gone beyond the necessity of the animals actually being fit to breed and in fact breed, but extend liability to the offspring, declaring that such offspring are to be healthy and not infected with any disease that was present at the time of sale of the parent.

The court interpretations which have more adversely affected the livestock marketing industry are those that relate to the sale of feeder livestock. It is much easier to predicate the seller's extended liability on an implied warranty of fitness for a particular purpose than on an implied warranty of merchantability. Interpretations under these provisions are finding that where the livestock seller has reason to know that the buyer desires "feeders" and the buyer is relying on the seller's skill and judgment to furnish "feeders", then there is an implied warranty made by the seller that the animal sold will in fact be fit for that purpose, including freedom from any latent or undiscoverable diseases at the time of sale and delivery, and further the courts are strongly leaning toward interpretations that the animals will feed out for resale at market weight in a normal length of time, living long enough for that to be accomplished. Damage liability has also been extended to cover such things as veterinarian expenses, medication expenses, feed for feeding animals that die, excess feed necessary where the feeding period required is extended, and other out-of-pocket expenses of the buyer. Additional liability is also been extended to cover animals other than those involved in the sale which were infected with the disease from the animals in question.

An implied warranty of fitness for a particular purpose cannot be disclaimed by an oral disclaimer, but may be disclaimed by the other various methods available for disclaiming the implied warranty of merchantability. According to the UCC, the language to disclaim the implied warranty of fitness for a particular purpose may be more general than the language to disclaim the implied warranty of merchantability.

Disclaimer Prohibition

The state of Kansas has taken an approach to implied warranties which could result in a burden on the livestock marketing industry which is even harsher than the UCC as adopted in most states. In enacting the Kansas Consumer Protection Act in 1973, the Kansas Legislature in effect superseded the UCC and made an attempted exclusion or limitation of the implied warranties of merchantability or fitness for a particular purpose a violation of the KCPA, and provided severe penalties for violators.

Under the act, agricultural products, including the livestock, and such products purchased for agricultural purposes are covered. Further, while the breadth of the term "supplier" is not clear, it appears that a "consumer", as defined, could include any person or business (other than a corporation) purchasing livestock.

K.S.A. 50-623 provides that the:

> "act shall be construed liberally to promote the following policies:... (c) To protect consumers from unbargained for warranty disclaimers...."

K.S.A. 50-639 provides:

> "(a) Notwithstanding any other provisions of law, with respect to property which is the subject of or is intended to become the subject of a consumer transaction in this state, no supplier shall: (1) Exclude, modify or otherwise attempt to limit the implied warranties of merchantability and fitness for a particular purpose;...(c) A supplier may limit (the) implied warranty of merchantability and fitness for a particular purpose with respect to the defect or defects in the goods only if the supplier establishes that the consumer had knowledge of the defect or defects, which became the basis of the bargain between the parties...(e) A disclaimer or limitation in violation of this section is void. If a consumer prevails in an action based upon breach of warranty, and the supplier has violated this section, the court may, in addition to any actual damages recovered, award

> reasonable attorneys fees and a civil penalty under K.S.A. 50-636,..., or both, to be paid by the supplier who caused the improper disclaimer to be written."

It is difficult to envision two experienced stockmen engaged in an arms-length, even-handed livestock transaction being in need of the same protection intended by the KCPA for an unsophisticated consumer. Not only is it not needed, it is not wanted. The traditional warranties and trade rules have stood the livestock industry in good stead but these traditional warranties are being eroded by the case law interpretations under the UCC which are expanding the implied warranties. This expanded warranty liability coupled with an inability to disclaim such expansion because of the KCPA can only produce one result. Since all buyers eventually become sellers, the increased financial burden created by expanded liability will eventually force the livestock industry to pass the added cost on to the final consumer and force the small operator out of business.

Proposed Legislative Action

One solution to the problems arising from implied warranties in livestock marketing transactions might be to amend the UCC to exclude livestock from the limits of the term "goods", or to provide a special exclusion for livestock under the exclusion or modification provisions in section 2-316. In 1975, the Nebraska State Legislature amended section 2-316 to provide for an additional exclusion. It added a subsection (3)(d), which states:

> "With respect to the sale of cattle, hogs, and sheep, there shall be no implied warranty that the cattle, hogs, and sheep, are free from disease."

This Nebraska statutory provision would appear to alleviate much liability where the defect is a condition of disease. It would not, however, negate liability where the defect is not a condition of disease. Note also that it does not apply to other species classified as livestock, such as goats and horses.

Another solution might be to amend the KCPA to permit disclaimers of implied warranties in the sale of livestock. In 1976, K.S.A. 50-639 was amended by adding a subsection (g) which states:

> "This section does not apply to seed for planting."

This amendment would appear to allow planting seed suppliers to disclaim the implied warranties of merchantability and fitness for a particular purpose.

An amendment to Kansas UCC, K.S.A. 84-2-316, to the effect that:

> "With respect to the sale of livestock, there shall be no implied warranties as to the health of the livestock."

would be preferable because it would restrict warranties in livestock sales transactions to bargained-for express warranties. However, an amendment to KCPA, K.S.A. 50-639, to the effect that:

> "This section does not apply to livestock sales for agricultural purposes."

would be satisfactory since it would allow disclaimers of implied warranties in most livestock sales transactions while still protecting the unsophisticated consumer who is not buying livestock for agricultural purposes.

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February 10, 1981

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TO: THE HONORABLE MEMBERS OF THE HOUSE
AGRICULTURE AND LIVESTOCK COMMITTEE

SUBJECT: COMPARATIVE LEGISLATIVE ANALYSIS

The following is a comparative analysis of the legislative enactments by those states which have undertaken amendments to their respective versions of Section 2-316 of the Uniform Commercial Code to date.

NEBRASKA

Nebraska, the first state to pass such legislation, amended § 2-316 of the Uniform Commercial Code (UCC) to say:

> "With respect to the sale of cattle, hogs and sheep, there shall be no implied warranty that the cattle, hogs and sheep are free from disease."

At least three things are worth noting about the wording of the Nebraska law:

1. It affords protection to all sellers of cattle, hogs and sheep.

2. It covers only cattle, hogs and sheep; it does not, on its face, cover horses, goats, mules, etc.

3. It only excludes implied warranties with respect to disease; it does not, on its face, say anything about excluding implied warranties with respect to sickness, defects or conditions. It still remains to be seen how liberally or strictly the Nebraska courts will construe the word "disease."

SOUTH DAKOTA

South Dakota amended Chapter 57-4 of its code to say, in pertinent part:

> "Notwithstanding § 57-4-35, there is no implied warranty on the sale of cattle, hogs, or sheep that such cattle, hogs, or sheep are free from disease."

As you can see, this is almost exactly the same as Nebraska's law.

MONTANA

In Montana, § 30-2-316 (§ 2-316 of the UCC) was amended to say:

> "In sales of cattle, hogs, sheep and horses, there are no implied warranties, as defined in this chapter, that the cattle, hogs, sheep or horses are free from sickness or disease."

This law - just as South Dakota's - is almost identical with Nebraska's. There is, however, one significant difference: Montana's law excludes implied warranties with respect to disease and sickness; thus, theoretically at least, increasing the scope of the seller's protection.

FLORIDA

Florida's amendment of § 672.316, Florida Statutes (§ 2-316 of the UCC), reads as follows:

> "In a transaction involving the sale of cattle or hogs, there shall be no implied warranty that the cattle or hogs are free from sickness or disease. Provided, however, that no exemption shall apply in cases where the seller knowingly sells cattle or hogs that are diseased."

Although Florida's law is substantially the same as that passed in Nebraska, South Dakota and Montana, it appears the lawmakers in Florida wanted to make it crystal clear that this law could not be used as a defense by a person who knowingly sold diseased cattle or hogs.

NORTH DAKOTA

North Dakota amended subsection 3 of § 41-02-33 of the North Dakota Century Code to say:

> "With respect to the sale of cattle, hogs, sheep and horses, there shall be no implied warranty that cattle, hogs, sheep and horses are free from sickness or disease at the time the sale is consummated, conditioned upon reasonable showing by the seller and that all state and federal regulations pertaining to animal health were complied with."

As you can see, North Dakota's law is essentially the same as that of the other states as set forth above, except that the protection afforded by the statute is conditioned on the seller showing that he has complied with federal and state animal health regulations.

INDIANA

The amendment to Indiana Code § 26-1-2-316 (§ 2-316 of the UCC, reads as follows:

> "With respect to the sale of cattle, hogs, or sheep, there is no implied warranty that cattle, hogs, or sheep are free from disease, if the seller shows that all state and federal regulations concerning animal health have been complied with."

GEORGIA

Georgia Code § 109A-2-316 (§ 2-316 of the UCC) was amended to add a new paragraph (d) which says:

> "With respect to the sale of cattle, hogs and sheep by a licensed auction company or by an agent, there shall be no implied warranty by said auction company or agent that the cattle, hogs and sheep are free from disease. Provided, however, that the provisions of this subsection shall not be applicable to brucellosis reactor cattle detected at an official State Laboratory within thirty days following the date of sale."

The two most important things worth noting about Georgia's law is that it only affords protection to auction markets and agents and the exemption does not apply to brucellosis reactor cattle.

OREGON

Section 72.3160 of the Oregon Revised Statutes (§ 2-316 of the UCC) was amended to read, in pertinent part, as follows:

> "With respect to the sale of livestock, equines, cattle, sheep, goats and swine) between merchants, excluding livestock sold for immediate slaughter, there shall be no implied warranty that the livestock is free from disease except where the seller had knowledge or reason to know that the animal was not free from disease at the time of the sale."

The most important things to note about Oregon's law are:

1. It covers all types of livestock;

2. It applies only to sale of livestock between merchants, i.e., persons who deal in goods of the kind or who hold themselves out as having special knowledge or skill peculiar to the goods involved;

3. It excludes from coverage livestock sold for immediate slaughter;

4. It only excludes implied warranties with respect to disease; and

5. It makes it clear that a person cannot use this subsection as a defense if he knows or should have known that the animal was not free from disease at the time of sale.

TEXAS

Texas amended § 2.316 of its Business and Commerce Code by adding a subsection (f) which reads as follows:

> "The implied warranties of merchantability and fitness do not apply to the sale or barter of livestock or its unborn young."

Although this, on its face is the simplest of the state laws exempting livestock transactions from the implied warranty provisions of the UCC, it is undoubtedly the most encompassing. It does not limit protection to any class or type of seller; it does not limit the exemption to just disease or sickness and disease; it does not put any conditions, such as showing compliance with animal health regulations, on the protection afforded, etc. It simply says the implied warranties do not apply to livestock transactions. In my opinion, this is the gist of the statutes passed thus far regarding implied warranties in livestock transactions.

MISSOURI

Missouri changed its law regarding implied warranties in livestock transactions by adding a new section (§ 277.141) to the Missouri Livestock Marketing Law and a new subsection to § 400.2-316 of its Uniform Commercial Code.

§ 277.141 reads as follows:

> "If a contract for the sale of livestock does not contain a written statement as to a warranty of merchantability or fitness for a

particular purpose, the seller is not liable for damages resulting from the lack of merchantability or fitness for a particular purpose of the livestock sold under the terms of that contract."

§ 400.2-316(5) reads as follows:

"A seller is not liable for damages resulting from the lack of merchantability or fitness for a particular purpose of livestock he sells if the contract for the sale of the livestock does not contain a written statement as to a warranty of merchantability or fitness for a particular purpose of the livestock."

In my opinion, the wording of the sections just quoted above is the poorest of any of the legislation that has been passed to limit or do away with implied warranties in livestock transactions, for the simple reason that these two sections can be interpreted at least two or three different ways. One possible interpretation is that the drafter or drafters of these sections did not understand what implied warranties are and consequently that the language concerning written statements in a contract for sale is superfluous and should be ignored. Another possible interpretation is that the exemption from liability applies only when the contract for sale does not mention the implied warranties in any way. If this interpretation should happen to be the one followed by the courts, a seller of livestock would be well advised to make absolutely no mention of the implied warranties in a contract for sale or to make absolutely sure that his contracts for sale contain a full and absolute disclaimer of all implied warranties of merchantability and fitness for a particular purpose, because a disclaimer of implied warranties with respect to disease only, for example could lead to disastrous results.

IOWA

Iowa amended its Uniform Commercial Code by adding the following new section:

"Notwithstanding subjection two (2) of § 554.2316 of the Code, all implied warranties arising under §§ 554.2314 and 554.2315 of the Code are excluded from a sale of cattle, hogs, sheep and horses if the following information is disclosed to the prospective buyer or the buyer's agent in advance of the sale, and if confirmed in writing at or before the time of acceptance of the livestock when confirmation is requested by the buyer or the buyer's agent:

a. That the animals to be sold have been in accordance with existing federal and state animal health regultions and found apparently free

from any infectious, contagious or communicable disease.

b. One of the following, as applicable:

(1) Except when the livestock have been confined with livestock from another source or assembled within the meaning of subparagraph two (2) of this paragraph, the name and address of the present owner, and whether or not that owner has owned all of the livestock for at least thirty (30) days.

(2) If the livestock have been confined with livestock from another source or assembled from two or more sources within the previous thirty (30) days, the livestock shall be represented as being "assembled livestock." As used in the subparagraph, "confined with livestock from another source" means the placement of livestock in a livestock auction market, yard, or other unitary facility in which livestock from another source are confined, but does not include livestock confined at the facility where the sale takes place if such confinement if for less than forty-eight (48) hours prior to the day of sale; provided the livestock which are not sold after being confined with livestock from another source at a facility and offered for sale shall be deemed "assembled livestock" for the thirty (30) day period following the day when offered for sale.

If the livestock are represented as being "assembled livestock", the name and address of the present owner shall be disclosed.

In the case of an auction sale, the disclosure required by this subsection shall be made verbally immediately before the sale by the owner, an agent for the owner, or the person who is conducting the auction of the lot of livestock in question. Warranties shall be implied to the person who is conducting the auction only if the disclosure contains representations which he or she knew or had reason to know were untrue.

As you can see, the Iowa legislation contains many conditions which sellers have to meet if they want the protection afforded by this new section. Basically, it appears that the theory behind Iowa's approach is that the market price of livestock will reflect the information set out in the disclosures.